15-3775

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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

Plaintiffs-Appellants,

v.

ALTITUDE EXPRESS, INC., d/b/a SKYDIVE LONG ISLAND; and RAYMOND MAYNARD,

Defendants-Appellees.

On Appeal from the U.S. District Court for the Eastern District of New York
Hon. Joseph Bianco, Judge

BRIEF OF LAMBDA LEGAL AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Amicus curiae Lambda Legal Defense and Education Fund, Inc. has no parent corporation(s), does not have shareholders, and does not issue stock.

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***AMICUS CURIAE*'S INTEREST**

Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal") is the nation's oldest and largest legal organization committed to achieving the full recognition of the civil rights of lesbian, gay, bisexual, and transgender ("LGBT") people and people living with HIV through impact litigation, education, and policy advocacy. Since its founding in 1973, Lambda Legal has striven to ensure employment fairness for LGBT people by serving as counsel of record or *amicus curiae* in litigation addressing the application of federal law to discrimination against LGBT individuals.

Amicus files this brief, pursuant to Federal Rule of Appellate Procedure 29(b). Appellants consent to the filing of the brief. Appellees do not.[1]

[1] No party's counsel authored this brief in whole or in part. No party, party's counsel, or other person—other than *amicus curiae*, its members, or its counsel—has contributed money intended to fund preparing or submitting the brief.

SUMMARY OF THE ARGUMENT

This Court is being asked whether sexual orientation discrimination is actionable under Title VII's sex discrimination proscription, 42 U.S.C. § 2000e-2(a)(1). *Amicus* urges this Court to answer such question in the affirmative for the reasons below.

First, sexual orientation discrimination is sex discrimination because: (1) it is based on gendered stereotypes that a man should only be attracted to women, and a woman only be attracted to men; (2) it inherently involves considerations of an employee's sex; and (3) discrimination based on association with someone of a particular sex is analogous to discrimination based on association with someone of a particular race.

Second, because *Simonton v. Runyon*, 232 F.3d 33 (2d Cir. 2000), and *Dawson v. Bumble & Bumble*, 398 F.3d 211 (2d Cir. 2005), were wrongly decided, this Court can and should reconsider and reject their reasoning.

Third, the Equal Employment Opportunity Commission's ("EEOC") decision in *Baldwin v. Foxx*, 2015 WL 4397641 (E.E.O.C. July 16, 2015), holding that sexual orientation discrimination is sex discrimination, is entitled to *Chevron* deference by this Court and overrides contrary precedent.

Finally, considering the new legal landscape surrounding the legal protections afforded to lesbians and gay men by the Constitution, this Court should

reject any efforts to create a gay exception to Title VII's sex discrimination prohibition.

ARGUMENT

I. TITLE VII'S PROSCRIPTION AGAINST SEX DISCRIMINATION ENCOMPASSES DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION.

Under any theory, antigay discrimination that an employee experiences is necessarily "because of such individual's ... sex." 42 U.S.C. § 2000e-2. First, sexual orientation discrimination involves sex stereotyping, as it is based on the perception that the sexual orientation of lesbians and gay men does not conform to gender norms. Second, discrimination on the basis of sexual orientation necessarily involves sex-based considerations prohibited by Title VII. Finally, just as discrimination against someone because of their association with someone of a particular race has been recognized as race discrimination, discrimination against someone because of their romantic involvement with someone of a particular sex is sex discrimination.

A. Employees, Including LGBT Employees, Are Protected From Discrimination Based On Nonconformity To Sex Stereotypes.

In 1989, the Supreme Court ruled in *Price Waterhouse v. Hopkins*, 490 U.S. 228, that "[a]s for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they match[] the stereotype associated with their group." *Id.* at 251. Lest any mystery

remain, this Court has held "that adverse actions taken on the basis of gender stereotypes can constitute sex discrimination." *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 130 (2d Cir. 2004).[2] Because a man who is attracted to men does not conform to gender stereotypes, it is untenable to suggest that Title VII does not cover discrimination based on this attraction.

1. A Man's Attraction to Men Is Undeniably a Stereotypically Gender-Nonconforming Trait.

Indisputably, attraction to women is a gender norm or stereotype about men. Discrimination and harassment against men who defy that stereotype is "motivated by a desire to enforce heterosexually defined gender norms." *Baldwin*, 2015 WL 4397641, *8 (citation omitted). Indeed, *Dawson* and other decisions contrary to *amicus*'s coverage position have freely conceded the presence of gender stereotyping in sexual orientation discrimination. *See Dawson*, 398 F.3d at 218 ("'Stereotypical notions about how men and women should behave will often necessarily blur into ideas about heterosexuality and homosexuality.'") (citation omitted); *Gilbert v. Country Music Ass'n*, 432 F. App'x 516, 520 (6th Cir. 2011) ("Gilbert fits every male 'stereotype' save one—sexual orientation"); *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 764 (6th Cir. 2006) ("[A]ll homosexuals, by

[2] While *Back* was brought under 42 U.S.C. § 1983, this Court made clear that its analysis was the same under Title VII.

definition, fail to conform to traditional gender norms in their sexual practices."). Courts cannot coherently follow *Price Waterhouse* and still immunize discrimination based on failure to conform to the gender norm that men should only date women.

