15-3775-cv

United States Court of Appeals
For the Second Circuit

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

Plaintiffs-Appellants,

v.

ALTITUDE EXPRESS, INC., doing business as Skydive Long Island; and RAY MAYNARD,

Defendants-Appellees.

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

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION; NEW YORK CIVIL LIBERTIES UNION; NATIONAL WOMEN'S LAW CENTER; 9to5, NATIONAL ASSOCIATION OF WORKING WOMEN; A BETTER BALANCE; CALIFORNIA WOMEN'S LAW CENTER; EQUAL RIGHTS ADVOCATES; FEMINIST MAJORITY FOUNDATION; GENDER JUSTICE; LEGAL VOICE; NATIONAL ORGANIZATION FOR WOMEN (NOW) FOUNDATION; NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES; SOUTHWEST WOMEN'S LAW CENTER; WOMEN EMPLOYED; WOMEN'S LAW CENTER OF MARYLAND, INC.; and WOMEN'S LAW PROJECT IN SUPPORT OF PLAINTIFFS-APPELLANTS MELISSA ZARDA and WILLIAM ALLEN MOORE, JR.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29, the undersigned counsel of record certifies that none of the *amici curiae* is a nongovernmental entity with a parent corporation or a publicly held corporation that owns 10% or more of its stock. This representation is made in order that the judges of this Court may evaluate possible disqualification or recusal.

Dated: June 26, 2017

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INTERESTS OF *AMICI CURIAE*[1]

Amici are a coalition of civil rights groups and public interest organizations committed to preventing, combating, and redressing sex discrimination and protecting the equal rights of women in the United States. Detailed statements of interest are contained in the accompanying appendix.

Amici have a vital interest in ensuring that Title VII's promise of equal employment opportunity effectively protects all people – including lesbian, gay, and bisexual persons – from invidious discrimination "because of sex."

SUMMARY OF THE ARGUMENT

This appeal presents the momentous issue of whether employers are free to discriminate against lesbian, gay, and bisexual people without violating Title VII's historic prohibition against discrimination "because of sex." Decades of Supreme Court history make plain that Title VII's prohibition against discrimination because of sex has become a robust source of protection for male and female workers alike. Initially, Title VII was a vehicle for striking down employer policies and practices that literally excluded women (or men) from certain employment opportunities. It soon became clear, however, that discrimination

[1] Pursuant to Rule 29(c)(5) of the Federal Rules of Appellate Procedure and Local Rule 29.1, counsel for *amici curiae* state that no counsel for a party authored this brief in whole or in part, and that no person other than *amici curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

"because of sex" means much more than simply getting rid of "Help Wanted – Male" signs (or, for that matter, "Help Wanted – Female" signs). The Supreme Court has explained that sex discrimination occurs whenever an employer takes an employee's sex into account when making an adverse employment decision. Courts have applied this principle to countless forms of employer bias, from cases involving a ban on hiring mothers of preschool-aged children to bias against Asian-American women to the failure to promote a Big Eight accounting firm partnership candidate because she was "macho." Time and again, courts have refused to allow generalizations about men and women – or about certain types of men and women – to play any role in employment decisions.

This rich history of courts' interpretations of Title VII, in addition to the reasons stated by Plaintiff-Appellant and articulated by Chief Judge Katzmann in his recent concurring opinion in *Christiansen v. Omnicom Group, Inc.*, 852 F.3d 195 (2d Cir. 2017), show why discrimination on the basis of sexual orientation (also referred to as discrimination against lesbian, gay, and bisexual people) is discrimination "because of sex." Indeed, many of the rationales advanced to exclude lesbian, gay, and bisexual employees from Title VII were also made by employers, and rejected by the courts, in cases involving equal opportunity for women. Employers who take sexual orientation into account necessarily take sex into account, because sexual orientation turns on one's sex in relation to the sex of

the individuals to whom one is attracted. And bias against lesbian, gay, and bisexual people turns on the sex-role expectation that women should be attracted to only men (and not women) and vice versa. There is no principled reason to create an exception from Title VII for sex discrimination that involves sexual orientation, as the en banc Seventh Circuit, Chief Judge Katzmann, federal district courts (including district courts in the Second Circuit), and administrative agencies have recognized. This Court should come to the same conclusion.

This case presents an opportunity for the full Court to correct its outdated and unworkable interpretation of Title VII's prohibition of discrimination "because of sex." In 2000, a three-judge panel of this Court held in *Simonton v. Runyon*, 232 F.3d 33 (2d Cir. 2000), that harassment on the basis of sexual orientation is not sex-based discrimination. Yet sex stereotyping, as defined by the Supreme Court, plainly encompasses discrimination on the basis of sexual orientation. Continued reliance on *Simonton*'s outdated categorical exclusion has led to cramped and illogical attempts to distinguish between sex stereotyping that does not implicate sexual orientation, which is clearly prohibited by Title VII, and sex stereotyping that relates to the fact that an employee is lesbian, gay, or bisexual. This Court should now hold that there is no coherent line to be drawn between such forms of discrimination and that sexual orientation discrimination is discrimination "because of sex."

ARGUMENT

I. Since Title VII's enactment, courts consistently have adopted an expansive interpretation of what constitutes discrimination "because of sex."

This Court should overrule its decision in *Simonton v. Runyon*, 232 F.3d 33 (2d Cir. 2000), that discrimination on the basis of sexual orientation is not sex-based discrimination prohibited by Title VII. In doing so, this Court should take into account the Supreme Court's expansive interpretation of the phrase "because of sex" during the past fifty years.

Title VII of the Civil Rights Act of 1964 forbids employers from making adverse decisions about hiring, firing, or the terms, conditions, or privileges of employment because of sex. 42 U.S.C. § 2000e-2(a)(1). Unlike the prohibition against discrimination because of race, the prohibition against discrimination because of sex was added to the bill at the last minute, with little floor debate and without the benefit of congressional hearings. 110 Cong. Rec. 2577-84 (1964).

