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15-3775

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MELISSA ZARDA, co-independent executor of the estate of Donald Zarda;
WILLIAM ALLEN MOORE, JR., co-independent executor of the estate of Donald Zarda,
Plaintiffs-Appellants,

v.

ALTITUDE EXPRESS, DOING BUSINESS AS SKYDIVE LONG ISLAND;
and RAY MARNARD
Defendants-Appellees.

On Appeal from United States District Court
for the Eastern District of New York, No. 10 Civ. 4334 (Bianco, J.)

BRIEF OF AMICI CURIAE GLBTQ LEGAL ADVOCATES & DEFENDERS ("GLAD") AND NATIONAL CENTER FOR LESBIAN RIGHTS ("NCLR") IN SUPPORT OF PLAINTIFFS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* GLBTQ Legal Advocates & Defenders certifies that it has no parent corporation and no corporation or publicly held entity owns 10% or more of its stock.

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* National Center for Lesbian Rights certifies that it has no parent corporation and no corporation or publicly held entity owns 10% or more of its stock.

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INTEREST OF *AMICI CURIAE*[1]

Through strategic litigation, public policy advocacy, and education, GLBTQ Legal Advocates & Defenders ("GLAD") works in New England and nationally to create a just society free of discrimination based on gender identity and expression, HIV status, and sexual orientation. GLAD has litigated widely in both state and federal courts in all areas of the law in order to protect and advance the rights of lesbians, gay men, bisexuals, transgender individuals, and people living with HIV and AIDS. GLAD has an enduring interest in ensuring that employees receive full and complete redress for violation of their civil rights in the workplace.

The National Center for Lesbian Rights ("NCLR") is a national non-profit legal organization dedicated to protecting and advancing the civil rights of lesbian, gay, bisexual, and transgender people and their families through litigation, public policy advocacy, and public education. Since its founding in 1977, NCLR has played a leading role in securing fair and equal treatment for LGBT people and their families in cases across the country involving constitutional and civil rights. NCLR has a particular interest in promoting equal opportunity for LGBT people in the workplace through legislation, policy, and litigation, and represents LGBT people in employment and other cases in courts throughout the country.

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[1] Counsel for the parties have not authored this brief. The parties and counsel for the parties have not contributed money that was intended to fund preparing or submitting the brief. No person other than the amicus curiae contributed money that was intended to fund preparing or submitting this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Simonton v. Runyon*, 232 F.3d 33 (2d Cir. 2000), this Court concluded that although Title VII does not allow discrimination claims based on sexual orientation, it does permit claims based on sexual stereotyping—but not if that theory is being used merely to "bootstrap" a claim based on sexual orientation. *Simonton*'s conclusion was not rooted in the text of the statute, nor did it account for well-established Title VII doctrine. In effect, *Simonton* created a *sui generis* set of rules that apply only to sex discrimination claims brought by lesbian, gay, and bisexual employees and not to claims brought by other employees. As numerous judges inside and outside this Circuit have observed, that standard is simply impossible to apply with any degree of consistency or fairness.

The Court should avail itself of this opportunity to repudiate *Simonton*'s unworkable rule and hold that discrimination based on sexual orientation is a type of discrimination *because of sex* under Title VII. That is so for the straightforward reason that, but for the plaintiff's sex, discrimination based on sexual orientation would not occur. For example, if a man is treated adversely because he is attracted to men, then he has been discriminated against because of his sex—if he were instead a woman who was attracted to men, he would not have been treated that way. Recognition of such claims does not therefore require a view that the statute's meaning has evolved alongside extra-judicial developments. It merely

requires the application of Title VII in accordance with its text and established doctrines.

This brief proceeds in two parts. We first describe the confusion *Simonton* has sown, as it has required judges to parse a nonexistent line between discrimination claims brought by lesbian, gay, and bisexual employees based on their sexual orientation (which are impermissible) and those brought by lesbian, gay, and bisexual employees based on sex stereotyping (which are permissible, as long as they are not "bootstrapping" a claim based on sexual orientation). We then explain why established principles of stare decisis do not support leaving *Simonton* in place, particularly because the rule in that case has proved unworkable and there are no legitimate reliance interests to protect by maintaining the existing rule. In Part II, we show how *Simonton* departs from settled Title VII case law, and argue that bringing sexual orientation cases into line with Title VII case law requires repudiating *Simonton* and holding that claims of sexual orientation discrimination are cognizable.

