16-748-cv

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

ANONYMOUS,

Plaintiff,

MATTHEW CHRISTIANSEN,

Plaintiff-Appellant,

v.

OMNICOM GROUP, INC., DDB WORLDWIDE COMMUNICATIONS GROUP INC.,
JOE CIANCIOTTO, PETER HEMPEL AND CHRIS BROWN,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF *AMICI CURIAE* OF 128 MEMBERS OF CONGRESS IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL

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I. STATEMENT OF INTERESTS OF *AMICI CURIAE*

Amici are 23 United States Senators and 105 members of the United States House of Representatives.[1] All are cosponsors of the Equality Act,[2] which, when enacted, will both clarify and expand current civil rights laws to better protect people of color, women and lesbian, gay, bisexual and transgender ("LGBT") Americans from discrimination. The Equality Act represents the latest bipartisan legislative effort to update our nation's laws with respect to LGBT Americans. It uses a "belt-and-suspenders" approach to reflect what the Act's cosponsors and various federal regulatory and judicial bodies recognize: LGBT Americans are *already* protected against discrimination on the basis of sexual orientation and gender identity under Title VII of the Civil Rights Act of 1964, because sexual orientation and gender identity are inherently aspects of a person's "sex".

As members of Congress, we are uniquely able to advise the Court on draft and pending legislation. We also have an inherent interest in the proper interpretation of enacted laws and pending legislation—particularly when differing interpretations alternately vindicate or eliminate the rights of the constituents we

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[1] A complete list of *Amici* appears in the appendix to this brief.

[2] This Brief cites to the Senate version of the Equality Act, but the House and Senate versions, H.R. 3185 and S. 1858 respectively, are identical in substance.

represent. Different interpretations of Title VII have led to uncertainty in the workplace and left LGBT Americans inconsistently protected from workplace harassment and discrimination, despite applicable federal law. We firmly believe that Title VII's sex discrimination provision already prohibits discrimination based on an individual's sexual orientation and gender identity, and we urge the Court to overrule erroneous Second Circuit precedent to the contrary.

II. SUMMARY OF ARGUMENT

> "Numerous provisions of Federal law expressly prohibit discrimination on the basis of sex, and Federal agencies and courts have correctly interpreted these prohibitions on sex discrimination to include discrimination based on sexual orientation, gender identity and sex stereotypes. In particular, the Equal Employment Opportunity Commission has explicitly interpreted sex discrimination to include sexual orientation and gender identity. The absence of explicit prohibitions of discrimination on the basis of sexual orientation and gender identity under Federal statutory law, as well as some conflicting case law on how broadly sex discrimination provisions apply, has created uncertainty for employers and other entities covered by these laws. This lack of clear coverage also causes unnecessary hardships for LGBT people." Equality Act of 2015, S. 1858, 114th Cong. § 2(8)-(9) (2015).

This is why *Amici* introduced the Equality Act of 2015 and drafted it both to codify the status of current law and to provide clarity and stability for the American people. The Equality Act expressly adds "sexual orientation" and "gender identity" to Title VII of the Civil Rights Act, S. 1858 § 7, and it *also* defines "sex" to *include* "sexual orientation and gender identity", S. 1858 § 9(2). *Amici* drafters did this intentionally because we wanted to recognize that, under current law, "sex" already includes and is inseparable from sexual orientation and gender identity.

The district court dismissed Christiansen's Title VII discrimination claims on the basis of the Second Circuit's 2000 decision in *Simonton v. Runyon*. 232 F.3d 33, 35-36 (2000). *Simonton* held—contrary to established law and

common sense—that sexual orientation discrimination does not constitute "sex" discrimination under Title VII.

Simonton was wrongly decided. Title VII's protections against sex discrimination necessarily include discrimination based on a person's sexual orientation. Sexual orientation discrimination is, by definition, a form of sex discrimination. It is impossible to discriminate against an employee on the basis of sexual orientation without reference to the employee's sex. Moreover, the Supreme Court held in *Price Waterhouse v. Hopkins* that gender stereotyping is a form of sex discrimination under Title VII. 490 U.S. 228, 235, 250-51 (1989). Because sexual orientation discrimination is invariably rooted in gender stereotypes, it constitutes discrimination on the basis of sex. And just as it violates Title VII to discriminate against an employee based on the race of individuals with whom that employee associates, sex-based associational discrimination is impermissible under Title VII.

While Congress attempts to codify, update and expand civil rights protections for all LGBT Americans, courts continue to play a vital role by applying the law in individual cases. Indeed, the landmark Supreme Court cases of *Windsor* and *Obergefell* demonstrated the important role of the judiciary as a coequal branch with a duty to protect civil rights. The judiciary has an equal interest in the rule of law and in upholding an employee's statutory right to a

workplace free of proscribed discrimination. Now before this Court is the opportunity to rectify a years-long error in Title VII interpretation in the Second Circuit. The solution is straightforward, logical, just and supported by *Amici*. This Court should recognize that "sex" under Title VII encompasses sexual orientation, and *Simonton* and any other case law to the contrary should be overturned.