Since Title VII's enactment, this sparse record has been invoked by some to justify limiting Title VII's coverage solely to workplace barriers that explicitly disadvantage women as compared to men.[2] Indeed, many have presumed that such

[2] Even the motivations of the sex amendment's sponsor, Representative Howard Smith of Virginia, have been the subject of intense dispute among historians, giving rise to theories that he intended the addition as a joke or as a vehicle for scotching the entire bill, which he opposed. *See, e.g.*, Robert C. Bird, *More Than a Congressional Joke: A Fresh Look at the Legislative History of Sex*

distinctions were the only kind of discrimination "because of sex" that concerned legislators in 1964. This interpretation is incorrect. As one scholar has explained in a seminal law review article: "Contrary to what courts have suggested, there was no consensus among legislators in the mid-1960s that the determination of whether an employment practice discriminated on the basis of sex could be made simply by asking whether an employer had divided employees into two groups perfectly differentiated along biological sex lines." Cary Franklin, *Inventing the "Traditional Concept" of Sex Discrimination*, 125 HARV. L. REV. 1307, 1320, 1328 (2012).[3]

Given this history, it was left largely to the courts to define what is meant by "because of sex." Interpreting the plain meaning of these words, courts

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Discrimination of the 1964 Civil Rights Act, 3 WM. & MARY J. WOMEN & L. 137, 139-42 (1997); Michael Evan Gold, *A Tale of Two Amendments: The Reasons Congress Added Sex to Title VII and Their Implication for Comparable Worth*, 19 DUQUESNE L. REV. 453, 458-59 (1981). But as one scholar has noted, whatever Smith's "real" motivation, it is irrelevant; the reason(s) for introducing legislation may or may not bear any relation to the reason(s) the legislature enacts it. *Id.* at 462-67.

[3] Commentators also have noted that supporters of the sex amendment were motivated not by concern for women vis a vis men, but for white women vis a vis Black women. That is, if Title VII included only race but not sex provisions, Black women would enjoy a level of protection in the workplace that white women would not. *See, e.g.*, Bird, *supra* note 2, at 155-58; Carl M. Brauer, *Women Activists, Southern Conservatives, and the Prohibition of Sex Discrimination in Title VII of the 1964 Civil Rights Act*, 49 J. SOUTHERN HIST. 37, 49-50 (1983). These historical realities militate against, not in favor of, the crabbed analysis of Title VII embodied in *Simonton* and related decisions.

consistently have interpreted Title VII's prohibition against sex discrimination to cover a wide range of employer assumptions about women and men alike. As the Supreme Court put it nearly forty years ago, "'[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." *City of L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978) (internal citation omitted). Indeed, when examined in full, the half-century of precedent interpreting "sex discrimination" has dismantled not just distinctions *between* men and women, but also those *among* men and *among* women – distinctions that for generations had confined individuals to strict sex roles at work, as well as in society.

In *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), the Supreme Court famously held that when an employer relies on sex stereotypes to deny employment opportunities, it unquestionably acts "because of sex." There, the Court considered the Title VII claim of Ann Hopkins, who was denied promotion to partner in a major accounting firm – despite having brought in the most business of the eighty-seven other (male) candidates – because she was deemed "macho." *Id.* at 235 (plurality opinion). To be fit for promotion, Hopkins was told, she needed to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." *Id.*

As detailed in Part II.B, *infra*, *Price Waterhouse* confirms that adverse employment action based on all manner of sex stereotypes is prohibited by Title VII's sex provision. The stereotype concerning to whom men and women "should" be romantically attracted is encompassed within this principle. But Ann Hopkins's case was hardly the only instance in which an employer's stereotype-based decision making was found to violate Title VII.

Among the earliest Title VII cases were those addressing – and disapproving of – the literal exclusion of women from particular employment opportunities. The sex-segregated work world of 1964 that Title VII was charged with regulating reflected longstanding assumptions about the kinds of jobs for which women (and men) were suited – physically, temperamentally, and even morally. *See, e.g.*, *Goesaert v. Cleary*, 335 U.S. 464, 466 (1948) (upholding state law preventing women from working as bartenders unless their husband or father owned the bar, because "the oversight assured through [such] ownership . . . minimizes hazards that may confront a barmaid without such protecting oversight"); *Muller v. Oregon*, 208 U.S. 412, 421 (1908) (sustaining state maximum-hours law for women laundry workers because "woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence"); *Bradwell v. State*, 83 U.S. 130, 141 (1872) (Bradley, J., concurring) (in approving under the due process clause Illinois' law against admitting women to practice law,

observing that "[t]he natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life"). Indeed, just three years before Title VII became law, the Court had unanimously upheld a Florida statute exempting women from jury service because of their "special responsibilities" in the home unless they affirmatively chose to register for service. *Hoyt v. Florida*, 368 U.S. 57, 62 (1961).

It is unsurprising, then, that prior to Title VII's enactment, it had been routine for newspapers to separate "help wanted" advertisements into "male" and "female" sections, but the EEOC and courts found that practice illegal under the new law. *See Am. Newspaper Publishers Ass'n v. Alexander*, 294 F. Supp. 1100 (D.D.C. 1968). Employers' segregation of job opportunities by sex was premised on assumptions about what work women and men can and want to do. Indeed, Title VII was enacted at a time when the workforce was divided into "women's jobs" and "men's jobs," stemming largely from state "protective laws" restricting women's access to historically male-dominated fields, but also from the resulting cultural attitudes about the sexes' respective abilities and preferences. Just as sex-specific job listings were found to violate Title VII, so too were a variety of other policies and practices that had the purpose or effect of judging employees by their sex, not their qualifications.

By adopting a narrow approach to the bona fide occupational qualification (BFOQ) exception, for instance, courts assured that women and men alike would be assessed for jobs on individual merit, not group-based stereotypes. *See, e.g.*, *Rosenfeld v. S. Pac. Co.*, 444 F.2d 1219 (9th Cir. 1971) (striking down employer policy prohibiting women from becoming station agents due to job's physical demands); *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385 (5th Cir. 1971) (finding airline's women-only rule for flight attendants unlawful discrimination); *Weeks v. S. Bell Tel. & Tel. Co.*, 408 F.2d 228 (5th Cir. 1969) (prohibiting employer policy against women working as switchmen on grounds that job required heavy lifting).