ARGUMENT

I. *SIMONTON* HAS PROVED TO BE AN UNWORKABLE STANDARD AND OUGHT NOT BE GIVEN THE BENEFIT OF STARE DECISIS

A. *Simonton* Has Sown Confusion And Inconsistency In Title VII Cases Brought By Lesbian, Gay, And Bisexual Employees

This Court concluded in *Simonton* that Title VII's prohibition against sex discrimination permitted litigants to bring claims premised upon sexual stereotype discrimination, but not sexual orientation discrimination. The decision explained that sexual stereotype discrimination, deemed actionable under Title VII by the Supreme Court in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), could not be applied to cover discrimination based on sexual orientation because "not all homosexual men are stereotypically feminine, and not all heterosexual men are stereotypically masculine." *Simonton*, 232 F.3d at 37. Accordingly, the decision barred plaintiffs from using a sexual stereotyping theory to "bootstrap protection for sexual orientation into Title VII," though independent "relief would be available for discrimination based upon sexual stereotypes." *Id.*; *see, e.g.*, *Cargian v. Breitling USA, Inc.*, No. 15-01084, 2016 WL 5867445, at *4 (S.D.N.Y. Sept. 29, 2016) ("Courts in this Circuit must distinguish between claims based on discrimination targeting sexual orientation, which are not cognizable under Title

VII, and cognizable claims based on discrimination targeting nonconformity with gender stereotypes.").[2]

Simonton thus invited plaintiffs to try to thread the needle between a claim based on purportedly pure sexual stereotyping and a claim that merely uses a theory of sexual stereotyping to "bootstrap" a sexual orientation claim. That has saddled courts with what judges in this Circuit and elsewhere have come to recognize is the futile task of discerning on which side of a nonexistent line a particular claim falls. Indeed, even while hewing to *Simonton*, this Court has acknowledged that *Simonton* is the source of "confusion" within the Circuit,

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[2] The Court's error in *Simonton* is traceable in part to its conclusion that "Title VII does not proscribe discrimination because of sexual orientation" because sexual orientation is a form of "sexual affiliation," which is not covered by the term "sex" in the statute. *Simonton*, 232 F.3d at 36. In deeming sexual orientation a form of "sexual affiliation," the Court misunderstood the jurisprudence regarding that term. Apart from *Simonton*, courts have used "sexual affiliation" to refer to "sexual activity regardless of gender." *DeCintio v. Westchester County Med. Ctr.*, 807 F.2d 304, 306-307 (2d Cir. 2000); *see also Taken v. Okla. Corp. Comm'n*, 125 F.3d 1366, 1370 (10th Cir. 1997). As the facts of those cases illustrate, discrimination because of sexual *affiliation* occurs when an employer's act is based on whether a person is in a particular romantic relationship, such as when an employer favors a spouse or boyfriend or girlfriend. Such claims do not qualify as sex discrimination because changing the sex of the victim would not change the treatment; only changing their relationship status would. *See also Berry v. United States*, No. 93-86521995 WL 33284, at *3 (S.D.N.Y. Jan. 27, 1995) (woman failed to state sex-discrimination claim where harassment was due solely to her relationship with husband, an ex-employee; "the alleged mistreatment was based on the identity of Mrs. Berry's husband rather than her sex…"). For reasons explained below, the treatment of sexual affiliation discrimination has no purchase for sexual orientation discrimination because changing the sex of the victim of sexual *orientation* discrimination actually would change the treatment.

Christiansen v. Omnicom Grp., Inc., 852 F.3d 195, 200 (2d Cir. 2017) (per curiam), and that "gender stereotyping claims can easily present problems for an adjudicator … for the simple reason that stereotypical notions about how men and women should behave will often necessarily blur into ideas about heterosexuality and homosexuality," *Dawson v. Bumble & Bumble*, 398 F.3d 211, 218 (2d Cir. 2005) (alterations omitted); *see also Christiansen*, 852 F.3d at 205 (Katzmann, C.J., concurring) (observing that "[n]umerous district courts throughout the country have also found [*Simonton*'s] approach to gender stereotype claims unworkable").

Courts in this Circuit are not alone in their confusion. The en banc Seventh Circuit recently discussed the "confused hodge-podge of cases" that have attempted to extricate gender nonconformity claims from sexual orientation claims. *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 342 (7th Cir. 2017) (en banc); *see also, e.g.*, *Philpott v. New York*, No. 16-6788, 2017 WL 1750398, at *2 (S.D.N.Y. May 3, 2017) (commenting on the "'illogical' artificial distinction between gender-stereotyping discrimination and sexual-orientation discrimination"); *Boutillier v. Hartford Pub. Sch.*, 221 F. Supp. 3d 255, 270 (D. Conn. 2016) ("[R]econciliation of *Simonton* and *Price Waterhouse* produces untenable results."); *Christiansen v. Omnicom Grp.*, Inc., 167 F. Supp. 3d 598, 620 (S.D.N.Y. 2016) ("The lesson imparted by the body of Title VII litigation

concerning sexual orientation discrimination and sexual stereotyping seems to be that no coherent line can be drawn between these two sorts of claims"), *aff'd in part, rev'd in part*, 852 F.3d 195 (2d Cir. 2017) (per curiam); *Videckis v. Pepperdine Univ.*, 150 F. Supp. 3d 1151, 1159-1160 (C.D. Cal. 2015) ("Simply put, the line between sex discrimination and sexual orientation discrimination is 'difficult to draw' because that line does not exist, save as a lingering and faulty judicial construct. … It is impossible to categorically separate 'sexual orientation discrimination' from discrimination on the basis of sex or from gender stereotypes.").