III. ARGUMENT

A. *Simonton* Must Be Overturned Because It Relied on Incorrect Interpretations of Congressional Actions and Outdated Law To Justify an Incoherent Interpretation of "Sex" Under Title VII.

The Second Circuit's ruling in *Simonton* that a claim for discrimination based on sexual orientation is not cognizable under Title VII's sex discrimination prohibitions, 232 F.3d at 35-36, misinterpreted the intent of Congress and is inconsistent with the law. Specifically, the Court improperly relied on Congress's failure to pass legislation expanding Title VII to explicitly include LGBT status, as well as on a number of cases that were implicitly overruled by the Supreme Court in *Price Waterhouse*. *Id.*; *see also Dawson v. Bumble & Bumble*, 398 F.3d 211, 217 (2005) ("Title VII does not prohibit harassment or discrimination because of sexual orientation." (quoting *Simonton*, 232 F.3d at 35)). The Equality Act is directed at clarifying the existing protections of Title VII, notwithstanding *Simonton*'s misinterpretations.

1. *Simonton*'s Reliance on the Employment Non-Discrimination Act's Legislative History Was Misplaced.

Simonton's short discussion of legislative history is wrong in at least two respects. First, *Simonton* summarily described the legislative history of the Employment Non-Discrimination Act (ENDA) as a Congressional "rejection" of the notion that sexual orientation was a prohibited form of sex discrimination under Title VII. 232 F.3d at 35. Second, *Simonton* specifically cited Congress's "refusal" to pass ENDA during the 104th Congress in 1996 as evidence that Congress did not intend to expand the Civil Rights Act to protect against sexual orientation discrimination. *Id*. Below we address both of these two flawed assumptions.

The Supreme Court has warned against giving too much significance to rejected amendments to current law:

> "[S]ubsequent legislative history is a hazardous basis for inferring the intent of an earlier Congress. It is a particularly dangerous ground on which to rest an interpretation of a prior statute when it concerns . . . a proposal that does not become law. Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change." *Pension Ben. Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) (internal citations and quotation marks omitted).

Here, and contrary to the discussion in *Simonton*, ENDA's failure to pass in the 104th Congress was a function of unusual circumstances and was not a

reflection of congressional intent to reject ENDA. That year, ENDA failed in the Senate by only one vote, because of a single missing Senator who was called home for a family emergency. *See also* Richard Socarides, *Kennedy's ENDA: A Seventeen-Year Gay-Rights Fight*, New Yorker, Nov. 5, 2013. ENDA eventually *did* pass the Senate in 2013, by an overwhelming vote of 64-32. *On Passage of the Bill (S. 815 As Amended)*, United States Senate, http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=113&session=1&vote=00232.

To justify its flawed reliance on ENDA's legislative history, the *Simonton* Court pointed to "consistent judicial decisions refusing to interpret 'sex' to include sexual orientation". 232 F.3d at 35-36 (citing *DeSantis v. Pacific Tel & Tel. Co.*, 608 F.2d 327, 329-32 (9th Cir. 1979), and related cases that relied on *DeSantis* to suggest similar conclusions). The Court inferred that these decisions must have aligned with Congress's intent, or Congress would have acted to change the law. *Id.* However, *DeSantis* and its progeny rejected a Title VII prohibition on sex stereotyping and were thus implicitly overturned by *Price Waterhouse* in 1989. *See DeSantis*, 608 F.2d at 331-32 (concluding that disparate treatment because of male plaintiff's "effeminate appearance" was not sex discrimination, which is inconsistent with the *Price Waterhouse* standard); *Price Waterhouse*, 490 U.S. at 250 (holding that discrimination against a female plaintiff for her "aggressive" demeanor was a form of sex discrimination). The Ninth Circuit expressly

disavowed the sex stereotyping holding in *DeSantis* as inconsistent with *Price Waterhouse*. *See Nichols v. Azteca Rest. Enters.*, 256 F.3d 864, 875 (9th Cir. 2001). Thus the cases cited by *Simonton* were no longer authoritative law by the time that ENDA was introduced. *Simonton* assumed Congress introduced ENDA because it believed sexual orientation was not protected under Title VII, and that ENDA's failure represented a congressional refusal to expand Title VII protections. But it is equally plausible that ENDA was introduced to *clarify* as well as expand Title VII's protections, and that ENDA was not pursued by its drafters because *Price Waterhouse* had superseded case law holding that sexual orientation was outside the scope of Title VII. For the *Simonton* Court to select one inference over another was inherently arbitrary.