Similarly, within a few years of these decisions, the Supreme Court ruled that physical criteria that disproportionately exclude women applicants violate Title VII unless justified by business necessity; employers could no longer merely assume that "bigger is better" when it came to dangerous jobs. *See Dothard v. Rawlinson*, 433 U.S. 321 (1977) (unanimously extending disparate impact framework of *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), to cover height and weight minimums for prison guards).[4] The Court later relied on similar logic to

[4] Although the *Dothard* Court upheld on BFOQ grounds Alabama's exclusion of women from certain positions within maximum-security penitentiaries that required bodily contact with inmates, the Court emphasized that its decision should not be interpreted as endorsing an absolute male-only rule in all such jobs. Rather, the Court reiterated that the BFOQ exception was otherwise to be read narrowly; it

invalidate an employer's "fetal protection policy" that barred women, but not men, from jobs involving contact with lead – despite medical evidence showing that men faced equal if not worse reproductive hazards. *United Auto. Workers of Am. v. Johnson Controls, Inc.*, 499 U.S. 187 (1991). Such a policy, said the Court, unlawfully presumed that women were more suited to motherhood than to the rigors, and dangers, of certain work: "It is no more appropriate for the courts than it is for individual employers to decide whether a woman's reproductive role is more important to herself and her family than her economic role. Congress has left this choice to the woman as hers to make." *Id*. at 211.[5]

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was the harrowing conditions then prevailing in Alabama's maximum-security facilities, which were under federal court order to come into compliance with the Eighth Amendment, that made this a special case. *See* 433 U.S. at 335 ("In the usual case, the argument that a particular job is too dangerous for women may appropriately be met by the rejoinder that it is the purpose of Title VII to allow the individual woman to make that choice for herself.").

[5] At the time *Johnson Controls* was decided, Title VII had been amended by the 1978 Pregnancy Discrimination Act ("PDA"). The PDA's addition to the statute does not warrant the conclusion that Title VII's sex provision, as originally enacted, did not encompass pregnancy discrimination, or that the law otherwise was incomplete in its substantive reach. Rather, the PDA was enacted in response to the Supreme Court's widely-disparaged ruling in *Gen. Electric Co. v. Gilbert*, 429 U.S. 125 (1976), in which it found that the exclusion of pregnancy from a company's disability benefits plan did not favor men over women, but rather, differentiated between pregnant and non-pregnant persons. *Gilbert* was nearly universally considered a misreading of Title VII; at the time it was decided, the EEOC, as well as all of the courts of appeals that had considered the issue, had declared pregnancy discrimination to be unlawful sex discrimination. *See AT&T Corp. v. Hulteen*, 556 U.S. 701, 717-18 (2009) (Ginsburg, J., dissenting). Indeed, just one year after *Gilbert* (and before passage of the PDA), the Supreme Court

Although what little floor debate occurred prior to Title VII's passage focused on women's second-class status in the workplace, the prohibition against discrimination "because of sex" has long been understood to ban discrimination against men as well. As the Supreme Court noted, "[p]roponents of the legislation stressed throughout the debates that Congress had always intended to protect *all* individuals from sex discrimination in employment." *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 681 (1983).

In addition to protecting male employees, Title VII also has been read repeatedly to forbid discrimination against subsets of employees, resulting in a broad definition of sex discrimination that acknowledges the diversity of employees' identities – and the equally diverse forms of sex-based bias to which they may be subjected. *See, e.g.*, *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971) (*per curiam*) (invalidating employer's ban on hiring mothers of preschool-aged children, despite overall high rates of women's employment); *Lam v. Univ. of Hawai'i*, 40 F.3d 1551 (9th Cir. 1994) (Asian-American woman's Title VII sex discrimination claim viable despite evidence that white women comparators were not subjected to discrimination); *Jefferies v. Harris Cty. Cmty. Action Ass'n*, 693

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found discrimination on the basis of pregnancy to be discrimination "because of sex" when it struck down a municipal employer's policy of erasing women's seniority while they were out on maternity leave. *Nashville Gas Co. v. Satty*, 434 U.S. 136, 142-43 (1977).

F.2d 589 (5th Cir. 1982) (Black woman could bring Title VII claim despite evidence that employer treated white female comparators favorably); *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194 (7th Cir. 1971) (airline's policy of employing only unmarried female flight attendants violated Title VII).

The initial rejection and later recognition of sexual harassment as sex discrimination offers another useful lens into courts' ever-widening understanding of what constitutes discrimination "because of sex." Although courts understood by the early 1970s that using racial epithets or displaying racist symbols like nooses was harassment "because of race" that violated Title VII, they were slower to see sexual harassment as harassment "because of sex." Instead, judges routinely wrote off adverse employment actions against women who had spurned their supervisors' advances as "controvers[ies] underpinned by the subtleties of an *inharmonious personal relationship*." *Barnes v. Train*, No. 1828-73, 1974 WL 10628, at *1 (D.D.C. Aug. 9, 1974) (emphasis added), *rev'd sub nom Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977); *see also Miller v. Bank of Am.*, 418 F. Supp. 233, 236 (N.D. Cal. 1976) (sexual harassment could not be discrimination "because of sex" because "[t]he attraction of males to females and females to males is a natural sex phenomenon"), *rev'd*, 600 F.2d 211 (9th Cir. 1979); *Tomkins v. Pub. Serv. Elec. & Gas Co.*, 422 F. Supp. 553, 556 (D.N.J. 1976) (Title VII not meant to provide a remedy "for what amounts to physical attack motivated by

sexual desire . . . which happened to occur in a corporate corridor rather than a back alley"), *rev'd*, 568 F.2d 1044 (3d Cir. 1977); *Corne v. Bausch & Lomb, Inc.*, 390 F. Supp. 161, 163 (D. Ariz. 1975) (supervisor's sexual harassment was motivated not by plaintiff's sex but by a "personal proclivity, peculiarity or mannerism"), *rev'd*, 562 F.2d 55 (9th Cir. 1977).