Increasingly, courts have concluded that distinguishing between sex discrimination and sexual orientation discrimination is indefensible, as sanctioning discrimination based on failure to conform to heterosexually-defined gender norms does not coherently apply *Price Waterhouse*.[3] "It is impossible to categorically separate 'sexual orientation discrimination' from discrimination on the basis of sex or from gender stereotypes," because "to do so would result in a false choice." *Videckis v. Pepperdine Univ.*, 2015 WL 8916764, *7 (C.D. Cal. Dec. 15, 2015). In *Dawson*, this Court notably observed that "the borders" between sex and sexual orientation are "imprecise." 398 F.3d at 217. *See also Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 291 (3d Cir. 2009) ("line between sexual orientation discrimination and [sex] discrimination" is "difficult to draw"); *Christiansen v. Omnicom Group, Inc.*, 2016 WL 951581, *14 (S.D.N.Y. Mar. 9, 2016) ("no

[3] *See, e.g., Isaacs v. Felder Servs., LLC*, 2015 WL 6560655, *4 (M.D. Ala. Oct. 29, 2015); *Boutillier v. Hartford Pub. Schs.*, 2014 WL 4794527, *2 (D. Conn. Sept. 25, 2014); *Deneffe v. SkyWest, Inc*., 2015 WL 2265373, *5-6 (D. Colo. May 11, 2015); *TerVeer v. Billington*, 34 F. Supp. 3d 100, 116 (D.D.C. 2014); *Koren v. Ohio Bell Tel. Co.*, 894 F. Supp. 2d 1032, 1038 (N.D. Ohio 2012); *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212, 1224 (D. Or. 2002); *Centola v. Potter*, 183 F. Supp. 2d 403, 409 (D. Mass. 2002).

coherent line can be drawn between" sex and sexual orientation claims); *Centola*, 183 F. Supp. 2d at 408. And while some courts have attempted to impose an illusory line between allegations based on sexual orientation and allegations based on sex, the reason courts find it "difficult to discern" or draw this line, *Dawson*, 398 F.3d at 217, is because "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." *Videckis*, 2015 WL 8916764, *6.

2. *Dawson*'s Dicta Is Incorrect To The Extent It Purports To Immunize Discrimination Based on Certain Types of Gender Nonconformity.

In *Dawson*, this Court stated in dicta that "[g]enerally speaking, one can fail to conform to gender stereotypes in two ways: (1) through behavior or (2) through appearance." *Dawson*, 398 F.3d at 221 (citations omitted). That statement lamentably has been read to give a blank check to employers who discriminate based on an employee's nonconformity in sexual attraction, as that nonconformity may not be related to the employee's behavior or appearance.[4] *See, e.g.*, *Kiley v. Am. Soc. for Prevention of Cruelty to Animals*, 296 F. App'x 107, 109 (2d Cir. 2008); *Estate of D.B. v. Thousand Islands Cent. Sch. Dist.*, 2016 WL 945350, *8

[4] This brief focuses its sex stereotyping discussion on *Dawson*, and not *Simonton*, because this Court did "not reach the merits of" a possible sex stereotyping discrimination claim in *Simonton*. *See Simonton*, 232 F.3d at 38; *see also Koke v. Baumgardner*, 2016 WL 93094, *2 (S.D.N.Y. Jan. 5, 2016).

(N.D.N.Y. Mar. 14, 2016) (focusing on the victim's sexual orientation as "the critical fact," stating "If the harassment consists of homophobic slurs directed at a homosexual, then a gender-stereotyping claim by that individual is improper bootstrapping. If, on the other hand, the harassment consists of homophobic slurs directed at a heterosexual, then a gender-stereotyping claim by that individual is possible.").

But *Dawson* actually *held* that the plaintiff did not sufficiently prove sexual orientation discrimination, period, and thus affirmed summary judgment not only on her federal claims but also on her claims under state and local laws explicitly prohibiting sexual orientation discrimination. *See Dawson*, 398 F.2d at 213, 224-25. Thus, any insinuation in *Dawson* that sexual orientation discrimination is not sex stereotyping discrimination, or not covered by Title VII, is dicta that does not bind this Court, because it was not relevant to the holding that Dawson failed to establish sexual orientation discrimination on the facts. *See Xiao Ji Chen v. U.S. Dep't of Justice*, 471 F.3d 315, 338 (2d Cir. 2006).

Dawson thus did not create binding precedent either concerning Title VII's coverage of sexual orientation discrimination or in its behavior/appearance passage. Nor, for the reasons below, should the Court create a behavior/appearance limitation on actionable sex stereotyping discrimination.

a. The Behavior/Appearance Limitation Ignores Price Waterhouse*'s Import.*

The behavior/appearance limitation in *Dawson* appears to narrow inappropriately the universe of relevant gender norms to only those that Ann Hopkins was deemed to transgress in *Price Waterhouse*, despite that case's declaration that Title VII was "intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." *Price Waterhouse*, 490 U.S. at 251. Moreover, the "entire spectrum" phrase previously appeared in *City of L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702 (1978), which had a decidedly broad view of what constituted discrimination based on sex stereotypes. *See id.* at 707, n.13. *Manhart* struck down the employer's policy of making women, as a group, pay higher pension contributions because it is "unquestionably true" that "[w]omen, as a class, do live longer than men." 435 U.S. at 707. But because "[m]any women do not live as long as the average man" and Title VII's "focus on the individual is unambiguous," a "'stereotyped' answer to" the question of whether discrimination occurred "may not be the same as the answer that the language and purpose of the statute command." *Id.*at 708. *Manhart* had nothing to do with behavior or appearance, and neither did the case from which *Manhart* borrowed the "entire spectrum" concept – *Sprogis v. United Airlines*, 444 F.2d 1194, 1198 (7th Cir. 1971) (invalidating airline's policy against married female flight attendants).