It was also arbitrary to single out ENDA as evidence of congressional intent, as there have been many other attempts to create similar legislation with no effect on Title VII jurisprudence. Only ten years after the Civil Rights Act was passed, Congress introduced the Equality Act of 1974, which would have provided expansive protections for lesbians and gay men, women and unmarried individuals in employment and places of public accommodation. Equality Act of 1974, H.R.14752, 93d Cong. (1974). There is no indication that courts inferred any congressional intent from the introduction of this legislation—which, in contrast to ENDA, would have amended Title VII—or its failure to pass. In fact, courts

subsequently found that unmarried women were covered under Title VII as a subset of sex, despite the fact that the proposed amendment would have added marital status protections explicitly.[3]

There were a range of other legislative proposals from 1975 to 1982 to prohibit "discrimination based upon affectational or sexual orientation", as noted by the Seventh Circuit in *Ulane v. Eastern Airlines, Inc*. 742 F.2d 1081, 1085 (1984). Much like *Simonton*, *Ulane* pointed to this legislative history as evidence that Title VII did not protect transgender individuals. *Id*. at 1086 (also concluding that the absence of Civil Rights Act legislative history meant "sex should be given a narrow, traditional interpretation"). Yet that legislative history had no effect on the Supreme Court's more expansive interpretation of sex discrimination in *Price Waterhouse*, which implicitly overturned *Ulane*. *See Glenn v. Brumby*, 663 F.3d 1312, 1318 n.5 (11th Cir. 2011) ("[S]ince the decision in *Price Waterhouse*, federal courts have recognized with near-total uniformity that 'the approach in *Holloway*, *Sommers*, and *Ulane* . . . has been eviscerated . . . .'" (quoting *Smith v. City of Salem*, 378 F.3d 566, 573 (2004)); *see also Oncale v. Sundowner Offshore Servs., Inc*., 523 U.S. 75, 79 (1998) (noting that "statutory prohibitions often go

[3] See Part III.B.1 for more a detailed discussion of cases about discrimination based on sex plus marital status.

beyond" "the principal evil Congress was concerned with when it enacted" the statute).[4]

2. *Amici* Introduced the Equality Act To Codify Existing Law and Provide Explicit Protections for LGBT Americans Using a "Belt and Suspenders" Approach.

The Equality Act was drafted to codify current law and administrative rulings, to expand civil rights laws that do not currently prohibit sex discrimination and to put the public on clear notice that LGBT status is an explicitly protected characteristic under federal law. *Amici* also wished to avoid further confusion in the courts over whether legislative measures to protect employees from sexual orientation and gender identity discrimination were an indication that such protections did not already exist under current law. There are currently 218 members of Congress cosponsoring the Act to prohibit discrimination against people of color, women and LGBT Americans across many different aspects of

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[4] Increasing numbers of courts applying the *Price Waterhouse* standard recognize that transgender individuals *are* protected from sex discrimination under Title VII because they are defined in part by their nonconformity with the sex stereotypes associated with the sex they were assigned at birth. *See, e.g.*, *Glenn*, 663 F.3d 1312; *Smith*, 378 F.3d 566; *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000); *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000); *see also Fabian v. Hosp. of Cent. Connecticut,* No. 3:12-cv-1154 (SRU), 2016 WL 1089178, at *14 n.12 (D. Conn. Mar. 18, 2016) ("The fact that the Connecticut legislature added [the term 'gender identity'] does not require the conclusion that gender identity was not already protected by the plain language of the statute, because legislatures may add such language to clarify or to settle a dispute about the statute's scope rather than solely to expand it.").

public life. But the Equality Act acknowledges that Title VII *already* protects against sexual orientation and gender identity discrimination. S. 1858 § 2(8). *Amici* explicitly sought *not* to overrule case law and administrative holdings that discrimination based on sexual orientation and gender identity are sex discrimination. We therefore took a "belt and suspenders" approach when drafting the Equality Act's substantive provisions.

First, the Equality Act would amend Title VII to explicitly include "sexual orientation" and "gender identity" as protected characteristics alongside "sex". S. 1858 § 7. We believed this would help clarify the statute for the average American who would look at its text without the benefit of legal experience or a repository of case law. For instance, anyone Googling the Civil Rights Act would learn that sexual orientation and gender identity were protected classes. In addition, "EEO is the Law" posters[5] would be amended to include sexual orientation and gender identity, thereby giving workers in a variety of fields and who speak a number of languages clearer guidance about their rights.

[5] "EEO is the Law" posters are prepared by the EEOC and posted by employers in the workplace. They summarize federal laws prohibiting employment discrimination and explain how an employee or job applicant can file a complaint. *See "EEO is the Law" Poster*, U.S. Equal Employment Opportunity Commission, https://www1.eeoc.gov/employers/poster.cfm.

Second, in keeping with the proper interpretation of Title VII discussed in Part III.B, the Act also *defines* "sex" as including "a sex stereotype[,] . . . sexual orientation or gender identity". S. 1858 § 9(2). This would codify both existing case law and EEOC rulings. *See* Part III.B, *infra*. This definitional structure is the "suspenders" of our approach, and was drafted with circumstances such as the present case in mind.[6] We further included a "no negative inference" provision, to ensure nothing in the amended Civil Rights Act "shall be construed to support any inference that any Federal law prohibiting a practice on the basis of sex does not prohibit discrimination on the basis of . . . sexual orientation, gender identity, or a sex stereotype". S. 1858 § 9(3).

Therefore, we not only believe this Court must review *Simonton* in light of a proper understanding of ENDA, but also that if this Court once again considers proposed legislation to inform its Title VII interpretation, the Equality Act of 2015 is the correct benchmark for such an inquiry.

