No. 15-3775-CV

IN THE

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 EASTERN DISTRICT OF NEW YORK

BRIEF OFAMICI CURIAE MATTHEW CHRISTIANSEN & PROFESSOR ANTHONY MICHAEL KREIS IN SUPPORT OF PLAINTIFFS-APPELLANTS

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STATEMENT OF INTEREST OF AMICI CURIAE

Amici Curiae Matthew Christiansen and Professor Anthony Michael Kreis have a vital interest in this case. *Amicus* Matthew Christiansen is the plaintiff-appellant in *Christiansen v. Omnicom*, 852 F.3d 195, 2017 U.S. App. LEXIS 5278 (2d Cir. 2017). A concurring opinion in *Christiansen* strongly supported *en banc* review of whether sexual orientation is protected under Title VII, it was relied upon in the Seventh Circuit's decision in *Hively v. Ivy Tech*, 2017 WL 1230393 (7th Cir. Apr. 4, 2017) holding Title VII prohibits sexual orientation discrimination, and it lends invaluable support to the issue at bar by explaining the legal fiction distinguishing sexual orientation discrimination and sex stereotyping created by this Circuit in *Simonton*. Finally, Christiansen's petition for *en banc* review was put on hold by this Court pending the disposition of *Zarda* and will directly impact *Christiansen*.

Amicus Anthony Michael Kreis is law professor at Chicago-Kent College of Law where he teaches employment discrimination and publishes scholarship on workplace discrimination, sexual orientation and the law, and legislation.[1] Through his research and teaching, *amicus* works to promote equal employment

[1] *Amicus*' institutional affiliation is listed for identification purposes only. No party's counsel authored this brief in whole or in part.

opportunities for the gay, lesbian, and bisexual community. For the above reasons, *amici* have an interest in the proper interpretation and application of Title VII.

SUMMARY OF ARGUMENT

The exceptionally important question before this Court is whether employers covered under Title VII can discriminate against gay, lesbian, and bisexual persons with relative impunity despite Title VII's prohibition against sex discrimination, 42 U.S.C. § 2000e- 2(a)(1).

While Title VII was initially viewed as a tool to combat discrimination against women in the workplace, the Supreme Court has made clear in decades' worth of precedent that the sweep of Title VII's sex discrimination prohibition is significantly broader. Courts, however, struggle with sexual orientation discrimination claims offering unworkable and cramped interpretations of Title VII that provide remedies for sexual orientation discrimination only when a male plaintiff is effeminate or a female plaintiff is masculine. This incoherent line drawing essentially allows employers to invoke a "love the sin, hate the sinner" defense to escape liability for adverse employment actions harming lesbians, gays, and bisexuals. Any interpretation of Title VII's sex discrimination ban that attempts to parse

outward appearances and behaviors from a person's sexual orientation is inconsistent with Supreme Court precedent, Title VII's protections against racial and religious discrimination, and this Court's holding in *Holcomb v. Iona College*. This Court should overturn Circuit precedent and hold in line with the Circuit Court of Appeals for the Seventh Circuit, multiple federal district courts and the Equal Employment Opportunity Commission that there is no principled reason to distinguish sexual orientation discrimination and sex stereotyping because both are forms of impermissible discrimination "because of sex" under Title VII.

ARGUMENT

I. SEXUAL ORIENTATION DISCRIMINATION IS SEX DISCRIMINATION AND IS ACTIONABLE UNDER TITLE VII'S EXISTING FRAMEWORK

Chief Judge Katzmann's concurrence in *Christiansen* reflects society's evolving understanding that sexual orientation discrimination is sex discrimination because "homosexuality is the ultimate gender non–conformity, the prototypical sex stereotyping animus." *Boutillier v. Hartford Pub. Sch.*, No. 3:13–CV–01303–WWE, 2016 WL 6818348 (D. Conn. Nov. 17, 2016). In light of that concurrence and its impact in *Hively v. Ivy Tech* Community College, 2017 WL 1230393 (7th Cir. Apr. 4, 2017) holding that Title VII bans sexual orientation discrimination,

