KATZMANN, *Chief Judge*, and BRODIE, *District Judge*, concurring:

To ascertain whether Title VII of the Civil Rights Act of 1964 prohibits sexual orientation discrimination, we begin with the text:

> It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge . . . or otherwise to discriminate against any individual with respect to his [or her] compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . . .

42 U.S.C. § 2000e-2(a)(1). Christiansen and *amici* advance three arguments, none previously addressed by this Court, that sexual orientation discrimination is, almost by definition, discrimination "because of . . . sex." They argue first that sexual orientation discrimination is discrimination "because of . . . sex" because gay, lesbian, and bisexual individuals are treated in a way that would be different "but for" their sex. Second, they argue that sexual orientation discrimination is discrimination "because of . . . sex" because gay, lesbian, and bisexual individuals are treated less favorably based on the sex of their associates. Finally, they argue that sexual orientation discrimination is discrimination "because of . . . sex" because gay, lesbian, and bisexual individuals are treated less favorably because they do not conform to gender stereotypes, particularly stereotypes about the proper roles of men and women

in romantic relationships. I find persuasive these arguments, which reflect the evolving legal landscape since our Court's decisions in *Simonton v. Runyon*, 232 F.3d 33 (2d Cir. 2000), and *Dawson v. Bumble & Bumble*, 398 F.3d 211 (2d Cir. 2005), holding that sexual orientation discrimination claims are not cognizable under Title VII. Concluding that it was constrained by the law as it then was, the *Simonton* Court expressly decried the "appalling persecution," 232 F.3d at 35, that Simonton endured because of his sexual orientation, stating that such persecution was "morally reprehensible whenever and in whatever context it occurs." *Id*. For the reasons that follow, I write separately to express my view that when the appropriate occasion presents itself, it would make sense for the Court to revisit the central legal issue confronted in *Simonton a*nd *Dawson*, especially in light of the changing legal landscape that has taken shape in the nearly two decades since *Simonton* issued.

I. Sexual Orientation Discrimination As Traditional Sex Discrimination

First, sexual orientation discrimination is sex discrimination for the simple reason that such discrimination treats otherwise similarly-situated people differently solely because of their sex. A person is discriminated against "because of . . . sex" if that person is "exposed to disadvantageous terms or conditions of

employment to which members of the other sex are not exposed." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998) (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)). As the Supreme Court has alternatively explained, an action constitutes sex discrimination under Title VII if "the evidence shows treatment of a person in a manner which *but for that person's sex* would be different." *City of Los Angeles, Dep't of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978) (emphasis added) (internal quotation marks omitted). "Whatever evidentiary route the plaintiff chooses to follow, he or she must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted 'discrimina[tion] . . . because of . . . sex,'" *Oncale*, 523 U.S. at 81 (emphasis omitted), and Title VII's prohibition "must extend to [discrimination] *of any kind* that meets the statutory requirements," *id.* at 80 (emphasis added).

Sexual orientation discrimination meets this test. As the Equal Employment Opportunity Commission ("EEOC") has observed, sexual orientation "cannot be defined or understood without reference to sex," *Baldwin v. Foxx*, E.E.O.C. Decision No. 0120133080, 2015 WL 4397641, at *5 (July 16, 2015), because sexual orientation is defined by whether a person is attracted to people

of the same sex or opposite sex (or both, or neither). For this reason, the EEOC has concluded that "[s]exual orientation discrimination is sex discrimination because it necessarily entails treating an employee less favorably because of the employee's sex." *Id*. To illustrate, the EEOC gives an example:

> [A]ssume that an employer suspends a lesbian employee for displaying a photo of her female spouse on her desk, but does not suspend a male employee for displaying a photo of his female spouse on his desk. The lesbian employee in that example can allege that her employer took an adverse action against her that the employer would not have taken had she been male. That is a legitimate claim under Title VII that sex was unlawfully taken into account in the adverse employment action. The same result holds true if the person discriminated against is straight. Assume a woman is suspended because she has placed a picture of her husband on her desk but her gay colleague is not suspended after he places a picture of his husband on his desk. The straight female employee could bring a cognizable Title VII claim of disparate treatment because of sex.