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[6] Sexual orientation and gender identity are not the only examples of *Amici*'s efforts to codify Title VII's existing protections. Associational discrimination and discrimination based on sex stereotypes are already prohibited under current law, as discussed in Part III.B below. The Equality Act would make those express provisions of the statute. S. 1858 § 9(2) (defining "race" and "sex" as encompassing the "the race . . . [and] sex . . . respectively, of another person with whom the individual is associated or has been associated" and defining "sex" to include "a sex stereotype").

B. Because Title VII's Protection Against "Sex" Discrimination Necessarily Encompasses Sexual Orientation Discrimination, *Simonton* Should Be Overturned.

Binding and persuasive case law, administrative law and legislative developments clearly dictate that discrimination on the basis of sexual orientation is discrimination on the basis of sex, and therefore is illegal under Title VII. Further, the Supreme Court has repeatedly held that Title VII's protections were meant to "strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes". *Price Waterhouse*, 490 U.S. at 251 (quoting *City of L.A., Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)). Sexual orientation discrimination is also a form of associational discrimination—discrimination on the basis of a class of people with whom one associates—in violation of Title VII.

Based on all of this, the EEOC, the agency charged with enforcing Title VII, has explicitly interpreted Title VII's sex-based protections to include discrimination based on sexual orientation and gender identity. *See Baldwin v. Foxx*, EEOC Appeal No. 0120133080, 2015 WL 4397641, at *5 (July 16, 2015) ("Discrimination on the basis of sexual orientation is premised on sex-based preferences, assumptions, expectations, stereotypes, or norms. 'Sexual orientation' as a concept cannot be defined or understood without reference to sex."); *Macy v. Holder*, EEOC Appeal No. 0120120821, 2012 WL 143599, at *4 (Apr. 20, 2012)

("[T]he Commission hereby clarifies that claims of discrimination based . . . on gender identity, are cognizable under Title VII's sex discrimination prohibition."). The 218 Senators and Congressmen who have cosponsored the Equality Act agree that sexual orientation discrimination "is a form of sex discrimination", S. 1858 § 2(1), and the Equality Act would amend Title VII to make the definition of "sex" explicitly encompass sexual orientation and gender identity, S. 1858 § 9.[7]

There is no question that *all* employees, including LGBT employees, are protected under Title VII from gender stereotyping. *See Price Waterhouse*, 490 U.S. at 251. Yet despite logic and countervailing case law, this Court has held that the definition of "sex" under Title VII should not be "bootstrapped" into protecting against sexual orientation discrimination. *See Dawson*, 398 F.3d at 218; *Simonton*, 232 F.3d at 37-38. Unsurprisingly, this Court has struggled to

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[7] This interpretation of "sex" applies in other contexts. For example, a federal court in California recently ruled that discrimination and harassment based on two female athletes' sexual orientation was prohibited under Title IX because it is "impossible to categorically separate 'sexual orientation discrimination' from discrimination on the basis of sex or from gender stereotypes; to do so would result in a false choice". *Videckis v. Pepperdine Univ.*, CV 15-00298 DDP (JCx), 2015 WL 8916764, at *7 (C.D. Cal. Dec. 15, 2015). The *Videckis* Court explicitly stated that this Title IX interpretation applies to Title VII. *See id.* at *5. The U.S. Departments of Justice and Education have similarly specified that Title IX prohibits discrimination based on students' gender identity, protecting them from disparate treatment based on their gender-nonconforming or transgender status. *See, e.g.*, Catherine E. Lhamon & Vanita Gupta, *Dear Colleague Letter: Transgender Students*, U.S. Dep't of Just. & U.S. Dep't of Educ. (May 13, 2016).

distinguish sexual orientation discrimination from sex discrimination. *See, e.g.*, *Dawson*, 398 F.3d at 218 ("When utilized by an avowedly homosexual plaintiff, however, gender stereotyping claims can easily present problems for an adjudicator. This is for the simple reason that stereotypical notions about how men and women should behave will often necessarily blur into ideas about heterosexuality and homosexuality." (internal citation omitted)). District courts in this Circuit—including the court below—openly question the validity of such line drawing. *See Christiansen v. Omnicom Grp., Inc.*, No. 15 CIV. 3440 (KPF), 2016 WL 951581, at *15 (S.D.N.Y. Mar. 9, 2016) ("In light of the EEOC's recent decision on Title VII's scope, and the demonstrated impracticability of considering sexual orientation discrimination as categorically different from sexual stereotyping, one might reasonably ask—and, lest there be any doubt, this Court is asking—whether that line should be erased."); *Fabian*, 2016 WL 1089178, at *11 n.8 (noting "nonconformity with gender stereotypes is stereotypically associated with homosexuality", so "courts and juries have to sort out the difference [between gender stereotypes and sexual orientation discrimination] on a case-by-case basis"). Overturning *Simonton* and its progeny would restore logic to Title VII jurisprudence, affording clear guidelines for employers and employees.