Many other cases through Title VII's history reflect a broad understanding of sex stereotypes that the statute combats, including stereotypes about life choices about families and relationships. *Sobel v. Yeshiva Univ.*, 839 F.2d 18, 33 (2d Cir. 1988) (refusing to credit "stereotype" that men are more often sole wage earners); *Pond v. Braniff Airways, Inc.*, 500 F.2d 161, 166 (5th Cir. 1974) (discrimination based on "stereotypical culturally-based concepts of the abilities of people to perform certain tasks because of their sex" violates Title VII); *cf. Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975) (holding statute rooted in stereotype that families depend on male breadwinners unconstitutional).

b. The Behavior/Appearance Limitation Is Inconsistent With Back.

In contrast to *Dawson*, *Back* is both an actual holding about what sex stereotyping is actionable, and a careful examination of the history of sex stereotyping. Back produced evidence that her employer denied her tenure, believing "that a woman cannot 'be a good mother' and have a job that requires long hours" or "that a mother who received tenure 'would not show the same level of commitment she had shown because she had little ones at home.'" *Back*, 365 F.3d at 120 (alterations omitted). Rather than the approach in *Dawson*, which apparently viewed the exact stereotypes at issue in *Price Waterhouse* as an exclusive list, the *Back* court correctly concluded that a proper reading of *Price Waterhouse* is that the "question [of w]hat constitutes a gender-based stereotype ...

must be answered in the particular context in which it arises, and without undue formalization." *Id.* at 119-20.

Back cited a variety of precedents demonstrating that the fight against sex stereotyping discrimination always has been concerned with rules and exclusions that would dictate to women (whether working or not) whether they could be in a relationship and, if so, which kind; what their roles in their relationships should be; and what type of family structures they could establish consistent with their job obligations. *See Back,* 365 F.3d at 120-21, 130 (citations omitted). Thus, the *Back* court had little trouble recognizing that the employer's comments about the purported conflict between her motherhood and her commitment to the university reflected the kind of stereotyping that takes no "special training to discern." 365 F.3d at 120.

In sum, Title VII condemns all non-trivial[5] discrimination based on failure to conform to sex stereotypes, whether that nonconformity relates to behavior, appearance, marriage and family decisions, or sexual orientation.

[5] In *Tavora v. New York Mercantile Exch.*, 101 F.3d 907 (2d Cir. 1996), this Court upheld hair-length restrictions, rejecting the argument "that Title VII applies to any employment policy with any difference between men and women, no matter how trivial." *Id.* at 908. Plainly, after *Windsor* and *Obergefell*, discrimination against employees in same-sex relationships cannot be dismissed as too trivial for Title VII coverage.

B. When Employers Discriminate Based on Sexual Orientation, They Necessarily Consider An Employee's Sex.

Sexual orientation discrimination by an employer inherently involves differential treatment based on an employee's sex, in violation of Title VII, because one cannot consider an individual's sexual orientation without taking into account that individual's sex. *See Baldwin*, 2015 WL 4397641, *5. *Cf. Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 996 (N.D. Cal. 2010).

Conceptually, this is an even simpler formulation of why sexual orientation discrimination is sex discrimination under Title VII. Rather than rely on sex stereotypes, the Court need only ask whether the employee would have been discriminated against if the employee had been of a different sex. If the answer is "no," then the discrimination plainly was because of such individual's sex.

This Court's treatment of sexual orientation discrimination as distinct from sex discrimination in *Simonton* is therefore untenable. For one, the *Simonton* court did not articulate the relevant standard for sex discrimination as established by the Supreme Court. *Manhart* articulated the controlling, yet "simple[,] test of whether the evidence shows treatment of a person in a manner which but for that person's sex would be different" to determine whether a sex-based violation of Title VII occurred. *Manhart*, 435 U.S. at 711 (quotation omitted). *See also Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 682-83 (1983) (applying *Manhart*'s "simple test"). Ignoring this test, the *Simonton* court simply concluded,

without support, that "'sex' in Title VII refers only to membership in a class delineated by gender, and not to sexual affiliation," and that "Title VII does not proscribe discrimination because of sexual orientation." 232 F.3d at 36. *Simonton*'s articulation disregards the "inescapabl[e]" link between sexual orientation and sex, *Baldwin*, 2015 WL 4397641, *5, and fundamentally misapprehends the nature of the inquiry courts are required to perform when evaluating sex discrimination claims.

Indeed, numerous courts have ruled in favor of lesbian or gay Title VII plaintiffs, using the simple logic noted above. *See, e.g.*, *Isaacs*, 2015 WL 6560655, *3 ("If a business fires Ricky because of his sexual activities with Fred, while this action would not have been taken against Lucy if she did exactly the same things with Fred, then Ricky is being discriminated against because of his sex.") (alterations, citation omitted); *Hall v. BNSF Ry. Co.*, 2014 WL 4719007, *3 (W.D. Wash. Sept. 22, 2014); *Koren*, 894 F. Supp. 2d at 1038; *Heller*, 195 F. Supp. 2d at 1223; *see also Videckis*, 2015 WL 8916764, *8.