Courts adhering to the dichotomy adopted in *Simonton* are forced to engage in an artificial and ultimately futile analysis to try to distinguish homophobic slurs or other anti-gay workplace conduct from sex-based discrimination. *See Fabian v. Hosp. of Cent. Conn.*, 172 F. Supp. 3d 509, 524 n.8 (D. Conn. Mar. 18, 2016) ("a woman might have a Title VII claim if she was harassed or fired for being perceived as too 'macho,' but not if she was harassed or fired for being perceived as a lesbian, and courts and juries have to sort out the difference on a case-by-case basis"). For instance, one court dismissed a sexual stereotyping claim because "[i]n contrast" to what it deemed to be the paradigm of such a claim, the complaint was "rife with references to sexual orientation, homophobia, and accusations of discrimination based on homosexuality," including allegations that a superior had

called the plaintiff a "fag[g]ot … faggot ass … sissy"—as if such epithets did not play on the victim's deviation from masculine stereotypes. *Trigg v. N.Y. City Transit Auth.*, No. 99-4730, 2001 WL 868336, at *5-6 (E.D.N.Y. July 26, 2001). More recently, a district court concluded that a plaintiff was "clearly attempting to bring a Title VII claim based on sexual orientation" because the complaint referenced the phrase "sexual orientation at least twice" and identified the plaintiff as a "male homosexual." *Garvey v. Childtime Learning Ctr.*, 16-1073, 2016 WL 6081436, at *3 (N.D.N.Y. Sept. 12, 2016). Another district court recently concluded that a plaintiff's allegation that a coworker told him he was "'effeminate and gay so he must have AIDS'" failed to state a sexual stereotyping claim because this single allegation of stereotyping was outweighed by "multiple illustrations of [the co-worker's] animus towards gay individuals." *Christiansen*, 167 F. Supp. 3d at 621; *see also Martin v. N.Y. State Dep't of Corr. Servs.*, 224 F. Supp. 2d 434, 447 (N.D.N.Y. 2002) ("The torment endured by Martin, as reprehensible as it is, relates to his sexual orientation. The name-calling, the lewd conduct and the posting of profane pictures and graffiti are all of a sexual, not gender, nature."); *cf. Kay v. Indep. Blue Cross*, 142 F. App'x 48, 51 (3d Cir. 2005) (comparing the relative frequency of comments such as "ass wipe," "fag," "gay," "queer," "real man" and "fem" to conclude that it was "clear that Kay's claim is based upon discrimination that is motivated by perceived sexual orientation").

The result of this lexical bean counting is that courts find it difficult to assess—much less reach a proper conclusion in—discrimination cases brought by plaintiffs who are, or are perceived to be, lesbian, gay, or bisexual. In one recent case, two defendants made a number of disparaging comments about the plaintiff, a woman who was transgender. The Court concluded that the first co-worker's comments—calling the plaintiff a "faggot"—and some of the second co-worker's comments "appear to be directed at Morales' sexual orientation, and therefore, they are not actionable under Title VII. However, [the second co-worker's other comments] appear to be directed at Morale's failure to conform to societal stereotypes about how men should appear, and therefore" were actionable. *Morales v. ATP Health & Beauty Care, Inc.*, No. 06-01430 (AWT), 2008 WL 3845294, at *8 (D. Conn. Aug. 18, 2008). In other words, although all the comments were part of a single course of conduct and plainly evidenced sex stereotyping, the overtly "gay" words were excluded from the case as if they were irrelevant. *See Boutillier*, 221 F. Supp. 3d at 269 ("[S]exual orientation discrimination must be excluded from the equation when determining whether allegations or evidence of gender non-conformity discrimination are sufficient."); *Lugo v. Shinseki*, No. 06-13187, 2010 WL 1993065, at *10 (S.D.N.Y. May 19, 2010) ("The comments addressed to Lugo's perceived sexual orientation do not

enter our analysis because Title VII does not prohibit harassment or discrimination because of sexual orientation.") (quotation omitted).