1. Discrimination "Because of … Sex", by Its Plain Meaning, Includes Sexual Orientation Discrimination.

To hold that sexual orientation does not fall under "sex" in Title VII flies in the face of common sense, the understanding of more than 200 bipartisan members of the House and Senate who have cosponsored the Equality Act and the position taken by the EEOC and other federal circuits. Sexual orientation cannot be understood without reference to a person's sex, so any instance of discrimination based on sexual orientation must be rooted in impermissible sex-based considerations. Court interpretations of "sex" in parenthood and marital status cases confirm that discrimination on the basis of a characteristic which cannot be understood without reference to sex violates Title VII. It is also consistent with *Price Waterhouse* and mixed motives precedent, which holds that discrimination motivated in *any* respect by sex violates Title VII.

One cannot discriminate on the basis of sexual orientation without simultaneously discriminating because of sex. *See, e.g.*, *Baldwin*, 2015 WL 4397641, at *5; Corrected Brief of the U.S. Equal Employment Opportunity Commission as *Amicus Curiae* in Support of Appellant and Reversal at 21-24, *Burrows v. College of Central Florida*, No. 15-14554 (11th Cir., Jan. 6, 2016); Equality Act of 2015, S. 1858, 114th Cong. § 2(1); *Videckis*, 2015 WL 8916764, at *8; *Isaacs v. Felder Servs.*, LLC, No. 2:13CV693-MHT, 2015 WL 6560655, at *3

(M.D. Ala. Oct. 29, 2015); Brief of *Amici Curiae* American Civil Liberties Union *et al*. in Support of Plaintiffs-Appellants at 15-17, *Zarda v. Altitude Express, Inc*., No. 15-3775 (2d Cir., Mar. 18, 2016). To discriminate against gay male employees, for example, is to treat male employees negatively for being attracted to men, while female employees do not face equally negative treatment for identical conduct. This is a Title VII violation, because "[t]he critical issue, as stated in *Oncale*, 'is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed'". *Simonton*, 232 F.3d at 36 (quoting *Oncale*, 523 U.S. at 80).

This understanding of "sex" applies in various other "sex plus" cases, such as discrimination claims based on parenthood and marital status. As this Court recognized in *Simonton*, Supreme Court precedent requires "that every victim of [impermissible] harassment must show that he was harassed *because he was male*". 232 F.3d at 36 (interpreting *Oncale*, 523 U.S. at 80-81). This requirement plainly does not preclude mothers or unmarried women from establishing discrimination "because" they were female, even though their status as mothers or unmarried women is defined *both* by their sex *and* by their relationship to another individual. *See, e.g*., *Phillips v. Martin Marietta Corp*., 400 U.S. 542, 544 (1971) (holding it impermissible to have "one hiring policy for women and another for men—each having pre-school-age children"); *Back v. Hastings On*

Hudson Union Free Sch. Dist., 365 F.3d 107, 118-121 (2d Cir. 2004) (relying on Title VII case law to hold that a new mother passed over for promotion may have experienced discrimination because of her sex in violation of the Equal Protection clause, and rejecting defendant's argument that "stereotypes about pregnant women or mothers are not based upon gender, but rather, 'gender plus parenthood'"); *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971) (rejecting employer's argument that its single-women-only hiring policy was acceptable as "not directed against all females, but only against married females" and holding that "so long as sex is a factor in the application of the rule, such application involves discrimination based on sex").

Sexual orientation, like parenthood or marital status, is a protected subcategory of "sex" under Title VII. Accordingly, discrimination on the basis of Christiansen's sexual orientation must constitute discrimination because of his sex, because sexual orientation is defined *both* by Christiansen's sex *and* by his relationship to other individuals.[8] Therefore, this Court's prior holding that it is possible to "allege[] that [a male employee] was discriminated against not because

[8] Unlike parenthood or marital status, sexual orientation is an inherent characteristic defined by the employee's sex *and* the sex of individuals to whom the employee is attracted. Discriminating against an employee because of the sex of the individuals with whom the employee associates is in itself a form of impermissible sex discrimination. *See* Part III.B.3. *infra*.

he was a man, but because of his sexual orientation" is internally incoherent. *Simonton*, 232 F.3d at 36. Discrimination based on sexual orientation is inherently rooted in impermissible sex-based considerations.

Further, as the Supreme Court recognized in *Price Waterhouse*, "mixed" motives for discriminatory conduct constitute sex discrimination if any *single* motive is based on sex. 490 U.S. at 252. "[A]n employer may not meet its burden in [a mixed motives] case by merely showing that at the time of the decision it was motivated only in part by a legitimate reason. . . . The employer instead must show that its *legitimate reason*, *standing alone*, would have induced it to make the same decision." *Id*. (emphasis added). Any suggestion that a lesbian, gay or bisexual employee must establish that each instance of discriminatory conduct was motivated *solely* by sex is a misapplication of Title VII's mixed motives precedent. *See, e.g.*, *Dawson*, 398 F.3d at 223 (incorrectly suggesting that harassing comments against plaintiff may not be "actionable under Title VII because they appeared to relate to Dawson's sexual orientation and *not merely to her gender*" (emphasis added)).