Thus, because "sexual orientation is inseparable from and inescapably linked to sex," "allegations of sexual orientation discrimination [necessarily] involve sex-based considerations." *Baldwin*, 2015 WL 4397641, *5; *see also Videckis*, 2015 WL 8916764, *7.

C. Discrimination Based On Same-Sex Relationships Is Analogous To Discrimination Based On Interracial Relationships, And Therefore Equally Violates Title VII.

It is impossible to reconcile this Court's holding that discrimination based on an employee's interracial marriage or interracial associations constitutes race discrimination with an argument that discrimination based on a worker's same-sex intimate relationships is *not* sex discrimination. In *Holcomb v. Iona Coll.*, 521 F.3d 130 (2d Cir. 2008), a case post-dating *Simonton* and *Dawson*, this Court held that "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 (emphasis in original); *see also Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 892 (11th Cir. 1986); *Schroer v. Billington*, 577 F. Supp. 2d 293, 307 (D.D.C. 2008). The same principles of construction apply to determining what constitutes discrimination "because of race" and "because of ... sex," and thus should dictate the same treatment of relationships involving the enumerated traits in Title VII.

In light of *Holcomb*, and this Court's obligation "to give Title VII a liberal construction," *Parr*, 791 F.2d at 892, and "harmonize the standards" concerning actionable conduct among the categories enumerated in Title VII, *Faragher v. City of Boca Raton*, 524 U.S. 775, 787 n.1 (1998); *see also Williams v. Consol. Edison Corp. of N.Y.*, 255 F. App'x 546, 549 (2d Cir. 2007), the Court should reject the

idea that Title VII does not help those who suffer employment discrimination as a result of their association with persons of a particular sex.

In addition, this Court's analysis should be informed by how an individual's right to marry is protected by the Constitution no matter the race or sex of the person the individual chooses to marry. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2604 (2015); *Loving v. Virginia*, 388 U.S. 1, 12 (1967). Unlike interracial couples, whose right to marry was recognized in 1967, same-sex couples were unable to marry in most jurisdictions until relatively recently. But now, there should be no question that whether for the purposes of due process analysis or statutory interpretation, same-sex relationships and interracial relationships are afforded the same protections.

Title VII "on its face treats each of the enumerated categories exactly the same." *Price Waterhouse*, 490 U.S. at 243 n.9. Accordingly, this Court should treat discrimination based on same-sex relationships just as it treats discrimination based on interracial relationships, following *Holcomb*'s liberal construction of Title VII and "reject[ing] [the] restrictive reading of Title VII" employed by *Simonton* and *Dawson*. *Holcomb*, 521 F.3d at 139. Discrimination on the basis of an employee's personal association with someone of a particular sex is discrimination because of sex. *See Videckis*, 2015 WL 1735191, *8; *Isaacs*, 2015 WL 6560655, *3.

II. THE COURT SHOULD REJECT AND DISAVOW THE REASONING OF *SIMONTON* AND *DAWSON*.

Simonton and *Dawson* do not constrain this Court from holding that discrimination based on sexual orientation is sex discrimination under Title VII, because *Simonton*'s holding and *Dawson*'s dicta were clearly incorrect, and because legal developments post-dating them have neutered any precedential value they might have had.

A. Courts Should Not Rely Upon Congressional Inaction When Interpreting Title VII's Sex Discrimination Prohibition.

This Court's decision in *Simonton*, and *Dawson*'s reliance on it, is erroneous because it relied on Congressional inaction as the basis to carve out gay people from Title VII's protections. In *Simonton*, this Court primarily relied on Congressional inaction on legislation that would have made *explicit* Title VII's proscription on discrimination based on sexual orientation in order to find that "Title VII does not proscribe discrimination because of sexual orientation." 232 F.3d at 35; *see also id.* at 36. But reliance on Congressional inaction for statutory interpretation, especially with regards to Title VII's sex discrimination proscription, is not only treacherous, it is impermissible.

The Supreme Court has taken a dim view of reliance on Congressional inaction as a tool of statutory interpretation. Simply put, "[l]egislative silence is a poor beacon to follow in discerning the proper statutory route." *Zuber v. Allen*,

396 U.S. 168, 185 (1969); *see also Pension Ben. Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990); *Girouard v. United States*, 328 U.S. 61, 69 (1946). That is because Congressional inaction may be interpreted in many different ways, including an acknowledgement that Title VII's sex discrimination prohibition already encompasses discrimination on the basis of sexual orientation. *See United States v. Craft*, 535 U.S. 274, 287 (2002); *Girouard*, 328 U.S. at 70.

Moreover, "[t]he idea that congressional action is required (and inaction is therefore instructive in part) rests on the notion that protection against sexual orientation discrimination under Title VII would create a new class of covered persons. But analogous case law confirms this is not true." *Roberts v. United Parcel Serv., Inc.*, 115 F. Supp. 3d 344, 364 (E.D.N.Y. 2015) (citation omitted).