As a result of this confusion, discrimination claims have been "especially difficult for gay plaintiffs to bring." *Maroney v. Waterbury Hosp.*, No. 10-1415, 2011 WL 1085633, at *2 n.2 (D. Conn. Mar. 18, 2011). Indeed, cases presenting many nearly identical facts have reached inconsistent results as district courts struggle to apply the *Simonton* rule to complex fact patterns. *Compare Morales*, 2008 WL 3845294, at *8 (rejecting evidence of homophobic slurs by supervisor as reflecting sexual orientation discrimination rather than gender-based harassment), *Magnusson v. County of Suffolk*, No. 14-3449, 2016 WL 2889002, *8 (E.D.N.Y. May 17, 2016) (same), *and Tyrrell v. Seaford Union Free Sch. Dist.*, 792 F. Supp. 2d 601, 623 (E.D.N.Y. 2011) (same in Title IX case), *with Boutillier v. Hartford Pub. Sch.*, No. 13-1303, 2014 WL 4794527, *2 (D. Conn. Sept. 25, 2014) (holding that allegations plaintiff "was subjected to sexual stereotyping during her employment on the basis of her sexual orientation" were sufficient to state a claim under Title VII), *and Riccio v. New Haven Bd. of Educ.,* 467 F. Supp. 2d 219, 226 (D. Conn. 2006) (holding that plaintiff who was "targeted by other female students and called a variety of pejorative epithets, including ones implying that she is a female homosexual," stated a claim under Title IX).

Such is the confusion that one district court even held that a gender-stereotyping claim may be brought only if "the harassment consists of homophobic slurs *directed at a heterosexual*." *Estate of D.B. by Briggs v. Thousand Islands Cent. Sch. Dist.*, 169 F. Supp. 3d 320, 332-333 (N.D.N.Y. 2016) (citation omitted; emphasis added). That perverse holding, although rejected by this Court, *see Christiansen*, 852 F.3d at 200, was not necessarily an unreasonable inference to draw from *Simonton*. As Chief Judge Katzmann explained in his recent *Christiansen* concurrence, *Simonton*'s dichotomy creates unique challenges for gay men, lesbians, and bisexual people, who alone bear the burden of showing that their discrimination was motivated by their perceived gender non-conformity rather than their sexual orientation; heterosexual plaintiffs bear no such burden. *Christiansen*, 852 F.3d at 205.

Litigants have predictably responded to *Simonton*'s artificial distinction by omitting references to sexual orientation from their complaints, even where homophobic slurs or other orientation-related facts are highly relevant to their discrimination claim.[3] Some courts have played along, undoubtedly to the

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[3] *See* Ryan, *A "Queer" by Any Other Name: Advocating A Victim-Centered Approach to Title VII and Title IX Same-Sex Sexual Harassment Claims*, 13 B.U. Pub. Int. L.J. 227, 241 (2004) ("The *Simonton* opinion invites further conjecture into whether the plaintiff would have prevailed had he hidden his homosexuality from the court. The court's unwillingness to analyze the facts critically without reference to Simonton's sexuality evinces an inability to look beyond the terminology of the harassment …").

confusion of their fellow jurists. Although both out-of-Circuit and predating *Simonton*, the Eighth Circuit's decision in *Schmedding v. Tnemec Co.*, 187 F.3d 862 (8th Cir. 1999), is illustrative. There, the plaintiff was asked to perform sexual acts; given derogatory notes referring to his anatomy; called names such as "homo" and "jerk off"; and subjected to the exhibition of sexually inappropriate behavior by others. *Id.* at 865. The district court dismissed the complaint, holding the claim noncognizable because it alleged that the plaintiff was taunted due to his "perceived sexual preference." *Id.* The Eighth Circuit reversed, explaining that "simply because … the harassment alleged by Schmedding includes taunts of being homosexual…[does not] thereby transform[] [the complaint] from one alleging harassment based on sex to one alleging harassment based on sexual orientation." *Id.* In other words, it was plausible the plaintiff was taunted as a homosexual in "an effort to debase his masculinity, not … because he is homosexual or perceived as homosexual." *Id.* Nonetheless, the court acknowledged that the references to the plaintiff's sexual orientation confused the issue and that the complaint was "not a model of clarity." *Id.* The Court concluded that "the best recourse is to remand the case to the district court with instructions that plaintiff be allowed to amend his complaint" "so as to delete" a reference to the phrase "perceived sexual preference." *Id.*[4] By causing plaintiffs to

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[4] As one commentator has noted, the Eight Circuit's observation that a

disavow reliance upon homophobic slurs or similar facts that may be probative of sex discrimination, the *Simonton* rule denies courts highly relevant evidence, inevitably leading to the rejection of many meritorious discrimination claims solely because the plaintiff is lesbian, gay, or bisexual.

Given the lack of clarity and coherence *Simonton* has generated, its rule ought to be reconsidered in favor of a clear rule. As explained below, the rule that best accords with Title VII's text and case law is that claims of discrimination on the basis of sexual orientation are actionable as discrimination on the basis of sex. *See infra* Part II.