In this case, Christiansen was tormented in the workplace for appearing too masculine and publicly embarrassed by coworkers' drawings of his genitalia and his face on a woman's hypersexualized body—harassment necessarily based on his sex and his coworkers' perceptions of how people of a

particular sex should act. *See Christiansen*, 2016 WL 951581, at *2 (describing Christiansen's harassment allegations). This is quintessential sex discrimination. To hold otherwise is to defy common sense.

2. Sexual Orientation Discrimination Is a Form of Impermissible Gender Stereotyping.

The Supreme Court has long recognized that discrimination "because of . . . sex" under Title VII encompasses discrimination on the basis of gender stereotypes. *Price Waterhouse*, 490 U.S. at 251. The expectation that a member of one sex will be attracted to the opposite sex is a common gender stereotype. To the extent that non-heterosexual employees experience discrimination on the basis of their sexual orientation, it is because those employees fail to conform to the gender stereotype of heterosexuality. Further, as discussed below, members of different sexes face additional gender stereotypes depending on their sexual orientation. According to *Price Waterhouse*'s binding interpretation of "sex", discrimination rooted in *any* of these gender stereotypes, or any other gender stereotype, is "because of . . . sex" under Title VII.

Courts' attempts to differentiate discrimination based on gender stereotypes from discrimination based on sexual orientation have not led to any predictable standard that can be consistently applied by employers or enforced by employees. As it stands, a plaintiff who faces discrimination because he or she is

perceived as lesbian, gay or bisexual has a claim if he or she can show it was the result of gender stereotyping, while a plaintiff who faces discrimination because he or she is *in fact* lesbian, gay or bisexual does not. Where this hyper-nuanced factual distinction is determinative in court, it leads to incongruent outcomes. *Compare Gilbert v. Country Music Ass'n*, 432 F. App'x 516, 520 (6th Cir. 2011) ("For all we know, Gilbert fits every male 'stereotype' save one—sexual orientation—and that does not suffice to obtain relief under Title VII."), *and Bianchi v. City of Philadelphia*, 183 F. Supp. 2d 726, 737-38 (E.D. Pa., 2002) ("[Plaintiff's] unwavering persistence in presenting his complaint as one concerning his alleged sexuality, rather than one concerning his alleged failure to meet a masculine ideal, defeats his Title VII harassment claim."), *with Nichols*, 256 F.3d at 874 (finding that gay male plaintiff[9] had a Title VII claim not because of his sexual orientation, but because of evidence that he was harassed for being effeminate), *and Centola v. Potter*, 183 F. Supp. 2d 403, 407-10 (D. Mass., 2002) (denying defendant's summary judgment motion because alleged harassment about plaintiff employee's perceived sexual orientation may be based on impermissible gender stereotypes).

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[9] *See Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1068 (9th Cir. 2002) (Pregerson, J., concurring) (describing the *Nichols* plaintiff as a gay man).

Indeed, the irrationality and difficulty in applying this standard was recently highlighted in another case within this Circuit: "If the harassment consists of homophobic slurs directed at a homosexual, then a gender-stereotyping claim by that individual is improper bootstrapping. . . . If, on the other hand, the harassment consists of homophobic slurs directed at a *heterosexual*, then a gender-stereotyping claim by that individual is possible." *Estate of D.B. by Briggs v. Thousand Islands Cent. Sch. Dist.*, 2016 WL 945350 at *8 (N.D.N.Y. Mar. 14, 2016) (citing *Dawson*, 398 F.3d at 218). The fact that a plaintiff's success in court depends on these distinctions is both impractical and incompatible with *Price Waterhouse*, as discrimination based on sexual orientation is inherently the result of gender stereotyping.

Some courts have implied that discrimination on the basis of gender stereotypes is limited to men disparaged for behaving effeminately, or women for behaving masculinely. *See, e.g.*, *Simonton*, 232 F.3d at 37-38 (citing passages from cases that only refer to men disparaged for acting insufficiently masculine or women for acting insufficiently feminine, then noting "no basis to surmise that Simonton behaved in a stereotypically *feminine* manner and that the harassment he endured was, in fact, based on his non-conformity with gender norms" (emphasis added)). But such a limitation would fly in the face of Title VII's most basic sex-based protections. From the beginning, Title VII protected women from being

deemed too *feminine* to fit in at work. *See, e.g.*, *Phillips*, 400 U.S. at 544 (protecting female employees from discrimination for having children). Later, courts realized that women also experienced the opposite form of discrimination, often being deemed too masculine to be a proper woman at all. *See, e.g.*, *Price Waterhouse*, 490 U.S. at 235. To now hold that a gay male employee who is criticized for his masculine appearance—as Christiansen alleges in this very case—falls outside Title VII's purview is to rewrite the entire body of case law interpreting the statute. *See Back*, 365 F.3d at 119 ("The principle of *Price Waterhouse*, furthermore, applies as much to the supposition that a woman *will* conform to a gender stereotype (and therefore will not, for example, be dedicated to her job), as to the supposition that a woman is unqualified for a position because she does *not* conform to a gender stereotype.").