The Supreme Court has specifically instructed that Title VII should be interpreted based on the words of the statute and not on some divining of the evils that Congress meant to address. For example, when the Supreme Court held "that nothing in Title VII necessarily bars a claim of discrimination 'because of ... sex' merely because the plaintiff and the defendant ... are of the same sex" in *Oncale v. Sundowner Offshore Servs., Inc.*, it did so while noting that "statutory 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." 523 U.S. 75, 79-80 (1998). Similarly, the

Supreme Court has stated that it is not for the courts "to rewrite the statute so that it covers only what we think is necessary to achieve what we think Congress really intended." *Lewis v. City of Chicago*, 560 U.S. 205, 215 (2010); *see also id.* at 217 (court's "charge is to give effect to the law Congress enacted" even if "effect was unintended"). One can be reasonably sure that the unanimous *Oncale* Court, in dismissing the relevance of the motivations of the 88th Congress that passed Title VII, was not inviting courts deciding coverage issues to shift their focus to what *later* sessions of Congress did *not* enact into statutory law.

As a result, judge-made rules must not insulate from liability conduct falling within the language of Title VII. Whatever flexibility lower courts might have, when it comes to Title VII, a court's job is to entertain all claims that fall within "the statutory requirements," *Oncale*, 523 U.S. at 80, and not limit claims to only those "necessary to achieve what we think Congress really intended." *Lewis*, 560 U.S. at 215.

While this Court in *Simonton* failed to understand "how *Oncale* change[d] [its] well-settled precedent that 'sex' refers to membership in a class delineated by gender," 232 F.3d at 36, and purported to reaffirm in *Dawson* that sex stereotyping claims "should not be used to 'bootstrap protection for sexual orientation into Title VII.'" *Dawson*, 398 F.3d at 218-21 (citation omitted), such results-oriented approach is contrary to the Supreme Court's clear instructions regarding the

interpretation of Title VII, which is to follow the words of the statute, and let the chips fall where they may.

B. Should The Court Be Inclined To Consider Congress's Inaction, It Should Also Focus On Congress's Inaction In The Face Of The EEOC's Decision In *Baldwin* And Court Decisions Holding That Sexual Orientation Discrimination Is Actionable Under Title VII.

While this Court should rely on the text of Title VII for its interpretation, to the extent this Court continues to rely on Congressional inaction as a tool to interpret Title VII, it should do so bearing in mind Congress's inaction in the face of the EEOC's decision in *Baldwin* and decisions by numerous federal courts holding that sexual orientation discrimination is actionable under Title VII.

The EEOC's decision in *Baldwin* holding that discrimination on the basis sexual orientation violates Title VII occurred in mid-2015 and to date Congress has taken no action to override it. Similarly, multiple federal courts throughout the country have held that claims of discrimination against gay people under Title VII (whether based on same-sex relationships, attraction, or orientation, or on sex stereotypes) are actionable. *See, e.g.*, *Isaacs*, 2015 WL 6560655, *3 ("This court agrees … that claims of sexual orientation-based discrimination are cognizable under Title VII."); *Deneffe*, 2015 WL 2265373, *5-6; *Hall*, 2014 WL 4719007, *4-5; *TerVeer*, 34 F. Supp. 3d at 116; *Koren*, 894 F. Supp. 2d at 1037-38; *Heller*, 195

F. Supp. 2d at 1223. *Cf. Videckis*, 2015 WL 8916764, *8; *Boutillier*, 2014 WL 4794527, *2; *Centola*, 183 F. Supp. 2d at 410.

Congress's lack of action with regards to these decisions, some of them dating back more than a decade, could be seen as ratifying the understanding that sexual orientation discrimination violates Title VII's sex discrimination prohibition. Any argument that *Baldwin* and some of the aforementioned decisions are too recent to rely on is misguided. For if a district court could hold in 1975 that Congress's failure to enact Bella Abzug's Equality Act of 1974 was indicative that sexual orientation and gender identity were not covered under Title VII, *see Voyles v. Ralph K. Davies Med. Ctr.*, 403 F. Supp. 456, 457 (N.D. Cal. 1975), then surely Congress's lack of action after the EEOC's decision in *Baldwin* and the numerous federal courts that have held that sexual orientation discrimination is actionable under Title VII must equally mean that Congress has now ratified such decisions.

C. The Court Can And Should Reconsider *Simonton* And *Dawson*.

This Court can and should reconsider *Simonton* and *Dawson* because while three-judge panels of this Court should "ordinarily" adhere to a prior panel's holding, *Zervos v. Verizon N.Y., Inc.*, 252 F.3d 163, 171-72 (2d Cir. 2001), this general rule does not apply where subsequent legal developments at the Supreme Court, the EEOC, and the Second Circuit have rendered a prior panel's decision hollow.

First, this Court may disregard another panel's decision when an intervening Supreme Court or Second Circuit *en banc* decision has explicitly or implicitly rejected the prior panel's reasoning. *See New York v. Nat'l Serv. Indus., Inc.*, 460 F.3d 201, 207 (2d Cir. 2006); *Union of Needletrades, Indus. & Textile Emps. v. U.S.I.N.S.*, 336 F.3d 200, 210 (2d Cir. 2003). A panel may also overrule a prior panel by relying on Supreme Court precedent *pre-dating* the prior panel's holding if, for example, a more recent, intervening Supreme Court decision lends new significance to the earlier Supreme Court precedent. *See Finkel v. Stratton Corp.*, 962 F.2d 169, 174-75 (2d Cir. 1992); *see also Local Union 36 v. N.L.R.B.*, 706 F.3d 73, 83 (2d Cir. 2013). Supreme Court decisions regarding the proper interpretation of Title VII's text and the recognition of same-sex relationships and the constitutional rights of lesbians and gay men, *see* Part IV, have fatally undermined *Simonton* and *Dawson* to the point that they should be deemed rejected.