B. *Simonton* Ought Not Be Given The Benefit Of Stare Decisis

Although courts ought not "overturn [their] precedents lightly," stare decisis is "not an inexorable command." *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2036 (2014); *see also Shi Liang Lin v. U.S. Dep't of Justice*, 494 F.3d 296, 310 (2d Cir. 2007) (en banc) ("While stare decisis is undoubtedly of considerable importance to questions of statutory interpretation, the Supreme Court 'ha[s] never

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homophobic slur may be animated by a desire to both demean another person's sexual orientation and gender conformity reveals the fundamental futility of *Simonton*'s separation of orientation from stereotype. *See* Kanazawa, *Schwenk and the Ambiguity in Federal "Sex" Discrimination Jurisprudence: Defining Sex Discrimination Dynamically Under Title VII*, 25 Seattle U. L. Rev. 255, 284-285 (2001) (arguing that *Schmedding* suggests the "sex/sexual orientation dichotomy is inherently unworkable" and that "Courts should stop making mechanical and futile inquiries into what stereotypes are attached to masculinity or femininity on the one hand and what stereotypes are attached to sexual orientation on the other").

applied stare decisis mechanically to prohibit overruling … earlier decisions determining the meaning of statutes.'" (quoting *Monell v. Dep't of Social Serv.*, 436 U.S. 658, 695 (1978)). Indeed, the doctrine retains its utility only to the extent it "ensure[s] that legal rules develop 'in a principled and intelligible fashion.'" *Michigan*, 134 S. Ct. at 2036 (quoting *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986)). Where a rule "prove[s] unworkable," *Kimble v. Marvel Entertainment, LLC*, 135 S. Ct. 2401, 2410-2411 (2015), or where "experience has pointed up the precedent's shortcomings," *Pearson v. Callahan*, 555 U.S. 223, 233 (2009), stare decisis poses no impediment to repudiating prior decisions. *See also Shipping Corp. of India Ltd. v. Jaldhi Overseas Pte Ltd.*, 585 F.3d 58, 67-69 (2d Cir. 2009) (overruling *Winter Storm Shipping, Ltd. v. TPI*, 310 F.3d 263 (2d Cir. 2002), in view of the "strains on federal courts" imposed by the earlier decision).

As discussed, *Simonton* has created confusion and disarray in the courts of this Circuit, and the results for plaintiffs pressing Title VII claims have been inconsistent and unpredictable. This Court has not hesitated to revisit even recent precedent under similar circumstances. In *Jaldhi*, the Court repudiated its six-year-old decision in *Winter Storm* after district judges in the Circuit began "to question the correctness" of the earlier decision. 585 F.3d at 61. The standard set in *Winter Storm* had "prov[en] to be practically unworkable," and the consequences for the courts, the parties, and their lawyers were "too significant to let th[e Court's] error

go uncorrected simply to avoid overturning a recent precedent." *Id.* at 67. Thus, notwithstanding that "[o]verturning *Winter Storm* [would] dramatically affect the law … in our Circuit," the Court saw fit to do so. *Id.* at 62. The Court should take the same step here.

Moreover, stare decisis does not ordain the outcome here because the rule laid down in *Simonton* is not "subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854 (1992). For purposes of determining the weight to be given to stare decisis in a given case, courts generally focus on the extent to which private parties have relied on existing precedent to shape their affairs. *See, e.g.*, *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 234 (1995). It is hard to imagine that employers intent on discriminating against lesbian, gay, and bisexual employees have, in the years since *Simonton*, shaped their conduct around the indecipherable line between sexual-stereotype and sexual-orientation discrimination. Nor is it plausible that lesbian, gay, and bisexual employees have based their workplace behavior around *Simonton*'s unintelligible rule. Rather, the absence of a principled way to determine how courts will rule on Title VII claims by lesbian, gay, or bisexual plaintiffs has left both employers and employees bereft of clear guidance. The instability and unpredictability inherent in such a scheme thwart reliance, leaving litigants to

guess as to whether courts will categorize particular facts as evidence of sexual orientation discrimination or as evidence of sex discrimination. The divergent outcomes in factually similar cases (*see supra* pp. 10-11) confirm the fundamental unreliability of the current regime.

As Justice Sotomayor recently explained, "particularly in a case where the reliance interests are so minimal, and the reliance interests of private parties are nonexistent, stare decisis cannot excuse a refusal to bring 'coherence and consistency'" to the law. *Alleyne v. United States*, 133 S. Ct. 2151, 2165 (2013) (Sotomayor, J., concurring). Overruling *Simonton* would not cause hardship or inequity; rather, it would eliminate the inconsistent and inequitable results made inevitable by the existing rule and provide clarity to employees and employers.

II. RECOGNIZING THAT SEXUAL ORIENTATION DISCRIMINATION IS A FORM OF SEX DISCRIMINATION IS COMPELLED BY TITLE VII'S TEXT AND DOCTRINE

The result of the *Simonton* rule is that a gay plaintiff is allowed to bring a claim of sex-stereotyping discrimination involving his or her sexual orientation if the plaintiff does not explicitly identify as lesbian, gay, or bisexual or invoke his or her sexual orientation as the basis of the claim. As discussed above, that rule is untenable, and district courts rightly perceive that the law in this Circuit is "clearly in a state of flux." *Philpott*, 2017 WL 1750398, at *2. This Court can and should

now put its Title VII jurisprudence on sounder footing by holding that discrimination on the basis of sexual orientation is a form of sex discrimination.