this Court has an important opportunity to overturn its decision in *Simonton v. Runyon*, 232 F.3d 33 (2d Cir. 2000), which held Title VII does not proscribe harassment or discrimination because of sexual orientation. *Simonton*'s antiquated and cramped approach distinguishing sex stereotyping unrelated to sexual orientation (prohibited by Title VII), and sex stereotyping arising from an employee's lesbian, gay, or bisexual status (as non-actionable) is unworkable and inconsistent with evolving gay, lesbian, and bisexual (LGB) rights jurisprudence.

The Seventh Circuit Court of Appeals in *Hively v. Ivy Tech Community College* recognized that Title VII's ban on sex discrimination includes sexual orientation discrimination. Sexual orientation discrimination fits cleanly within the Supreme Court's "simple" "but for" test for what constitutes sex discrimination under Title VII— "whether the evidence shows 'treatment of a person in a manner which but for that person's sex would be different" *L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978) (citation omitted). The "but for" causation is easiest understood when an adverse employment action arises from an employer's disapproval or unequal treatment of an employee's same-sex relationship that would not occur if that employee was in an opposite-sex relationship.

Such was the case in *Hall v. BSNF Railway Company*, 2014 WL 4719007 (W.D. Wash. Sept. 22, 2014) where an employer denied healthcare benefits to married same-sex couples otherwise provided to married opposite-sex couples. The company moved to dismiss the Title VII sex discrimination claim arguing that the thrust of the plaintiff's case was really about sexual orientation discrimination. The court denied the motion to dismiss noting that "Plaintiff alleges disparate treatment based on his sex, not his sexual orientation, specifically that he (as a male who married a male) was treated differently in comparison to his female coworkers who also married males" *Id*. at *3.

The *Hall* court's reading of Title VII importantly mirrors the analysis used by a handful of courts considering constitutional challenges to anti-marriage equality laws. The first state courts and the first federal courts to deal blows to state same-sex marriage prohibitions did so under the rationale that anti-gay marriage laws constituted sex discrimination.[2] See *Lawson v. Kelly*, 2014 WL 5810215, at

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[2] Notable concurring and dissenting opinions in same-sex marriage litigation also acknowledged marriage discrimination against same-sex couples was a form of sex-discrimination. *See Latta v. Otter*, 771 F.3d 456, 480-96 (9th Cir. 2014) (Berzon, J., concurring); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 971-73 (Mass. 2003) (Greaney, J., concurring); *Hernandez v. Robles*, 855 N.E.2d 1, 29-30 (N.Y. 2006) (Kaye, C.J., dissenting); *Baker v. State*, 744 A.2d 864, 905-07 (Vt. 1999) (Johnson, J., concur-

*8 (W.D. Mo. Nov. 7, 2014) ("The State's permission to marry depends on the genders of the participants, so the restriction is a gender-based classification."); *Perry v. Schwarzenegger*, 704 F.Supp.2d 921, 996 (N.D.Cal.2010) ("Perry is prohibited from marrying Stier, a woman, because Perry is a woman. If Perry were a man, Proposition 8 would not prohibit the marriage. Thus, Proposition 8 operates to restrict Perry's choice of marital partner because of her sex."), *aff'd sub nom.*, Perry v. Brown, 671 F.3d 1052 (9th Cir.2012), *vacated and remanded sub nom.*, *Hollingsworth v. Perry*, —— U.S. ——, 133 S.Ct. 2652 (2013); *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1206–07 (D. Utah 2013), *aff'd*, 755 F.3d 1193 (10th Cir. 2014) (finding Utah's same-sex marriage ban subject to "the heightened burden of justification that the Fourteenth Amendment requires of state laws drawn according to sex. . . . and unable to satisfy the more rigorous standard of demonstrating an "exceedingly persuasive" justification for its prohibition against same-sex marriage."); *Brause v. Bureau of Vital Statistics*, 1998 WL 88743, at *6 (Alaska Super. Ct. Feb. 27, 1998) (noting that "the prohibition of same-sex marriage does implicate the Constitution's prohibition of classifications based on sex or gender");

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ring in part and dissenting in part); *Andersen v. King Cnty.*, 138 P.3d 963, 1037-39 (Wash. 2006) (en banc) (Bridge, J., concurring in dissent).