Second, *Dawson*'s analysis of this issue was dicta, *see* Part I.A.2, and is therefore not binding on this Court. The obligation to follow prior decisions extends only to express *holdings*. *See Xiao Ji Chen*, 471 F.3d at 338; *Ming Shi Xue v. BIA*, 439 F.3d 111, 121 (2d Cir. 2006); *Getty Petroleum Corp. v. Bartco Petro. Corp.*, 858 F.2d 103, 113 (2d Cir. 1988). Because the plaintiff in *Dawson* failed even to raise a triable issue of fact as to sexual orientation discrimination, 398 F.2d

at 213, 224-25, any analysis of Title VII's application to such discrimination was unnecessary and does not bind future panels.

Third, *Simonton* and *Dawson*'s conclusions about sexual orientation discrimination are fundamentally inconsistent with *Holcomb*. *See* Part I.C. Even if *Simonton* or *Dawson* silently rejected the reasoning later endorsed in *Holcomb*, *Holcomb* abrogates their unexpressed view. *See Getty Petroleum Corp.*, 858 F.2d at 113 (*sub silentio* rulings are not binding). It is also well-established that one panel may overrule another to resolve inconsistencies among this Court's precedents, *see Diebold Found., Inc. v. C.I.R.*, 736 F.3d 172, 183 n.7 (2d Cir. 2013); *United States v. Brutus*, 505 F.3d 80, 86 n.3, 87 n.5 (2d Cir. 2007); *Germain v. Conn. Nat'l Bank,* 926 F.2d 191, 193-94 (2d Cir. 1991), *rev'd on other grounds*, 503 U.S. 249 (1992), or to remedy significant, unforeseen consequences, *see Shipping Corp. of India v. Jaldhi Overseas Pte*, 585 F.3d 58, 67-69 (2d Cir. 2009); *see also United States v. Elbert*, 658 F.3d 220, 222-24 (2d Cir. 2011). Where panels reject a prior panel's decision in the absence of intervening higher authority, they typically—though not invariably—indicate that their opinion was circulated, prior to filing, to some or all of the Court's other judges, though they do not always disclose the extent of other judges' agreement. *See Burda Media, Inc. v. Viertel*, 417 F.3d 292, 298 & n.5 (2d Cir. 2005); *see also In re Initial Pub. Offerings Secs. Litig.*, 471 F.3d 24, 39-42 (2d Cir. 2006) (disavowing prior decisions without

relying on intervening Supreme Court or *en banc* precedent and without stating whether opinion was circulated to other judges).

Fourth, because *Simonton* and *Dawson* relied on non-textual considerations to carve an exception in Title VII, *see* Parts II.A and IV, they have been abrogated by the Supreme Court's repeated repudiation of non-textual interpretations of Title VII. *See EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2033 (2015) (court may not "add words to the law to produce what is thought to be a desirable result"); *Thompson v. N. Am. Stainless, LP*, 562 U.S. 170, 175 (2011) (court's preference for different rule "cannot justify departing from statutory text"); *Lewis*, 560 U.S. at 215-17.

Fifth, the EEOC's decision in *Baldwin*, a decision entitled to *Chevron* deference, overrides *Simonton* and *Dawson*. *See* Part III.

Finally, reaffirming *Simonton*'s *and Dawson*'s sexual orientation analysis under Title VII would be inconsistent with, and raise constitutional concerns under, this Court's ruling in *Windsor v. United States*, 699 F.3d 169 (2012), *aff'd*, 133 S. Ct. 2675 (2013), adopting heightened constitutional protection for lesbians and gay men. *Id.* at 181-82.[6] It would be untenable for this Court, having deemed sexual orientation classifications "quasi-suspect," *id.*, to perpetuate a judicial bar

[6] Affirming this Court, the Supreme Court also applied heightened scrutiny. *See SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 480-84 (9th Cir. 2014).

on otherwise viable sex-stereotyping and associational-gender claims *precisely because* they involve sexual orientation bias, or to again single out sex-discrimination claims by "avowedly homosexual" plaintiffs as a "problem." *Dawson*, 398 F.3d at 218; *see also Estate of D.B.*, 2016 WL 945350, *8.[7]

Applying the foregoing principles, this Court can and should reject *Simonton*'s and *Dawson*'s discussion of sexual orientation claims under Title VII.

III. THE EEOC'S INTERPRETATION OF TITLE VII IN *BALDWIN* IS ENTITLED TO STRONG DEFERENCE.

Further, the EEOC's decision in *Baldwin* holding that sexual orientation discrimination is sex discrimination is entitled to strong deference from this Court. *See Parr*, 791 F.2d at 892 ("EEOC's interpretation of Title VII is to be accorded 'great deference.'" (citation omitted)). Indeed, *Baldwin* supersedes earlier contrary court precedent, including *Simonton* and *Dawson*.