That conclusion follows for several reasons, which were laid out by Chief Judge Katzmann in his *Christiansen* concurrence. First, Title VII's plain text and traditional doctrines compel the conclusion that discrimination based on sexual orientation is discrimination "because of … sex." *Christiansen*, 852 F.3d at 205 (Katzmann, C.J., concurring). The en banc Seventh Circuit recently took the same tack in concluding that "discrimination on the basis of sexual orientation is a form of sex discrimination." *Hively*, 853 F.3d at 341. That decision was based on "the common-sense reality that it is actually impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex." *Id.* at 351.

Second, contrary to *Simonton*'s crabbed view, sexual orientation discrimination is a paradigmatic instance of gender stereotyping. *Christiansen*, 852 F.3d at 205 (Katzmann, C.J., concurring). After all, "stereotypes concerning sexual orientation are probably the most prominent of all sex related stereotypes." *Boutillier*, 221 F. Supp. 3d at 269; *see also EEOC v. Scott Med. Health Ctr., P.C.*, 217 F. Supp. 3d 834, 841 (W.D. Pa. 2016); *Howell v. N. Cent. Coll.*, 320 F. Supp. 2d 717, 723 (N.D. Ill. 2004); *Centola v. Potter*, 183 F.Supp.2d 403, 410 (D. Mass. 2002).

Third, recognizing that sexual orientation discrimination is a form of sex discrimination follows from this Court's jurisprudence concerning associational discrimination. *Christiansen*, 852 F.3d at 205 (Katzmann, C.J., concurring).

Any of these three theories is sufficient to establish sexual orientation discrimination as a cognizable form of sex discrimination under Title VII. As explained below, the theory that sexual orientation discrimination is discrimination "because of … sex" is particularly straightforward and consonant with established Title VII doctrines. That theory therefore provides a compelling basis—though not the only one—to recognize sexual orientation claims as cognizable under Title VII.

A. Sexual Orientation Discrimination Is Discrimination "Because of … Sex" Because *But For* The Plaintiff's Sex, The Treatment Would Have Been Different

Title VII makes it unlawful for an employer to "discriminate against any individual … because of such individual's … sex." 42 U.S.C. § 2000e-2(a). As the majority in *Hively* explains, the "tried and true" method in Title VII cases is "to isolate the significance of the plaintiff's sex to the employer's decision: has she described a situation in which, holding all other things constant and changing only her sex, she would have been treated the same way?" *Hively*, 853 F.3d at 345; *accord City of L.A., Dep't of Water and Power v. Manhart*, 435 U.S. 702, 711 (1978) (under Title VII, applying "the simple test of whether the evidence shows 'treatment of a person in a manner which but for that person's sex would be

different'"). In applying this method in cases of sex discrimination, "[i]t is critical … to be sure that only the variable of the plaintiff's sex is allowed to change." *Hively*, 853 F.3d at 345.

Application of this "comparative method" shows that sexual orientation discrimination is discrimination *because of sex*. Where a woman is fired or harassed because of her attraction to other women, changing the single variable of sex—a man would not have been fired because of his attraction to women—reveals that the discrimination is *because of sex*, *i.e.*, because of the victim's membership in the class *woman*. As the majority in *Hively* concluded, such a scenario "describes paradigmatic sex discrimination." *Id.*

This analysis betrays the error that underlies *Simonton*: Mr. Simonton would have not have been subject to an endless stream of homophobic invective if, all else constant, he had been a *woman* attracted to men. *See Simonton*, 232 F.3d at 35. Chief Judge Katzmann could not have put it more directly: "[S]exual orientation discrimination is sex discrimination for the simple reason that such discrimination treats otherwise similarly-situated people differently solely because of their sex … [B]ut for the employee's sex, the employee's treatment would have been different. Because this situation meets the statutory requirements of Title VII, the statute must extend to prohibit it." *Christiansen*, 852 F.3d at 202-203 (Katzmann, C.J., concurring) (citations omitted); *see also Hively*, 853 F.3d at 357

(Flaum, J., concurring) ("[T]he statute's text commands" the conclusion that "discriminating against an employee for being homosexual violates Title VII's prohibition against discriminating against that employee because of their sex").

In her *Hively* dissent, Judge Sykes took issue with this use of the comparative method. In the dissent's view, "the comparative method" as used by the majority was "not serving its usual and intended purpose; it [wa]s not invoked as a *method of proof* or a technique for evaluating the sufficiency of the plaintiff's allegations or evidence." 853 F.3d at 365. Rather, the dissent posited that the majority was improperly using the method to resolve "a pure question of statutory interpretation," namely, whether the statutory term "sex" should now be interpreted to encompass "sexual orientation," regardless of its original meaning. *Id*. at 366. One need not quarrel with the dissent's conception of the comparative method as a tool for applying the law to a particular set of facts to see that its conclusion was wrong. The *Hively* majority was doing exactly what the dissent argued was necessary: using the comparative method to apply the statutory phrase "because of … sex" to the particular factual circumstances of that case, in which a woman alleged she faced workplace sex discrimination because she was a lesbian.