Notably, these courts buttressed their narrow readings of Title VII by referencing the limited debate that preceded Congress's addition of the sex provision. *See Miller*, 418 F. Supp. at 235 (the "Congressional Record fails to reveal any specific discussions as to the amendment's intended scope or impact"); *Tomkins*, 422 F. Supp. at 556-57 (sexual harassment "clear[ly] . . . without the scope of the Act," because otherwise "we would need 4,000 federal trial judges instead of some 400"); *Corne*, 390 F. Supp. at 163 (given the "[little] legislative history surrounding the addition of the word 'sex' to the employment discrimination provisions of Title VII," it would "be ludicrous to hold that the sort of activity involved here was contemplated by the Act").

The jurisprudential tide began to turn in the late 1970s (as evidenced in part by the appellate reversals of the above-cited decisions), and in 1980 the EEOC updated its Guidelines on Discrimination Because of Sex to declare that sexual harassment of a female employee could not be disentangled from her sex. 29 C.F.R. § 1604.11(a) (1980). The 1980 Guidelines recognized that it is not

"personal" to disadvantage a female employee because of her supervisor's sexual conduct toward her; it is illegal.

The Supreme Court continued this evolution in 1986, when it ruled that severe or pervasive conduct that creates a sexually hostile work environment violates Title VII by altering the "terms, conditions, or privileges" of employment. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 63-67 (1986). But the *Vinson* Court took it as a given that sexual harassment was sex discrimination; its analysis centered on whether a plaintiff's "voluntary" acquiescence to sexual demands and her failure to lodge a formal complaint negated her Title VII claim. As the Court put it, "*Without question*, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex." *Id.* at 64

Roughly a decade later, the Court extended *Vinson* – unanimously – to encompass same-sex sexual harassment. *See Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 79-80 (1998). In so doing, the *Oncale* Court rejected various attempts to define sexual harassment narrowly. For example, the Court declined to hold that whether an employee is the victim of sex (or race) discrimination turns on the sex (or race) of the harasser. *Id.* at 78-79. The Court likewise did away with the argument that sexual harassment must be motivated by sexual desire to be actionable under Title VII. *Id.* at 80-81. Rather, the Court adopted perhaps the

simplest test for whether discrimination had occurred: whether the conduct at issue met Title VII's "statutory requirements," *i.e.*, whether the harassment occurred because of the employee's sex. *Id.* at 80. The same test applies to discrimination against lesbian, gay, and bisexual employees, for the reasons explained below.

II. Title VII's prohibition against sex discrimination protects all employees, including lesbian, gay, and bisexual people.

As a remedial statute, and as illustrated by the foregoing decisions, Title VII does not prohibit only discrimination against women in favor of men. *Oncale*, 523 U.S. at 78. Rather, the statute protects "*all* individuals" from differential treatment because of their sex. *Newport News*, 462 U.S. at 681. This includes lesbian, gay, and bisexual individuals, as the en banc Seventh Circuit recently held and Chief Judge Katzmann recognized in his concurrence in *Christiansen*. *See Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339 (7th Cir. 2017) (en banc); *Christiansen v. Omnicom Grp., Inc.*, 852 F.3d 195, 201 (2d Cir. 2017) (Katzmann, C.J., concurring).

A. Discrimination because of sexual orientation is sex discrimination under the plain meaning of the term "sex."

Discrimination on the basis of sexual orientation is sex discrimination under the plain meaning of the term, because sexual orientation turns on one's sex in relation to the sex of one's partner. Consideration of an employee's sexual

orientation therefore necessarily involves consideration of the employee's sex. *Hively*, 853 F.3d at 345-47; *Isaacs v. Felder Servs., LLC*, 143 F. Supp. 3d 1190 (M.D. Ala. 2015) (holding that "claims of sexual orientation-based discrimination are cognizable under Title VII"); *Baldwin v. Foxx*, EEOC Doc. 0120133080, 2015 WL 4397641, at *5 (EEOC July 15, 2015).

That discrimination because of sexual orientation involves impermissible consideration of sex is particularly apparent in the employee benefits context. When an employer refuses to provide insurance coverage to an employee's same-sex spouse, but would provide such benefits to a different-sex spouse, the employment benefit depends on the sex of the employee. For example, a female employee who is denied fringe benefits because she is married to a woman experiences sex discrimination, because she would be provided those benefits if she were a man married to a woman. *See* Final Determination, *Cote v. Wal-Mart Stores E., LP*, EEOC Charge No. 523-2014-00916 (Jan. 29, 2015), https://www.glad.org/wp-content/uploads/2014/09/cote-v-walmart-probable-cause-notice.pdf. In addition to the EEOC, several federal courts have reached the same conclusion in analogous contexts. For example, in *Foray v. Bell Atlantic*, the court recognized that a male plaintiff could advance a sex discrimination theory based on the denial of benefits to his same-sex partner. *See* 56 F. Supp. 2d 327, 329-30 (S.D.N.Y. 1999) (recognizing sex discrimination theory under Title VII and the

Equal Pay Act "because all things being equal, if [plaintiff's] gender were female, he would be entitled to claim his domestic partner as an eligible dependent under the benefits plan" but dismissing both claims because plaintiff and his partner were not similarly situated to married couples (internal quotation marks omitted)); *see also In re Levenson*, 560 F.3d 1145, 1147 (9th Cir. 2009) (holding that denial of benefits for same-sex spouse of federal public defender constituted discrimination on the basis of sex or sexual orientation).

Numerous federal courts have concluded that sexual orientation discrimination is sex discrimination in cases seeking the freedom to marry for same-sex couples. As Judge Berzon recognized, the Equal Protection Clause forbids marriage bans for same-sex couples as a form of impermissible sex discrimination, because "[o]nly women may marry men, and only men may marry women." *Latta v. Otter*, 771 F.3d 456, 480 (9th Cir. 2014) (Berzon, J., concurring); *see also Jernigan v. Crane*, 64 F. Supp. 3d 1260, 1286-87 (E.D. Ark. 2014), *aff'd on other grounds*, 796 F.3d 976 (8th Cir. 2015); *Rosenbrahn v. Daugaard*, 61 F. Supp. 3d 845, 859-60 (D.S.D. 2014), *aff'd on other grounds*, 799 F.3d 918 (8th Cir. 2015); *Lawson v. Kelly*, 58 F. Supp. 3d 923, 934 (W.D. Mo. 2014); *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1206 (D. Utah 2013), *aff'd on other grounds*, 755 F.3d 1193 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 265 (2014); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 996 (N.D. Cal. 2010), *appeal*

dismissed sub nom. Perry v. Brown, 725 F.3d 1140 (9th Cir. 2013); *cf. Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 982 n.4 (N.D. Cal. 2012) ("Ms. Golinski is prohibited from marrying Ms. Cunninghis, a woman, because Ms. Golinski is a woman. If Ms. Golinski were a man, [the Defense of Marriage Act ("DOMA")] would not serve to withhold benefits from her. Thus, DOMA operates to restrict Ms. Golinski's access to federal benefits because of her sex."), *initial hearing en banc denied*, 680 F.3d 1104 (9th Cir. 2012) *and appeal dismissed*, 724 F.3d 1048 (9th Cir. 2013). This reasoning applies with equal force to Title VII as it does to the Equal Protection Clause.