Baehr v. Lewin, 852 P.2d 44, 59 (Haw. 1993) (plurality) (proffering that a ban on same-sex marriage "on its face, discriminates based on sex"). Same-sex marriage rulings are further significant in light of Title VII's "main purpose" which is "to extend the constitutional prohibition against discrimination from public to private action." George Rutherglen & Daniel R. Ortiz, *Affirmative Action Under the Constitution and Title VII: From Confusion to Convergence*, 35 UCLA L. REV. 467, 470 (1988). *See also* Hively, 2017 WL 1230393, at *8 (7th Cir. Apr. 4, 2017) (noting that recognizing sexual orientation claims' viability under Title VII "must be understood against the backdrop of the Supreme Court's decisions, not only in the field of employment discrimination, but also in the [constitutional law] area of broader discrimination on the basis of sexual orientation.").

Trickier questions arise, however, in the context of an employer who harbors anti-LGB animus and takes hostile action against a person because of their sexual orientation without any direct connection to a same-sex relationship. What if a bisexual female worker in an opposite-sex relationship is fired because of her sexual orientation? What if a single, hyper-masculine, gay male employee is denied a promotion because of his sexual orientation? Title VII safeguards these persons from discrimination because it protects men and women from "the entire

spectrum of disparate treatment . . . resulting from sex stereotypes." *Price Waterhouse,* 490 U.S. at 251. Thus, employers cannot engage in "practices that classify employees in terms of . . . sex [and] . . . assumptions about groups rather than thoughtful scrutiny of individuals." *L.A. Dept. of Water & Power,* 435 U.S. at 709. This Court's rulings in *Simonton* and *Dawson v. Bumble & Bumble*, 398 F.3d 211 (2d Cir. 2005) failed to capture the relationship between sex stereotypes and sexual orientation discrimination.

Chief Judge Katzmann's concurrence in *Christiansen, supra*. at *7 provides the correct analysis, which this Court should adopt:

> [To wall off a person's sexual orientation from their demeanor and conduct is] 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.[3]

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[3] Other courts have echoed this idea. *See Hively v. Ivy Tech Cmty. Coll.*, S. Bend, 830 F.3d 698, 705 (7th Cir. 2016), *as amended* (Aug. 3, 2016), *reh'g en banc granted, opinion vacated*, No. 15-1720, 2016 WL 6768628 (7th Cir. Oct. 11, 2016) (explaining that "almost all discrimination on the basis of sexual orientation can be traced back to some form of discrimination on the basis of gender nonconformity."); *EEOC v. Scott Med. Health Ctr., P.C.*, No. CV 16-225, 2016 WL 6569233, at *6 (W.D. Pa. Nov. 4, 2016) ("There is no more obvious form of sex stereotyping than making a determination that a person should conform to heterosexuality."). *See also Videckis v. Pepperdine Univ.*, 150 F. Supp. 3d 1151, 1159 (C.D. Cal. 2015) (criticizing the workability of courts trying to distinguish sexual orientation discrimination claims and sex stereotyping) ("Simply put,

Simply put, "the question of whether sexual orientation discrimination claims are colorable under *Price Waterhouse* must turn on whether the root of the animus harbored against sexual minorities stems from sex-stereotypes— not whether all sexual minorities uniformly manifest a set of gender non-conforming characteristics." Anthony Michael Kreis, *Against Gay Potemkin Villages: Title VII and Sexual Orientation Discrimination,* 96 TEX. L. REV. SEE ALSO 1, 6 (2017).