Id. (citation omitted). Under this framework, "but for [the employee's] sex," the employee's treatment would have been different. *Manhart*, 435 U.S. at 711. Because this situation "meets the statutory requirements" of Title VII, the statute "must extend" to prohibit it. *Oncale*, 523 U.S. at 80.

One could argue in response that a man married to a man is not similarly situated to a man married to a woman, but is instead similarly situated to a woman married to a woman. In other words, one might contend that, for comparative purposes, a gay man is not married to a man; he is married to someone of the same sex, and it is other people married (or otherwise attracted) to the same sex who are similarly situated for the purpose of Title VII. In my view, this counterargument, which attempts to define "similarly situated" at a different level of generality, fails to demonstrate that sexual orientation discrimination is not "but for" sex discrimination. The Supreme Court rejected an analogous argument on interracial marriage—"that members of each race [were] punished to the same degree"—in *Loving v. Virginia* and held that treating all members of interracial relationships the same, but less favorably than members of intraracial relationships, was a race-based classification violating the Equal Protection Clause. *See* 388 U.S. 1, 7–8 (1967). The same logic suggests that it is sex discrimination to treat all individuals in same-sex relationships the same, but less favorably than individuals in opposite-sex relationships. Similarly, *Manhart* tells us that sex discrimination is treating someone "in a manner which *but for* that person's sex would be different," 435 U.S. at 711 (emphasis added)

(internal quotation marks omitted), suggesting that when evaluating a comparator for a gay, lesbian, or bisexual plaintiff, we must hold every fact except the sex of the plaintiff constant—changing the sex of *both* the plaintiff and his or her partner would no longer be a "but-for-the-sex-of-the-plaintiff" test.

Thus in my view, if gay, lesbian, or bisexual plaintiffs can show that "but for" their sex, *Manhart*, 435 U.S. at 711, they would not have been discriminated against for being attracted to men (or being attracted to women), they have made out a cognizable sex discrimination claim. In such a case, then, traditional sex discrimination would encompass discrimination on the basis of sexual orientation. Neither *Simonton* nor *Dawson* addressed this argument.

II. Sexual Orientation Discrimination As Associational Sex Discrimination

Next, sexual orientation discrimination is discrimination "because of . . . sex" because it treats people differently due to the sex of their associates. The associational discrimination theory, which we articulated with respect to racial discrimination eight years after our decision in *Simonton*, provides 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, 138 (2d Cir. 2008). As we explained, "[t]he reason [for this holding]

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" in relation to the race of his or her associate. *Id*. at 139 (emphasis in original).

As the Supreme Court has observed, Title VII "on its face treats each of the enumerated categories exactly the same,"[1] and for that reason "the principles . . . announce[d]" with respect to sex discrimination "apply with equal force to discrimination based on race, religion, or national origin," and vice versa. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 243 n.9 (1989). Thus, the associational theory of race discrimination applies also to sex discrimination. Putting aside romantic associations, this principle is not controversial. If a white employee fired or subjected to a hostile work environment after friendly association with black coworkers has a claim under Title VII, *see Drake v. Minnesota Min. & Mfg. Co.*, 134 F.3d 878, 881, 883-84 (7th Cir. 1998) (finding no categorical bar to the application of the associational theory of race discrimination to interracial friendships), then a female employee fired or subjected to a hostile work environment after friendly

[1] The only exception, not relevant here, is for a "bona fide occupational qualification" ("BFOQ"), which is a justification for some differential treatment based on religion, sex, or national origin but not based on race. *See* 42 U.S.C. § 2000e-2(e); *see also Price Waterhouse v. Hopkins*, 490 U.S. 228, 242 (1989).

association with male coworkers should have a claim under Title VII. Once we accept this premise, it makes little sense to carve out same-sex relationships as an association to which these protections do not apply, particularly where, in the constitutional context, the Supreme Court has held that same-sex couples cannot be "lock[ed] . . . out of a central institution of the Nation's society." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015); *see also United States v. Windsor*, 133 S. Ct. 2675, 2693-94 (2013) (explaining that differentiation between opposite-sex and same-sex couples in the Defense of Marriage Act "demeans the couple, whose moral and sexual choices the Constitution protects, and whose relationship the State has sought to dignify" (citation omitted)). In sum, if it is race discrimination to discriminate against interracial couples, it is sex discrimination to discriminate against same-sex couples.