B. Discrimination because of sexual orientation involves impermissible sex-role stereotyping.

As the Supreme Court recognized in *Price Waterhouse*, the prohibition against discrimination "because of sex" is not limited to discrimination based on the fact that an individual is male or female, but also discrimination based on other aspects of a person's sex, such as gender expression and conformity (or lack of conformity) with social sex roles. 490 U.S. at 250 (employers discriminate "because of sex" when they rely on sex-specific stereotypical beliefs, such as the notion that "a woman cannot be aggressive, or that she must not be"); *id.* at 256 ("[I]f an employee's flawed 'interpersonal skills' can be corrected by a soft-hued suit or a new shade of lipstick, perhaps it is the employee's sex and not her interpersonal skills that has drawn the criticism."); *see also Macy v. Holder*, EEOC

Doc. 0120120821, 2012 WL 1435995, at *6 (EEOC Apr. 20, 2012) (Title VII prohibits discrimination based "not only [on] a person's biological sex but also the cultural and social aspects associated with masculinity and femininity").

While discrimination because of sexual orientation often is accompanied by explicit evidence of disparate treatment because of an individual's failure to conform with sex stereotypes about dress and appearance, it need not be to constitute sex discrimination. *See Hively*, 853 F.3d at 346; *Baldwin*, 2015 WL 4397641, at *7-8. Since 2011, the EEOC has recognized that discrimination against lesbian, gay, and bisexual employees is unlawful to the extent that it turns on the sex-role expectation that women should be attracted to only men (and not women), and that men should be attracted to only women (and not men). *See Veretto v. Donahoe*, EEOC Doc. 0120110873, 2011 WL 2663401, at *3 (EEOC July 1, 2011) (Title VII prohibits adverse employment action "motivated by the sexual stereotype that marrying a woman is an essential part of being a man"); *see also Complainant v. Johnson*, EEOC Doc. 0120110576, 2014 WL 4407457, at *7 (EEOC Aug. 20, 2014) (collecting cases).

Because nonconformity with sex-role expectations is the very quality that defines lesbian, gay, and bisexual people, federal courts (including in this Circuit) likewise have begun to recognize that discrimination against members of those groups is a form of sex stereotyping without requiring additional evidence of

gender nonconformity. *See, e.g.*, *Hively*, 853 F.3d at 346 (noting that the plaintiff's same-sex attraction was "the ultimate case of failure to conform to the female stereotype"); *Philpott v. New York*, No. 16 Civ. 6778 (AKH), 2017 WL 1750398, at *2 (S.D.N.Y. May 3, 2017) ("[B]ecause plaintiff has stated a claim for sexual orientation discrimination, 'common sense' dictates that he has also stated a claim for gender stereotyping discrimination, which is cognizable under Title VII."); *EEOC v. Scott Med. Health Ctr., P.C.*, 217 F. Supp. 3d 834, 841 (W.D. Pa. 2016) ("There is no more obvious form of sex stereotyping than making a determination that a person should conform to heterosexuality."); *Videckis v. Pepperdine Univ.*, 100 F. Supp. 3d 927, 936 (C.D. Cal. 2015) ("[A] policy that female basketball players could only be in relationships with males inherently would seem to discriminate on the basis of gender."); *Boutillier v. Hartford Pub. Sch.*, No. 3:13CV1303 WWE, 2014 WL 4794527, at *2 (D. Conn. Sept. 25, 2014) (denying motion to dismiss where plaintiff alleged that "she was subjected to sexual stereotyping during her employment on the basis of her sexual orientation"); *Hall v. BNSF Ry. Co.*, No. C13-2160, 2014 WL 4719007, at *3 (W.D. Wash. Sept. 22, 2014) (denying motion to dismiss where plaintiff alleged that "he (as a male who married a male) was treated differently in comparison to his female coworkers who also married males"); *Terveer v. Billington*, 34 F. Supp. 3d 100, 116 (D.D.C. 2014) (denying motion to dismiss where "Plaintiff has alleged that he is 'a

homosexual male whose sexual orientation is not consistent with the Defendant's perception of acceptable gender roles'"); *Koren v. Ohio Bell Tel. Co.*, 894 F. Supp. 2d 1032, 1038 (N.D. Ohio 2012) (finding genuine issue of material fact under sex stereotyping theory where plaintiff failed to conform by taking his same-sex spouse's surname after marriage); *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212, 1224 (D. Or. 2002) (finding genuine issue of material fact under sex stereotyping theory where female plaintiff failed to conform by being attracted to and dating other women and not only men); *see also Centola v. Potter*, 183 F. Supp. 2d 403, 410 (D. Mass. 2002) ("Sexual orientation harassment is often, if not always, motivated by a desire to enforce heterosexually defined gender norms. In fact, stereotypes about homosexuality are directly related to our stereotypes about the proper roles of men and women.").