Framing the question in this fashion resolves the "extravagant legal fiction" where "the law protects effeminate men from employment discrimination, but only if they are (or are believed to be) heterosexuals." *Hamm v. Weyauwega Milk Prod., Inc.*, 332 F.3d 1058, 1067 (7th Cir. 2003) (Posner, J., concurring). Despite the state of the law today, *Simonton* remains an unworkable legal fiction that parses individuals' sexual orientation from LGB persons' relationships and outward traits, which is a hollow distinction.

Precedents like *Simonton* not only create absurd results but also improperly emphasize the inconsistent manifestation of non-conforming traits. A recent con-

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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*.") (emphasis added).

curring opinion from Judge William Pryor in *Evans v. Georgia Regional Hospital*, 2017 WL 943925 (11th Cir. Mar. 10, 2017), exposes the untenable theoretical framework that underpins decisions like *Simonton*. The Pryor concurrence in *Evans* proffered that since "[t]he doctrine of gender nonconformity is, and always has been, behavior based," sexual orientation discrimination claims do not necessarily qualify as nonconformity because LGB persons do not inherently violate gender norms. *Evans* at *9. This idea is, of course, consistent with the premise of *Simonton* that while sexual orientation discrimination and discrimination arising from a person's gender non-conformity may often overlap, they are distinct. Judge Pryor writes, "Deviation from a particular gender stereotype may correlate disproportionately with a particular sexual orientation, and plaintiffs who allege discrimination on the basis of gender nonconformity will often also have experienced discrimination because of sexual orientation." *Id*. at *8.

Part and parcel to the non-conformity theory according to Judge Pryor is that "[s]ome gay individuals adopt what various commentators have referred to as the gay "social identity" but experience a variety of sexual desires." *Id*. Supporting this proposition is that "like some heterosexuals, some gay individuals may choose

not to marry or date at all or may choose a celibate lifestyle. And other gay individuals choose to enter mixed-orientation marriages." *Evans* at *8.

The *Evans* concurrence underscores one of the flaws in *Simonton*'s attempt at line drawing. Indeed, this status-conduct dichotomy fails to comport with the lived experiences of gay, lesbian, and bisexual persons. The tortured logic courts have generally used to tip toe around the question before this Court relies on fictionalized theories of LGB persons that are contrary to reality.

II. SUPREME COURT PRECEDENT REJECTS DIVORCING STATUS AND CONDUCT

Supreme Court precedent has never made a distinction between sexual orientation as a status and the conduct of engaging in same-sex relationships. The Court expressly disapproved of divorcing status and conduct in *Christian Legal Society v. Martinez*, 561 U.S. 661, 689 (2010). In *Martinez*, the Christian Legal Society chapter at Hastings Law School challenged the law school's nondiscrimination policy that required any student group receiving student funding must be open to all students. The CLS chapter's bylaws included a provision that disallowed any individuals that engage in "unrepentant homosexual conduct" from

becoming members. *Id*. at 672. CLS argued that because persons with same-sex attractions could be members provided they disavowed same-sex relations, the bylaws did not discriminate against gays, lesbians, and bisexuals.

The Court rejected CLS' attempt to disaggregate status and conduct. Writing for the majority, Justice Ginsburg emphasized that the Court's decisions on LGB discrimination "have declined to distinguish between status and conduct." *Id*. at 689. When the Supreme Court invalidated anti-sodomy laws, the Court was clear that equal protection jurisprudence understood sexual orientation and same-sex sexual conduct as intertwined. *Lawrence v. Texas,* 539 U.S. 558, 575 (2003) ("When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination."). Equally instructive here are the subsequent decisions from federal courts in same-sex marriage litigation. The Supreme Court's rulings striking down federal non-recognition of same-sex marriages in *United States v. Windsor* 133 S. Ct. 2675, 2693 (2013), and ruling against state same-sex marriage bans in *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015) reinforced the non-severability of status and conduct. Thus, any interpretation of Title VII that allows for the parsing of

status from conduct cannot be reconciled with LGB rights jurisprudence more broadly.