Because the EEOC's decision in *Baldwin* occurred in a federal sector case, it is entitled to *Chevron* deference. Under *Chevron*, an agency's interpretation of a statute with which it has been charged with administering is to be fully accepted by a court as long as Congress has not directly spoken as to the precise question at

[7] This Court's straightforward application of *Price Waterhouse* in *Sassaman v. Gamache*, 566 F.3d 307 (2d Cir. 2009), which involved a stereotype about male-female sexual harassment, sharpens the tension between the Court's general acceptance of sex-stereotyping doctrine and its suspicion of sex-stereotyping claims by gay plaintiffs, *Dawson*, 398 F.3d at 218.

issue and the interpretation proffered by the agency is a permissible one. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984); *see also United States v. Mead Corp.*, 533 U.S. 218, 226-227 (2001) (agency decisions qualify for *Chevron* deference where "it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of such authority."). Here, *Baldwin* was decided pursuant to the EEOC's broad, explicit authority to interpret Title VII (including its substantive terms) in adjudicating federal sector cases. *See, e.g.*, 42 U.S.C. § 2000e-16(b); *see also Roberts*, 115 F. Supp. 3d at 363 (describing *Baldwin* as "a landmark ruling—binding on all federal agencies"). And while it appears to be an unsettled question whether *Chevron* deference applies to EEOC federal sector adjudications, there is authority that agency adjudications are entitled to *Chevron* deference, where otherwise appropriate. *See, e.g.*, *INS v. Aguirre-Aguirre*, 526 U.S. 415 (1999); *Velasco-Giron v. Holder*, 773 F.3d 774 (7th Cir. 2014). Indeed, other Courts of Appeals have granted *Chevron* deference to the EEOC's interpretation of the relevant provisions of Title VII. *See Jones v. Am. Postal Workers Union*, 192 F.3d 417, 427 (4th Cir. 1999) (granting *Chevron* deference to EEOC's interpretation of Title VII as set forth in an *amicus* brief). *Cf. EEOC. v. Seafarers Int'l Union*, 394 F.3d

197, 202 (4th Cir. 2005) ("[W]e review the EEOC's interpretation of the ADEA under the deferential standard of *Chevron*.").

As a result, the EEOC's decision in *Baldwin* supersedes any contrary earlier court decisions, because those decisions do not hold that the meaning of "sex" in Title VII is "unambiguous" and because the Commission was acting under a specific grant of authority from Congress in issuing those decisions. The Supreme Court has held that an agency interpretation that is entitled to *Chevron* deference governs over conflicting judicial precedent, unless that precedent holds that a statute's language "unambiguously" commands a contrary meaning. *Nat'l Cable & Telecomm. v. Brand X Internet Servs.*, 545 U.S. 967, 982-83 (2005) ("[A]llowing a judicial precedent to foreclose an agency from interpreting an ambiguous statute, as the Court of Appeals assumed it could, would allow a court's interpretation to override an agency's. *Chevron*'s premise is that it is for agencies, not courts, to fill statutory gaps."). Because *Baldwin* is entitled to *Chevron* deference, under *Brand X*, *Baldwin* supersedes prior contrary precedent, like *Simonton* and *Dawson*.

Alternatively, even if this Court were to conclude that the EEOC's decision in *Baldwin* is not entitled to *Chevron* deference, the EEOC's decision in *Baldwin* "is entitled to deference to the extent it has the power to persuade." *Townsend v. Benjamin Enters., Inc.*, 679 F.3d 41, 53 (2d Cir. 2012) (citing *Nat'l R.R. Passenger*

Corp. v. Morgan, 536 U.S. 101, 110 n.6 (2002), and *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). This Court should therefore defer to the EEOC's "reasoned" decision in *Baldwin, Roberts*, 115 F. Supp. 3d at 365, because the EEOC relied "on principles of Title VII in protecting against sex-based discrimination" and applied the "words of the statute Congress [] charged [it] with enforcing." *Id.* at 365, 366.

IV. THIS COURT SHOULD REJECT EFFORTS TO CREATE A SEXUAL ORIENTATION EXCEPTION TO TITLE VII'S CLEAR STATUTORY LANGUAGE.

Finally, this Court should reconsider *Simonton* and *Dawson* because of what they are: judicially-created carve-outs of gay people from Title VII's proscription against discrimination that disregard Title VII's clear and broad statutory language. Indeed, even with regard to clearly actionable sex stereotyping claims, the *Simonton* and *Dawson* courts adopted a notion that a statutory exclusion of sexual orientation claims is written into Title VII and that courts must be vigilant to ensure that lesbian and gay employees not be allowed to circumvent this illusory exclusion by invoking their rights to be free from sex-based discrimination. *See Dawson*, 398 F.3d at 218 (stating that while sex stereotypes "often necessarily blur" into ideas about sexual orientation, nevertheless "a gender stereotyping claim should not be used to bootstrap protection for sexual orientation into Title VII." (quotation omitted)). But Congress's actions subsequent to *Price Waterhouse* and

the legal developments affecting lesbians and gay men subsequent to *Simonton* and *Dawson* weigh heavily against judicially engrafting a sexual orientation exception to Title VII's coverage.