The discrimination employees like Christiansen experience sends a clear message: a masculine gay man violates traditional expectations for how both gay *and* heterosexual men should appear and behave. Only heterosexual men should present as masculine, and only gay men should present as feminine; any deviation on either a heterosexual or gay man's part is, in the eyes of Christiansen's coworkers, a punishable transgression from traditional gender stereotypes.

To uphold current Second Circuit precedent is to continue placing gay male employees like Christiansen in a catch 22. If a male employee is too feminine, he violates traditional gender stereotypes of heterosexuality. If he is a gay man who presents as too masculine, he violates stereotypes for gay men. When confronted with this type of situation, the Supreme Court emphatically held that Title VII was enacted to lift women out of a similar catch 22. *Price Waterhouse*, 490 U.S. at 251 ("An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not."). This Court should invalidate the sexual orientation exception to Title VII's standard protections invented by *Simonton* and its progeny.

3. Sexual Orientation Discrimination Is Also Impermissible Associational Discrimination.

If an adverse employment consequence results from an employee's personal association with someone of the same sex, then the employee has undeniably suffered discrimination because of sex under Title VII. Such associational discrimination is a well established violation of Title VII in the context of race discrimination. *See Holcomb v. Iona College*, 521 F.3d 130, 138 (2d Cir. 2008) ("[A]n employer may violate Title VII if it takes action against an employee because of the employee's association with a person of another race.").

Indeed, associational discrimination has played a role in a wide range of Title VII cases, all recognizing that disparate treatment or harassment because of an employee's interracial associations inevitably takes the employee's own race into account. *See, e.g.*, *Barrett v. Whirlpool Corp.*, 556 F.3d 502, 514 (6th Cir. 2009) (subjecting employees to a hostile work environment because of their association with and advocacy for their African-American colleagues is race-based discrimination under Title VII); *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1118 (9th Cir. 2004) (harassing plaintiff because of interracial friendships with co-workers violates Title VII); *Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick, & GMC Trucks, Inc.*, 173 F.3d 988, 994-95 (6th Cir. 1999) (discharging plaintiff for having a biracial child violates Titles VII); *Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 891-92 (11th Cir. 1986) (denying employment because of white plaintiff's marriage to a black woman violates Title VII). Disparate treatment or harassment because of an employee's associations with individuals of a particular race inherently stems from and expresses disapproval of those associations. *See, e.g.*, *Holcomb*, 521 F.3d at 140 ("[T]here is clearly evidence in the record of employer's disapproval of plaintiff's marriage to a black woman, and, indeed . . . willingness to act on his disapproval.").

The same standard applies "with equal force" to Title VII's other enumerated characteristics, including sex. *Price Waterhouse*, 490 U.S. at 243 n.9;

see also Whidbee v. Garzarelli Food Specialities, Inc., 223 F.3d 62, 69 n.6 (2d Cir. 2000) ("[T]he same standards apply to both race-based and sex-based hostile environment claims." (quoting *Richardson v. N.Y. Dep't of Corr. Serv.*, 180 F.3d 426, 436 n. 2 (2d Cir. 1999)). The only distinction between the standards for assessing race- and sex-based discrimination is the statutory exception for sex-based bona fide occupational qualifications, 42 U.S.C. § 2000e-2(e)(1), an extremely narrow category that would not extend to a heterosexuality requirement. Therefore, under a correct and consistent application of Title VII, disparate treatment based on an employee's same-sex associations is discrimination based on sex, just as disparate treatment based on an employee's interracial associations is discrimination based on race.

C. This Court Has the Authority To Overturn *Simonton,* Bringing Clarity to Title VII Law and Protecting Employees from Abhorrent Workplace Discrimination.

Simonton's interpretation of Title VII cannot withstand the more recent and logical countervailing interpretations of Title VII. Further, the conduct proscribed under a proper interpretation of "sex" discrimination is appropriately recognized across the circuit courts as abhorrent—conduct not worth protecting. *See, e.g.*, *Christiansen*, 2016 WL 951581, at *12 ("By any metric, the conduct alleged is reprehensible."); *Simonton*, 232 F.3d at 35 ("There can be no doubt that the conduct allegedly engaged in by Simonton's coworkers is morally

reprehensible whenever and in whatever context it occurs, particularly in the modern workplace."); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999) ("[H]arassment because of sexual orientation . . . is a noxious practice, deserving of censure and opprobrium."); *Bibby v. Philadelphia Coca Cola Bottling Co.*, 260 F.3d 257, 265 (3d Cir. 2001) ("Harassment on the basis of sexual orientation has no place in our society."); *Vickers v. Fairfield Medical Center*, 453 F.3d 757, 764-65 (6th Cir. 2006) ("[T]he harassment alleged by Vickers reflects conduct that is socially unacceptable and repugnant to workplace standards of proper treatment and civility . . . ."). It is time for this Court to update its precedent to bring clarity to Title VII law and to reflect the fact that discrimination based on sexual orientation *is* discrimination based on sex.