C. Discrimination against people who have or seek to have same-sex relationships is associational discrimination.

This Court first recognized that associational discrimination violates Title VII in *Holcomb v. Iona College*, which involved a white man who alleged he was fired in part because of his interracial marriage to a Black woman. 521 F.3d 130 (2d Cir. 2008). "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 same standard, and the same reasoning, apply to discrimination against an employee because he or she is in a relationship, or seeks to be in one, with a person of the same sex. *See Williams v. Consol. Edison Corp. of N.Y.*, 255 F. App'x 546, 549 n.2 (2d Cir. 2007) (noting that this Court "appl[ies] the same standard to both race-based and sex-based hostile work environment claims"); *Boutillier v. Hartford Pub. Sch.*, 221 F. Supp. 3d 255 (D. Conn. 2016) (applying *Holcomb* to same-sex relationships); *Baldwin*, 2015 WL 4397641, at *6-7; *see also Price Waterhouse*, 490 U.S. at 243 n.9 (plurality opinion) (noting that Title VII "on its face treats each of the enumerated categories exactly the same"). The employer's disapproval of same-sex relationships depends on the employee's sex: If the employee were of a different sex, he or she would not be in (or seek to be in) a same-sex relationship and, therefore, would not be subject to the employer's adverse action. *Cf. Foray*, 56 F. Supp. 2d at 329 ("[A]ll things being equal, if [plaintiff's] gender were female, he would be entitled to claim his domestic partner as an eligible dependent under the benefits plan."); Final Determination, *Cote v. Wal-Mart Stores E., LP*, EEOC Charge No. 523-2014-00916 (Jan. 29, 2015), https://www.glad.org/wp-content/uploads/2014/09/cote-v-walmart-probable-cause-notice.pdf (a female employee is "subjected to employment discrimination [where] she was treated differently and denied benefits *because* of her sex, since such coverage would be provided if she were a woman married to a man"). As the

en banc Seventh Circuit noted, this exercise "reveals that the discrimination rests of distinctions drawn according to sex" – distinctions prohibited by Title VII. *See Hively*, 853 F.3d at 349.

III. *Simonton* should be overruled in light of the Supreme Court's expansive interpretation of what constitutes discrimination "because of sex."

Simonton was wrongly decided because it ignored the meaning of sex discrimination discussed above. The occasion of rehearing this case en banc presents an opportunity for this Court to revisit and overrule that decision in light of the history of Title VII jurisprudence described above, the Seventh Circuit's recent en banc decision, *Hively*, 853 F.3d 339, and the concurring opinion by the Chief Judge in another case before it, *Christiansen*, 852 F.3d at 201 (Katzmann, C.J., concurring), recognizing that sexual orientation discrimination is necessarily sex discrimination within the meaning of Title VII. *See also Evans v. Ga. Reg'l Hosp.*, 850 F.3d 1248, 1261 (11th Cir. 2017) (Rosenbaum, J., dissenting).

This Court first held that Title VII does not prohibit sexual orientation discrimination in *Simonton v. Runyon*, a case brought by a postal worker who claimed he was subjected to an abusive and hostile work environment because he was gay. 232 F.3d 33. *Simonton*, in turn, relied in part on *DeCintio v. Westchester County Medical Center*, 807 F.2d 304 (2d Cir. 1986), a decision that did not involve sexual orientation discrimination at all. Rather, *DeCintio* involved male plaintiffs who were denied promotion in favor of a woman who was involved in a

heterosexual relationship with their supervisor. *Id.* at 305. In ruling that the male applicants did not have a Title VII claim, this Court observed that "[s]ex, when read in this context, logically could only refer to membership in a class delineated by gender, rather than sexual activity." *Id.* at 306 (internal quotation marks omitted).

Simonton relied on this language from *DeCintio* to rule that Title VII does not proscribe discrimination based on sexual orientation, 232 F.3d at 36, but its reliance was misplaced. First, the language was taken out of context; the "sexual activity" at issue was the male employer's romantic relationship with a woman. More significantly, it was inconsistent with *Price Waterhouse*, in which the Supreme Court held that sex means *more than* the fact of being a man or a woman and encompasses the full range of gender expression in the workplace. *See supra* Part II.B. What is more, the language relied on in *DeCintio* was derived from cases from other circuits, *see* 807 F.2d at 307 (citing *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748 (8th Cir. 1982)), whose reasoning has now been soundly rejected. *See Glenn v. Brumby*, 663 F.3d 1312, 1318 n.5 (11th Cir. 2011); *Smith v. City of Salem*, 378 F.3d 566, 573 (6th Cir. 2004).

This Court in *Simonton* also gave great weight to the fact that Congress has refused to amend Title VII to explicitly prohibit discrimination because of sexual

orientation. As an initial matter, the Supreme Court has repeatedly cautioned that acts of subsequent Congresses "deserve little weight in the interpretive process" regarding federal statutes. *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994). Moreover, congressional failure to act could just as easily establish the opposite conclusion from the one the *Simonton* Court drew: that amendment of the statute was unnecessary because sexual orientation discrimination already is covered by the prohibition against discrimination because of sex. *See* Br. *Amici Curiae* of 128 Members of Congress, *Christiansen v. Omnicom Grp.., Inc.*, No. 16-748-cv, 2016 WL 3551468, at *8 (2d Cir. June 28, 2016) ("[I]t is equally plausible that [the Employment Non-Discrimination Act] was introduced to *clarify* as well as *expand* Title VII's protections . . . ." (emphasis added)); *cf. Fabian v. Hosp. of Cent. Conn.*, 172 F. Supp. 3d 509, 527 n.12 (D. Conn. 2016) ("The fact that the Connecticut legislature added [language explicitly protecting gender identity] does not require the conclusion that gender identity was not already protected by the plain language of the statute [prohibiting sex discrimination], because legislatures may add such language to clarify or settle a dispute about the statute's scope rather than solely to expand it."). At a bare minimum, subsequent legislative action (or inaction) has no bearing on what Congress intended (or did not intend) in 1964 when it enacted Title VII. Nor can congressional intent – whatever it may have been – alter the

meaning of the words Congress actually used. Nearly two decades ago, *Oncale* squarely rejected the notion that legislative intent could limit the forms of sex discrimination prohibited by Title VII and made clear that the full scope of Title VII's protections cannot be determined solely by reference to the kinds of discrimination that were evident to legislators in 1964. 523 U.S. at 79-80. As Justice Scalia observed, the mere fact that a particular strain of bias was "not the principal evil Congress was concerned with when it enacted Title VII" does not end the analysis: "[S]tatutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Id.* at 79 (finding same-sex sexual harassment to be actionable sex discrimination under Title VII); *see also Newport News*, 462 U.S. at 679-81 (rejecting the argument that some of Title VII's protections apply only to women and not to men, despite the fact that the prohibition against sex discrimination was enacted to combat discrimination against women). Just as there is no exception to Title VII for same-sex sexual harassment, *see Oncale*, 523 U.S. at 79, there is no exception for lesbian, gay, or bisexual people either.