First, the Court should take note of the error of *Simonton* and *Dawson* and the fiction of the gay carve-out they create. Consider a hypothetical where the Acme Company issues a memorandum stating that the following employees were terminated for behavior unbecoming of "an Acme Lady": Agnes for driving a motorcycle to and from work, Beth for wearing pants and not wearing makeup or jewelry every day for six months, and Christine for having a relationship with another woman. If each employee sued under Title VII, they all should be allowed to proceed, because *all* have viable sex discrimination claims that they would not have been terminated for their conduct had they been male, based on the plain language of the statute and *Oncale*.

Second, Congress's actions subsequent to *Price Waterhouse* reveal that Congress never intended for Title VII to have a sexual orientation exception in its coverage. The Supreme Court has placed great weight on the significance of what amendments were and were not made in the Civil Rights Act of 1991. *See Univ. of Texas Southwestern Med. Ctr. v. Nassar*, 133 S. Ct. 2517 (2013); *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167 (2009). In 1989, *Price Waterhouse* ruled that it is sex discrimination for employees to be fired for their nonconformity with gender

norms. In 1990, Congress passed the Americans with Disabilities Act ("ADA") and incorporated a specific provision excluding homosexuality from the definition of "disability," despite the fact that it had not been viewed by medical and mental health authorities as an impairment since 1973. *See* 42 U.S.C. §§ 12211(a); Am. Psychiatric Ass'n, *Position Statement: Homosexuality and Civil Rights* (1973), in 131 Am. J. Psychiatry 497 (1974). A year later, Congress passed the Civil Rights Act of 1991, specifically repealing the part of *Price Waterhouse* regarding mixed-motive liability but not limiting in any way its sex stereotyping holding or amending Title VII to exclude coverage of sexual orientation discrimination, as it had a year earlier in passing the ADA. Congress's decision not to add the 1990 ADA exception for sexual orientation to Title VII coverage in 1991 speaks volumes. It thus was wrong of *Simonton* and *Dawson* to judicially engraft the type of "gay exception" found in the ADA onto Title VII when Congress had declined to do so.

Lastly, the world in which *Simonton* and *Dawson* were decided, no longer exists. *See Christiansen*, 2016 WL 951581, *13 ("The broader legal landscape has undergone significant changes since the Second Circuit's decision in *Simonton*."). When *Simonton* and *Dawson* were decided, it was constitutional for states to deny lesbians and gay men the fundamental right to marry, and for the federal government to refuse to recognize the marriages of same-sex couples that managed

to travel to the handful of jurisdictions that recognized their right to marry. Indeed, when *Simonton* was decided, conduct central to gay people's very identity could be criminalized, subjecting them to widespread discrimination. *See Lawrence v. Texas*, 539 U.S. 558, 575 (2003). As such, it is not difficult to understand why the *Simonton* and *Dawson* courts would engraft a gay exception onto Title VII's sex discrimination prohibition. For if a state could imprison someone for conduct central to being gay, how could employment discrimination on that basis be illegal? For if states could discriminate based on one's non-stereotypical sexual orientation, how could employment discrimination on such basis be illegal?

But "[t]he nature of injustice is that we may not always see it in our own times," *Obergefell*, 135 S. Ct. at 2598, and since *Simonton* was decided, the societal walls erected against gay people have steadily crumbled. In *Lawrence*, the Supreme Court "acknowledged, and sought to remedy, the continuing inequality that resulted from laws making intimacy in the lives of gays and lesbians a crime against the State," *Obergefell*, 135 S. Ct. at 2604, and it became clear that "same-sex couples have the same right as opposite-sex couples to enjoy intimate association." *Id.* at 2600. In 2011, New York enacted Marriage Equality Act, 2011 Sess. Law News of N.Y. Ch. 95 (A. 8354) (McKinney's), recognizing the right of same-sex couples to marry. And in 2012, this Court boldly held that the federal Defense of Marriage Act ("DOMA"), 1 U.S.C. § 7, was unconstitutional

because lesbians and gay men "compose a class that is subject to heightened scrutiny" just like women. *Windsor*, 699 F.3d at 185.[8] Finally, in 2015, the Supreme Court held that laws barring same-sex couples from marriage "burden the liberty of same-sex couples, and … abridge central precepts of equality." *Obergefell*, 135 S. Ct. at 2604.

While none of these cases directly answer "of what protections Title VII affords," when considered together, they "reflect a shift in the perception, both of society and of the courts, regarding the protections warranted for same-sex relationships and the men and women who engage in them." *Christiansen*, 2016 WL 951581, *13; *see also Roberts*, 115 F. Supp. 3d at 348 ("As the nation's understanding and acceptance of sexual orientation evolve, so does the law's definition of appropriate behavior in the workplace."). It is thus incumbent upon this Court to reject efforts to engraft a gay exception onto Title VII's sex discrimination prohibition, in the face of its clear statutory language. To do so "would disparage the[] choices and diminish the[] personhood" of gay people, *Obergefell*, 135 S. Ct. at 2602, and would cast lesbians and gay men out of Title VII's protective umbrage.

[8] The parties in *Windsor* did not present this Court with, nor did this Court consider, arguments regarding whether DOMA discriminated on the basis of sex. *See* Brief of Plaintiff-Appellee, *Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012) (Nos. 12-2335, 12-2435), 2012 WL 3900586.

CONCLUSION

The judgment of the district court should be reversed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B).

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CERTIFICATE OF SERVICE

I hereby certify that I filed the foregoing Brief with the Clerk of the United States Court of Appeals for the Second Circuit via the CM/ECF system this 18th day of March, 2016. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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