This Court has the authority to overturn *Simonton* and must not let *stare decisis* inhibit action in such an important civil rights case. In practice, this Court has recognized exceptions to *stare decisis* on numerous occasions and demonstrated that a three-judge panel has the power to reconsider and overturn precedent. *See, e.g.*, *Shipping Corp. of India v. Jaldhi Overseas Pte Ltd.*, 585 F.3d 58, 67 n.9 (2d Cir. 2009) ("[W]e have circulated this opinion to all active members of this Court prior to filing and have received no objection. . . . We refer to this process as 'mini-*en banc*.'"). In *Shipping Corp.*, for example, this Court held that electronic fund transfers processed by an intermediary bank in New York were not

subject to attachment, contrary to the applicable precedent from *Winter Storm Shipping, Ltd. v. TPI*, 310 F.3d 263 (2d Cir. 2002). The Court recognized that the *Winter Storm* precedent had created uncertainty and complexity in the law, with harmful effects on the international funds transfer business in New York. The prior holding had been cabined by subsequent decisions, mitigating the harmful effects but making the law even more complicated to administer. 585 F.3d at 62. The Court recognized the importance of overturning precedent in favor of clarity and administrability in the law and took the action necessary to fix it.

Three-judge panels on this Court have overturned precedent for a wide variety of reasons. For example, this Court has overturned precedent because a prior case was wrongly decided or misapplied prior case law. *See, e.g.*, *Zerilli-Edelglass v. N.Y.C. Transit Auth.*, 333 F.3d 74, 81 n.7 (2d Cir. 2003), *as amended* (July 29, 2003) (overturning standard of review established in *South v. Saab Cars USA, Inc.*, 28 F.3d 9 (2d Cir. 1994)). This Court has overturned precedent because a prior holding was "eroded" by subsequent case law. *See United States v. Taylor*, 464 F.2d 240, 244 (2d Cir. 1972) (overturning *United States v. Feinberg*, 140 F.2d 592 (2d Cir. 1944)). This Court has also overturned precedent when an intervening authority dictated a change in the law. *See, e.g.*, *Greathouse v. JHS Sec. Inc.*, 784 F.3d 105, 107 (2d Cir. 2015) (overturning *Lambert v. Genesee Hospital,* 10 F.3d 46 (2d Cir. 1993)); *see also United States v. Gonzalez*, 420 F.3d 111, 128 (2d Cir.

2005) (reinterpreting the "*Apprendi* rule" because "developments in *Apprendi* jurisprudence suggest that the rule may well reach more broadly than courts had originally understood").

Here, all three have taken place. *Simonton* was wrongly decided because it relied on an incorrect interpretation of legislative history and case law that had been implicitly overturned by the time of the decision; it created a standard that is difficult for courts to administer; and it has led to inconsistent outcomes for plaintiffs.[10] Recognizing these challenges, government authorities such as the EEOC, the Department of Justice and the Department of Education rightly understand sex discrimination to cover sexual orientation and gender identity.[11] Moreover, subsequent Supreme Court jurisprudence indicates an ever-growing recognition that federal law contains basic civil rights protections for LGBT Americans. *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558 (2003) (overturning *Bowers v. Hardwick,* 478 U.S. 186 (1986), and recognizing the right of gay people to form intimate relationships); *United States v. Windsor*, 133 S. Ct. 2675, 2694

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[10] See Part III.B.2 above for examples of incongruent outcomes when litigants and courts attempt to distinguish sexual orientation discrimination from sex discrimination.

[11] See Part III.B.1 above for a discussion of the EEOC interpretation of Title VII and the Departments of Justice and Education joint guidance on Title IX interpretation.

(2013) (holding that the federal government's failure to recognize married gay couples "demeans the couple, whose moral and sexual choices the Constitution protects"); *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (recognizing the right to marry for same-sex couples under the Fourteenth Amendment's Due Process and Equal Protection clauses). *Simonton*'s underinclusive interpretation of sex discrimination in the employment context does not align with legal developments in Title VII jurisprudence or LGBT civil rights law more broadly.

This Court now has the opportunity to "definitively untangle the doctrinal knot" created by *Simonton* and its progeny. *Cf. Shipping Corp.*, 585 F.3d at 64. The *Simonton* opinion has created uncertainty and complexity in Title VII law, with tangible negative repercussions on the LGBT population in this jurisdiction. *Simonton* requires plaintiffs in employment discrimination lawsuits to carefully frame their complaint in terms of narrow categories of gender stereotypes, which cannot be meaningfully distinguished from sexual orientation. The ambiguity in current sex discrimination law, the difficulty courts have in applying this Court's existing test, and the changing legal and political landscape favoring greater protections for the LGBT community all indicate that *Simonton* and its progeny are now ripe for reconsideration. This Court has the power to take action. *Stare decisis* should not prevent this Court from shielding American

employees from unlawful harassment and negative employment outcomes, potentially for decades to come.

IV. CONCLUSION

For the foregoing reasons, we respectfully request that this Court reverse and remand.

June 28, 2016

Respectfully submitted,

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APPENDIX

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June 28, 2016

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