That comparative analysis did not alter or expand the *meaning* of Title VII; it simply laid bare the reality that treating someone differently because of his sexual orientation is in fact treating him differently because of his sex. *See*

Baldwin v. Foxx, No. 2012-24738-FAA-03, 2015 WL 4397641 at *5 (EEOC July 15, 2015) ("'Sexual orientation' as a concept cannot be defined or understood without reference to sex."). And in that way, the majority's comparative analysis, contrary to the dissent, did "ferret[] out a prohibited discriminatory motive as an actual cause of the adverse employment action" and specifically revealed that the discriminatory treatment allegedly experienced by the plaintiff due to her sexual orientation was "actually motivated by the plaintiff's sex." *Hively*, 853 F.3d at 366 (Sykes, J., dissenting).

The *Hively* dissent also contended that the majority "load[ed] the dice" in its comparative method analysis by changing two variables—sex *and* sexual orientation. *Id*. But that is simply not the case. As the *Hively* majority explained, "[i]t makes no sense to control for or rule out discrimination on the basis of sexual orientation if the question before us is *whether* that type of discrimination is nothing more or less than a form of sex discrimination." *Id.* at 347.

Nor, on the other hand, does recognizing a claim of sexual orientation discrimination retroactively impute to the defendant an intent that was not there. The *Hively* dissent objected that "[a]n employer who refuses to hire a lesbian applicant because she is a lesbian only accounts for her sex in the limited sense that he notices she is a woman. But that's not the object of the employer's discriminatory intent, not even in part." *Id.* at 367 (Sykes, J., dissenting) (citations

omitted). That is wrong—not as a matter of statutory interpretation, but as a matter of fact. As the Supreme Court has explained, "Congress meant to obligate [a plaintiff] to prove that the employer *relied upon sex-based considerations in coming to its decision*." *Price Waterhouse v. Hopkins*, 490 U.S. at 241-242 (emphasis added). Sexual orientation discrimination inherently involves sex-based considerations. Such a claim rests on the realization that when someone intentionally treats a person differently because of his or her sexual orientation, that differential treatment depends upon, and thus is "because of," the person's sex. The dissent's hypothetical employer does not take a lesbian woman's sex into account incidentally; the discriminatory employer takes it into account by treating her differently because she is a *woman* who is attracted to women, and not a man who is attracted to women.

B. Concluding That Sexual Orientation Discrimination Is "Because Of … Sex" Accords With Settled Title VII Doctrine

Although the comparative analysis described above suffices to show that sexual orientation discrimination is discrimination "because of … sex" and thus is actionable under Title VII, that conclusion is underscored by well-established Title VII doctrine. Indeed, only recognition of sexual orientation discrimination as a form of sex discrimination can be reconciled with settled Title VII case law.

First, one might object that sexual orientation discrimination is not because of sex because it does not entail discrimination against all members of a given sex

but rather requires that the victim also possess another defining trait—namely, attraction to members of the same sex. Those features, however, have not precluded sex discrimination claims in other situations, and therefore they should not preclude sex discrimination claims based on sexual orientation. This Court has repeatedly recognized that Title VII claims are not defeated merely because "certain members of a protected class are not subject to discrimination." *Gorzynski v. JetBlue Airways Corp.*, 596 F.3d 93, 109 (2d Cir. 2010).

The long line of decisions recognizing so-called sex-plus cases illustrates this principle. *See, e.g.*, *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 118 (2d Cir. 2004) (explaining that the term "sex plus" is a heuristic affirming that sex discrimination claims are cognizable even "when not all members of a disfavored class are discriminated against"). Sexual orientation claims are, in effect, but another type of sex-plus claim and therefore equally cognizable under Title VII.

Second, this Court (and many others) has recognized that "an employer may violate Title VII if it takes action against an employee because of the employee's association with a person of another race." *Holcomb v. Iona Coll.*, 521 F.3d 130, 132 (2d Cir. 2008). That interracial discrimination is discrimination *because of race* confirms that sexual orientation discrimination is discrimination *because of sex*.

In *Holcomb*, for example, a white male plaintiff alleged that he had been discriminated against by his employer because he was married to a black woman. *Id.* at 132. The employer sought summary judgment on the basis that the plaintiff was not fired "because of [his] race," as the adverse employment action was not animated by his status as a white person. This Court rightly rejected that argument and concluded the plaintiff was penalized by his class membership. "The reason is simple: where an employee is subjected to adverse action because an employer disapproves of interracial association, the employee suffers discrimination because of the employee's *own* race." *Id.* at 139. The Court reached this conclusion because such discrimination could only be understood by reference to the *plaintiff's* race—a black employee married to another black person would not have been treated adversely in the way that the white employee married to a black person was. *See Rosenblatt v. Bivona & Cohen, P.C.*, 946 F. Supp. 298, 300 (S.D.N.Y. 1996) ("Plaintiff has alleged discrimination as a result of his marriage to a black woman. Had he been black, his marriage would not have been interracial. Therefore, inherent in his complaint is the assertion that he has suffered racial discrimination based on his own race.").