This Court's only other precedential case addressing sexual orientation discrimination is *Dawson v. Bumble & Bumble*, 398 F.3d 211 (2d Cir. 2005). In *Dawson*, the plaintiff alleged that her employer, a hair salon, did not promote her

to stylist because she was a lesbian who did not conform to sex stereotypes about femininity. *Id.* at 213-16. The *Dawson* Court noted that the plaintiff asserted a sex stereotyping claim and recognized that "[w]hen utilized by an avowedly homosexual plaintiff, however, gender stereotyping claims can easily present problems for an adjudicator. This is for the simple reason that '[s]tereotypical notions about how men and women should behave will often necessarily blur into ideas about heterosexuality and homosexuality.'" *Id.* at 218. Despite recognizing that sexual orientation necessarily implicates sex, this Court nevertheless cited *Simonton* for the proposition that "a gender stereotyping claim should not be used to 'bootstrap protection for sexual orientation into Title VII.'" *Id.* (quoting *Simonton*, 232 F.3d at 38).

The Court's discussion regarding "bootstrapping" reveals the tension between the categorical rejection of sexual orientation claims, on the one hand, with the expansive definition of sex discrimination adopted in *Price Waterhouse*, on the other. *Dawson* purported to limit sex stereotyping claims to those premised on an employee's "behavior" or "appearance." 398 F.3d at 221. But that limitation is not found in *Price Waterhouse* and, in fact, is contradicted by decades of case law – both before and after *Price Waterhouse*. *See, e.g.*, *Manhart*, 435 U.S. at 707 n.13 (noting that Title VII prohibits "the entire spectrum of disparate treatment of men and women resulting from sex stereotypes"); *see generally supra*

Part I. Those decisions make clear that employers may not make adverse decisions based on any aspect of a person's sex, including the respective roles of men and women as spouses, breadwinners, or caregivers at home. Just as employers may not refuse to hire a woman because she is married, *see Sprogis*, 444 F.2d at 1197, or because she is a mother, *see Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 120 (2d Cir. 2004), or because she is the sole wage-earner in her household, *see Sobel v. Yeshiva Univ.*, 839 F.2d 18, 33 (2d Cir. 1988), so too they may not refuse to hire a woman because she is married to a person of the same sex. As one judge of this Circuit has recognized, the results of the *Dawson* decision are "logically untenable." *Christiansen*, 852 F.3d at 205-06 (Katzmann, C.J., concurring); *see also Hively*, 853 F.3d at 342, 350 (observing that attempting to parse sexual orientation discrimination and sexual stereotyping claims led to "a 'confused hodge-podge of cases'" with "bizarre," "confusing and contradictory results").

This Court should no longer adhere to pre-*Price Waterhouse* precedent and reasoning. Instead, this Court should apply the principles mandated by the Supreme Court to determine whether sexual orientation claims are covered by Title VII. Applying those principles leads to the conclusion that sexual orientation discrimination is a form of sex discrimination prohibited by Title VII.

CONCLUSION

This Court should hold that sexual orientation discrimination is sex discrimination prohibited by Title VII.

Dated: June 26, 2017

Respectfully submitted,

s/ Ria Tabacco Mar

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Local Rules 32.1 and 29.1(c) because it contains 6,976 words, excluding the parts of the brief exempted by Fed. R. App. P. 32.

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 2010 in 14-point Times New Roman type style.

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CERTIFICATE OF SERVICE FOR ELECTRONIC FILINGS

I hereby certify that on June 26, 2017, I electronically filed the foregoing Brief of *Amici Curiae* American Civil Liberties Union; New York Civil Liberties Union; National Women's Law Center; 9to5, National Association of Working Women; A Better Balance; California Women's Law Center; Equal Rights Advocates; Feminist Majority Foundation; Gender Justice; Legal Voice; National Organization for Women (NOW) Foundation; National Partnership for Women & Families; Southwest Women's Law Center; Women Employed; Women's Law Center of Maryland, Inc.; and Women's Law Project in Support of Plaintiffs-Appellants Melissa Zarda and William Allen Moore, Jr. with the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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APPENDIX: INTERESTS OF *AMICI CURIAE*

The **American Civil Liberties Union** is a nationwide, nonprofit, nonpartisan organization with over one million members dedicated to defending the principles embodied in the Constitution and our nation's civil rights laws. The ACLU has long fought to ensure that lesbian, gay, bisexual, and transgender people are treated equally and fairly under law. The **New York Civil Liberties Union** ("NYCLU"), the New York affiliate of the American Civil Liberties Union, is a nonprofit, nonpartisan organization with approximately 80,000 members founded in 1951 to protect and advance civil rights in New York. The NYCLU has long fought to ensure that lesbian, gay, bisexual, and transgender New Yorkers are treated equally and fairly under New York and federal law.

The **National Women's Law Center** is a nonprofit legal advocacy organization dedicated to the advancement and protection of women's legal rights and opportunities since its founding in 1972. The Center focuses on issues of key importance to women and their families, including economic security, employment, education, health, and reproductive rights, with special attention to the needs of low-income women and women of color, and has participated as counsel or amicus curiae in a range of cases before the Supreme Court and the federal Courts of Appeals to secure the equal treatment of women

under the law, including numerous cases addressing the scope of Title VII's protection. The Center has long sought to ensure that rights and opportunities are not restricted for women or men on the basis of gender stereotypes and that all individuals enjoy the protection against such discrimination promised by federal law.

9to5, National Association of Working Women is a 44-year-old national membership organization of women in low-wage jobs dedicated to achieving economic justice and ending all forms of discrimination. Our membership includes transgender individuals. 9to5 has a long history of supporting local, state and national measures to combat discrimination. The outcome of this case will directly affect our members' and constituents' rights and economic well-being, and that of their families.