Therefore, I conclude that if gay, lesbian, or bisexual plaintiffs can show that they would not have been discriminated against but for the sex of their associates, they have made out a cognizable sex discrimination claim. In such a case, the associational theory of sex discrimination would encompass discrimination on the basis of sexual orientation. Because *Simonton* and *Dawson* were decided before *Holcomb*, we have had no opportunity to address the

associational theory of sex discrimination as applied to sexual orientation discrimination.

III. Sexual Orientation Discrimination As Gender Stereotyping

Finally, sexual orientation discrimination is discrimination "because of . . . sex" because such discrimination is inherently rooted in gender stereotypes. In *Back v. Hastings On Hudson Union Free Sch. Dist.*, 365 F.3d 107 (2d Cir. 2004), we considered "a crucial question: What constitutes a gender-based stereotype?" *Id.* at 119-20. While we did not definitively answer that question, we invoked the Seventh Circuit's observation that whether there has been improper "reliance upon stereotypical notions about how men and women should appear and behave" can sometimes be resolved by "consider[ing] . . . whether [the plaintiff's] gender would have been questioned for [engaging in the relevant activity] if he were a woman rather than a man." *Id.* at 120 n.10 (quoting *Doe ex rel. Doe v. City of Belleville, Ill.*, 119 F.3d 563, 581–82 (7th Cir. 1997), *vacated on other grounds by* 523 U.S. 1001 (1998) (remanding the case in light of *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998))).

Relying on common sense and intuition rather than any "special training," *see Back*, 365 F.3d at 120 (quoting *Price Waterhouse*, 490 U.S. at 256), courts have

explained that sexual orientation discrimination "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. . . . The gender stereotype at work here is that 'real' men should date women, and not other men," *Centola v. Potter*, 183 F. Supp. 2d 403, 410 (D. Mass. 2002); *see also Boutillier v. Hartford Pub. Sch.*, No. 3:13-CV-01303-WWE, 2016 WL 6818348 (D. Conn. Nov. 17, 2016) ("[H]omosexuality is the ultimate gender non-conformity, the prototypical sex stereotyping animus."). Indeed, we recognized as much in *Dawson* when we observed that "[s]tereotypical notions about how men and women should behave will often necessarily blur into ideas about heterosexuality and homosexuality."398 F.3d at 218 (alteration in original) (internal quotation marks omitted). Having conceded this, it is logically untenable for us to insist that this particular gender stereotype is outside of the gender stereotype discrimination prohibition articulated in *Price Waterhouse*.

Numerous district courts throughout the country have also found this approach to gender stereotype claims unworkable. *See, e.g.*, *Videckis v. Pepperdine Univ.*, 150 F. Supp. 3d 1151, 1159 (C.D. Cal. 2015) (collecting cases) ("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."). The binary distinction that *Simonton* and *Dawson* establish between permissible gender stereotype discrimination claims and impermissible sexual orientation discrimination claims requires the factfinder, when evaluating adverse employment action taken against an effeminate gay man, to decide whether his perceived effeminacy or his sexual orientation was the true cause of his disparate treatment. *See Fabian v. Hosp. of Cent. Connecticut*, 172 F. Supp. 3d 509, 524 n.8 (D. Conn. 2016). This is likely to be an exceptionally difficult task in light of the degree to which sexual orientation is commingled in the minds of many with particular traits associated with gender. More fundamentally, carving out gender stereotypes related to sexual orientation ignores the fact that negative views of sexual orientation are often, if not always, rooted in the idea that men should be exclusively attracted to women and women should be exclusively attracted to men—as clear a gender stereotype as any.