A decision from the Sixth Circuit further illustrates the point. In *Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick, & GMC Trucks, Inc.*, a white employee alleged he was discriminated against because he had fathered a biracial

child. The Court concluded that such an allegation stated a claim of discrimination "because of race" under Title VII because "the alleged discrimination … was *due to* Tetro's race being different from his daughter's." 173 F.3d 988, 994-995 (6th Cir. 1999). As the Court explained, "If [the employee] had been African-American, presumably the dealership would not have discriminated because his daughter would also have been African-American." *Id.*; *see also Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 892 (11th Cir. 1986) ("Where a plaintiff claims discrimination based upon an interracial marriage or association, he alleges, by definition, that he has been discriminated against because of *his* race.").[5]

These cases show instances of discrimination where, but for the plaintiff's race, she or he would not have been discriminated against—and the claim therefore is cognizable under Title VII——regardless of the discriminator's animus towards the plaintiff's specific class in isolation. The same analysis should apply to claims of sex discrimination based on same-sex relationships or associations. *See Hively*, 853 F.3d at 349 (citing *Price Waterhouse*, 490 U.S. at 244 n.9). Judge Flaum's concurrence in *Hively* makes the connection well:

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[5] The same analysis has long been used to invalidate anti-miscegenation laws under the Equal Protection Clause. *See Loving v. Virginia*, 388 U.S. 1, 11 (1967) ("There can be no question but that Virginia's miscegenation statutes rest solely upon distinctions drawn according to race."). Although *Loving* is a constitutional decision, it still provides a meaningful guide for understanding and interpreting anti-discrimination statutes. *See Hively*, 853 F.3d at 349 (citing *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015)).

> Interracial relationships are comprised of (A) an individual of one race, and (B) another individual of a *different race*. Without considering the first individual's race, the word 'different' is meaningless. Consequently, employment discrimination based on an employee's interracial relationship is, in part, tied to an enumerated trait: the employee's race … The same principle applies here. Ivy Tech allegedly refused to promote Professor Hively because she was homosexual—or (A) a woman who is (B) sexually attracted to women.

853 F.3d at 359. As Judge Flaum recognized, the long line of cases upholding claims of discrimination based on interracial associations is fundamentally incompatible with the rule of *Simonton*. Judges within the Second Circuit have observed the same. *See Christiansen*, 852 F.3d at 204 (Katzmann, C.J., concurring); *Boutillier*, 221 F. Supp. 3d at 268 ("The logic is inescapable: [i]f interracial association discrimination is held to be 'because of the employee's *own* race,' so ought sexual orientation discrimination be held to be because of the employee's *own* sex. *Holcomb* and *Simonton* are not legitimately distinguishable."); *Roberts v. United Parcel Serv., Inc.*, 115 F. Supp. 3d 344, 365-366 (E.D.N.Y. 2015) (applying reasoning of *Holcomb* to case of sexual orientation discrimination).[6]

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[6] The *Hively* dissent mistakenly rejected this analogy to Title VII's race-based precedent on the ground that, whereas anti-interracial rules "are inherently racist [because] [t]hey are premised on invidious ideas about white superiority, … [s]exual-orientation discrimination … is not inherently *sexist*." *Hively*, 853 F.3d at 368. But, as the *Hively* majority correctly noted, *Loving* struck down the Virginia anti-miscegenation law because it "rest[ed] solely upon distinctions drawn according to race." *Loving*, 388 U.S. at 11; *id.* at 11 n.11 (court "need not reach

CONCLUSION

This Court should overrule *Simonton* and hold that discrimination on the basis of sexual orientation is actionable discrimination because of sex under Title VII.

Respectfully submitted,

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this [white-supremacy] contention because we find the racial classifications in these statutes repugnant … even assuming an even-handed state purpose to protect the ‘integrity’ of all races”); *see also Hively*, 853 F.3d at 348 n.4. *Holcomb* confirms that the same principle obtains in the Title VII context. 521 F.3d at 139.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), the undersigned hereby certifies that,

1. This brief complies with the type-volume limitation of Second Circuit Local Rule 29.1(c) because it contains 6441 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman type style.

/s/ Alan E. Schoenfeld
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June 26, 2017

CERTIFICATE OF SERVICE

I hereby certify that I filed the foregoing brief with the Clerk of the United States Court of Appeals for the Second Circuit via the CM/ECF system this 26th day of June, 2017, to be served on all counsel of record via ECF.

/s/ Alan E. Schoenfeld
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