A Better Balance is a national legal advocacy organization dedicated to promoting fairness in the workplace and helping employees meet the conflicting demands of work and family. Through its legal clinic, A Better Balance provides direct services to low-income workers on a range of issues, including employment discrimination based on pregnancy and/or caregiver status. A Better Balance is also working to combat LGBTQ employment discrimination through its national LGBT Work-Family project. The workers we serve, who are often struggling to care for their families while holding down a job, are

particularly vulnerable to retaliation that discourages them from complaining about illegal discrimination.

California Women's Law Center ("CWLC") is a statewide, nonprofit law and policy center dedicated to advancing the civil rights of women and girls through impact litigation, advocacy and education. CWLC's issue priorities include gender discrimination, reproductive justice, violence against women, and women's health. Since its inception in 1989, CWLC has placed an emphasis on eliminating all forms of gender discrimination, including discrimination based on sexual orientation. CWLC remains committed to supporting equal rights for lesbians and gay men, and to eradicating invidious discrimination in all forms, including eliminating laws and policies that reinforce traditional gender roles. CWLC views sexual orientation discrimination in the workplace as a form of illegal gender discrimination that is harmful to our state and country, and needs to be eradicated.

Equal Rights Advocates ("ERA") is a national non-profit legal organization dedicated to protecting and expanding economic and educational access and opportunities for women and girls. Since its founding in 1974, ERA has litigated numerous class actions and other high-impact cases on issues of gender discrimination and civil rights. ERA has appeared as *amicus curiae* in numerous Supreme Court cases involving the interpretation of anti-

discrimination laws, including *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006); *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998); *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993); and *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986).

Founded in 1987, the **Feminist Majority Foundation** ("FMF") is a cutting-edge organization devoted to women's equality, reproductive health, and non-violence. FMF uses research and action to empower women economically, socially, and politically through public policy development, public education programs, grassroots organizing, and leadership development. Through all of its programs, FMF works to end sex discrimination and achieve civil rights for all people, including people of color and LGBTQ individuals.

Gender Justice is a nonprofit advocacy organization based in the Midwest that works to eliminate gender barriers based on sex, sexual orientation, gender identity, or gender expression. Gender Justice targets the root causes of gender discrimination, such as cognitive bias and stereotyping. We believe that courts should take an expansive, and inclusive, interpretation of what constitutes discrimination "because of sex." Consistent with that view, we represent the transgender plaintiff in *Rumble v. Fairview Health Services*, No. 0:14-cv-02037-SRN-FLN (D. Minn.), whose right to sue under the Affordable Care Act, Section 1557, was recognized by the court in 2015.

Legal Voice is a nonprofit public interest organization in the Pacific Northwest that works to advance the legal rights of women and girls through litigation, legislation, and public education on legal rights. Since its founding in 1978, Legal Voice has been at the forefront of efforts to combat sex discrimination in the workplace, in schools, and in public accommodations. We have served as counsel and as amicus curiae in numerous cases involving workplace gender discrimination throughout the Northwest and the country. Legal Voice serves as a regional expert advocating for legislation and for robust interpretation and enforcement of anti-discrimination laws to protect women and LGBTQ people. Legal Voice has a strong interest in ensuring that Title VII is interpreted to cover discrimination based on sexual orientation and sex stereotyping.

The **National Organization for Women (NOW) Foundation** is a 501(c)(3) entity affiliated with the National Organization for Women, the largest grassroots feminist activist organization in the United States with chapters in every state and the District of Columbia. NOW Foundation is committed to advancing equal opportunity, among other objectives, and works to assure that women and LGBTQIA persons are treated fairly and equally under the law. As an education and litigation organization dedicated to eradicating sex-based discrimination, we believe that the Civil Rights Act of 1964, Title VII provision

prohibiting sex discrimination extends to sexual orientation.

The **National Partnership for Women & Families** (formerly the Women's Legal Defense Fund) is a national advocacy organization that develops and promotes policies to help achieve fairness in the workplace, reproductive health and rights, quality health care for all, and policies that help women and men meet the dual demands of their jobs and families. Since its founding in 1971, the National Partnership has worked to advance women's equal employment opportunities and health through several means, including by challenging discriminatory employment practices in the courts. The National Partnership has fought for decades to combat sex discrimination, including on the basis of sex stereotypes, and to ensure that all people are afforded protections against discrimination under federal law.

The **Southwest Women's Law Center** is a legal, policy and advocacy law center that utilizes law, research and creative collaborations to create opportunities for women and girls in New Mexico to fulfill their personal and economic potential. Our mission is: (1) to eliminate gender bias; and (2) to utilize the provisions of Title IX to protect women against violence in schools and on college campuses and to protect the rights of LGTB individuals. We collaborate with community members, organizations, attorneys and public officials to ensure that the interests of all individuals are protected.

Women Employed's mission is to improve the economic status of women and remove barriers to economic equity. Since 1973, the organization has assisted thousands of working women with problems of discrimination and harassment, monitored the performance of equal opportunity enforcement agencies, and developed specific, detailed proposals for improving enforcement efforts, particularly on the systemic level. Women Employed believes that barring discrimination "because of sex" encompasses discrimination against an employee because of his/her sexual orientation because women's rights and LGBT rights are inextricable.

The **Women's Law Center of Maryland, Inc.** is a non-profit, membership organization established in 1971 with a mission of improving and protecting the legal rights of women, particularly regarding gender discrimination, employment law, family law and reproductive rights. Through its direct services and advocacy, the Women's Law Center seeks to protect women's legal rights and ensure equal access to resources and remedies under the law. The Women's Law Center is participating as an *amicus* in *Zarda v. Altitude Express, Inc.* because it agrees with the proposition that sex, gender, and sexual orientation are intrinsically intertwined, particularly in the realm of discrimination. The concerns and struggles of the LGBTQ community impact all women, regardless of sexual orientation.

The **Women's Law Project** ("WLP") is a non-profit women's legal advocacy organization with offices in Philadelphia and Pittsburgh, Pennsylvania. Founded in 1974, WLP's mission is to create a more just and equitable society by advancing the rights and status of all women throughout their lives. To this end, we engage in high impact litigation, policy advocacy, and public education. For over forty years, WLP has challenged discrimination rooted in gender stereotyping and based on sex.