III. *SIMONTON* MUST BE OVERTURNED TO RESOLVE THE INCONSISTENT APPLICATION OF TITLE VII GIVEN THIS CIRCUIT'S PRECEDENT IN *HOLCOMB*

Not only does *Simonton* contravene Supreme Court precedent, but it also creates inconsistencies in Title VII's application. Unlike the Equal Protection Clause's tired scrutiny approach to discrimination, "under Title VII a distinction based on sex stands on the same footing as a distinction based on race unless it falls within one of a few narrow exceptions." *Arizona Governing Comm. for Tax Deferred Annuity & Deferred Comp. Plans v. Norris*, 463 U.S. 1073, 1083–84 (1983). *See also Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 66 (1986) ("Nothing in Title VII suggests that a hostile environment based on discriminatory sexual harassment should not be" prohibited like racial harassment); *Hively v. Ivy Tech*, 2017 WL 1230393, at *7 (7th Cir. Apr. 4, 2017) ("The text of the statute draws no distinction, for this purpose, among the different varieties of discrimination it addresses . . . to the extent that the statute prohibits discrimination on the basis of the race of someone with whom the plaintiff associates, it also prohibits discrimi-

nation on the basis of the national origin, or the color, or the religion, or (as relevant here) the sex of the associate."). Because Title VII "on its face treats each of the enumerated categories exactly the same," any doctrinal inconsistencies between protected classes raise serious concerns. *Price Waterhouse*, 490 U.S. at 243 n.9.

Courts have held consistently that Title VII's protections cover employees adversely treated because of their relationship with a person or persons of a race or national origin different from their own. This Circuit recognizes 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 the Eleventh Circuit recognized, it would "be folly" to read Title VII as not permitting a claim for "discrimination based on an interracial marriage because, had the plaintiff been a member of the spouse's race, the plaintiff would still not have been hired." *Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 889 (11th Cir. 1986). Failure to recognize sex associational claims undermines the equal footing which Title VII places race and sex discrimination.

More than creating a fork in Title VII doctrine for sex and race/national origin claims, the approach in *Simonton* and the *Evans* concurrence conflicts with

basic religious anti-discrimination principles. Consider religious articles of clothing, like yarmulkes. If an employer refused to hire applicants that wear yarmulkes, would that constitute discrimination against a class of persons or the targeting of applicants' behavior? If the status of being an observant Jew were severable from the conduct of yarmulke wearing, the employer would be free to engage in religious discrimination with impunity. This logic fails to hold water. As the Supreme Court has noted, "A tax on wearing yarmulkes is a tax on Jews." *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993).

As the Seventh Circuit held and Judge Katzmann in *Christiansen* wisely recognized, in the wake of *Lawrence*, *Windsor*, and *Obergefell*, persons discriminated against because of their same-sex relationships should have viable association-based Title VII actions. *See Christiansen* at *6 (Katzmann, J., concurring) ("…it makes little sense to carve out same–sex relationships as an association to which [Title VII associational] protections do not apply, particularly where, in the constitutional context, the Supreme Court has held that same–sex couples cannot be" denied marriage rights). Leaving *Simonton* in place improperly creates a disparity in how Title VII sex discrimination doctrine operates with how Title VII

treats other protected persons— and with the sole impact of isolating gay, lesbian, and bisexual persons from workplace protections.

CONCLUSION

This Court should reject any attempt to create artificial distinctions that treat same-sex conduct and sexual orientation as discrete concepts or treat sex discrimination as a lesser societal evil than other forms of workplace discrimination under Title VII. Accordingly, this Court should overturn *Simonton* and hold that sexual orientation discrimination is an actionable subset of sex discrimination under Title VII.

Dated: June 26, 2017

Respectfully submitted,

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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 pursuant to Fed. R. App. P. 29(b)(4) totaling 3,505, words exclusive of the exempted portions of the brief.

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3. As permitted by Fed. R. App. P. 32(g)(1), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

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