Thus, in my view, if gay, lesbian, or bisexual plaintiffs can show that they were discriminated against for failing to comply with some gender stereotype, including the stereotype that men should be exclusively attracted to women and

women should be exclusively attracted to men, they have made out a cognizable sex discrimination claim. In such a case, the gender stereotype theory of discrimination would encompass discrimination on the basis of sexual orientation. In neither *Simonton* nor *Dawson* did we consider this articulation of the gender stereotype at play in sexual orientation discrimination.

IV. Congressional Inaction

Our decision in *Simonton* was understandably influenced by "Congress's refusal to expand the reach of Title VII" in the wake of "consistent judicial decisions refusing to interpret 'sex' to include sexual orientation," which we viewed as "strong evidence of congressional intent." 232 F.3d at 35. The Supreme Court has indicated, however, that:

> [S]ubsequent legislative history is a hazardous basis for inferring the intent of an earlier Congress. It is a particularly dangerous ground on which to rest an interpretation of a prior statute when it concerns . . . a proposal that does not become law. Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change.

Pension Ben. Guar. Corp. v. LTV Corp., 496 U.S. 633, 650 (1990) (internal citations and quotation marks omitted).

As several *amici* point out, there are idiosyncratic reasons that many bills do not become law, and those reasons may be wholly unrelated to the particular provision of a bill that a court is assessing. In light of the force of the arguments as to why discrimination "because of . . . sex" encompasses sexual orientation discrimination and *Oncale*'s admonition that "it is ultimately the provisions of our laws . . . by which we are governed," 523 U.S. at 79, we should not rely on the "hazardous basis" of subsequent congressional inaction, *LTV Corp.*, 496 U.S. at 650, to exclude sexual orientation discrimination from Title VII's coverage.

V. Conclusion

When *Simonton* was decided, this Court reached the same conclusion as every other circuit court that had considered the issue: that discrimination "because of . . . sex" did not encompass discrimination on the basis of sexual orientation, a view then shared by the EEOC. But in the years since, the legal landscape has substantially changed, with the Supreme Court's decisions in *Lawrence v. Texas*, 539 U.S. 558 (2003), and *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), affording greater legal protection to gay, lesbian, and bisexual individuals. During the same period, societal understanding of same-sex relationships has evolved considerably.

There is no doubt that sexual orientation discrimination "was assuredly not the principal evil Congress was concerned with when it enacted Title VII." *Oncale*, 523 U.S. at 79. However, "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws . . . by which we are governed." *Id*. Title VII prohibits all "discriminat[ion] . . . because of . . . sex" and its protections "must extend to [discrimination] *of any kind* that meets the statutory requirements." *Id*. at 80 (emphasis added). Despite recent congressional inaction in the face of judicial decisions excluding sexual orientation discrimination from Title VII's coverage, there is "no justification in the statutory language . . . for a categorical rule excluding" such claims so long as a plaintiff can demonstrate that he or she was discriminated against "because of . . . sex." *Id*.

Taking a fresh look at existing cases, the EEOC and other advocates have articulated three ways that gay, lesbian, or bisexual plaintiffs could make this showing. First, plaintiffs could demonstrate that if they had engaged in identical conduct but been of the opposite sex, they would not have been discriminated against. Second, plaintiffs could demonstrate that they were discriminated against due to the sex of their associates. Finally, plaintiffs could demonstrate

that they were discriminated against because they do not conform to some gender stereotype, including the stereotype that men should be exclusively attracted to women and women should be exclusively attracted to men. Neither *Simonton* nor *Dawson* had occasion to consider these worthy approaches. I respectfully think that in the context of an appropriate case our Court should consider reexamining the holding that sexual orientation discrimination claims are not cognizable under Title VII. Other federal courts are also grappling with this question, and it well may be that the Supreme Court will ultimately address it.