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 DEFENSE AND EDUCATION FUND, INC. 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. ("Lambda Legal") has no parent corporation(s), does not have shareholders, and does not issue stock.

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STATEMENT OF INTEREST[1]

Formed in 1973, Lambda Legal Defense and Education Fund, Inc. is the nation's oldest and largest legal organization committed to achieving full recognition of the civil rights of lesbian, gay, bisexual, and transgender ("LGBT") people and everyone living with HIV through impact litigation, education, and public policy work. Lambda Legal has served as counsel or *amicus* in seminal cases regarding the rights of LGBT people and people living with HIV. *See, e.g.*, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *United States v. Windsor*, 133 S. Ct. 2675 (2013); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Bragdon v. Abbott*, 524 U.S. 624 (1998); *Romer v. Evans*, 517 U.S. 620 (1996).

Of special relevance here, Lambda Legal successfully represented the plaintiff-appellant in *Hively v. Ivy Tech Community College*, 853 F.3d 339 (7th Cir. 2017) (en banc), in which the Seventh Circuit recently held en banc "that discrimination on the basis of sexual orientation is a form of sex discrimination." *Id.* at 341. It has also served as counsel or *amicus curiae* in many other employment

[1] *Amicus* certifies that no party's counsel authored this brief in whole or in part, and no person other than *Amicus*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Fed. R. App. P. 29(a)(4)(E); L.R. 29.1(b).

Amicus's counsel assisted with the petition for rehearing en banc in this case, *see* Plaintiffs-Appellants' Pet. for Reh'g En Banc at 17, *Zarda v. Altitude Express*, No. 15-3775 (2d Cir. May 2, 2017) (ECF No. 255); this brief, however, reflects solely the work of *Amicus*'s counsel.

discrimination cases involving the rights of LGBT people. *See, e.g.*, *Evans v. Ga. Reg'l Hosp.*, 850 F.3d 1248 (11th Cir. 2017), *pet. for reh'g en banc pending*; *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011); *Rene v. MGM Grand Hotel*, 305 F.3d 1061 (9th Cir. 2002) (en banc); *EEOC v. Scott Med. Health Ctr., P.C.*, 217 F. Supp. 3d 834 (W.D. Pa. 2016) ; *Hall v. BNSF Ry. Co.*, No. C13-2160, 2014 WL 4719007 (W.D. Wash. Sept. 22, 2014); *TerVeer v. Billington*, 34 F. Supp. 3d 100 (D.D.C. 2014).

Amicus files this brief pursuant to the Court's May 25, 2017 Order inviting "*amicus curiae* briefs from interested parties." *See* Order, *Zarda v. Altitude Express, Inc.*, No. 15-3775 (2d Cir. May 25, 2017) (ECF No. 271).

INTRODUCTION

In enacting Title VII, 42 U.S.C. § 2000e *et seq.*, Congress established a statutory imperative to extinguish discrimination in employment "because of . . . sex." 42 U.S.C. § 2000e-2(a)(1). Now, this Court sitting en banc must decide whether Title VII's prohibition against sex discrimination encompasses sexual orientation discrimination claims. The panel in this case felt bound by *Simonton v. Runyon*, 232 F.3d 33 (2d Cir. 2000), and *Dawson v. Bumble & Bumble*, 398 F.3d 211 (2d Cir. 2005), both of which rejected Title VII coverage of sexual orientation; the panel thus adhered to a Title VII interpretation allowing employers to fire male employees, such as Donald Zarda, based on their attraction to men, even where

women with identical attractions face no such adverse treatment, *see Zarda v. Altitude Express*, 855 F.3d 76, 80-82 (2d Cir. 2017). However, neither *Simonton* nor *Dawson*—nor any other opinion of this Court—has addressed the multiple "persuasive" reasons that support a holding that Title VII's bar on sex discrimination encompasses antigay discrimination. *See Christiansen v. Omnicom Grp., Inc.*, 852 F.3d 195, 202 (2d Cir. 2017) (Katzmann, C.J., concurring). This full Court should endorse these "persuasive" arguments and overrule *Simonton* and *Dawson*, thereby bringing this Court's caselaw into compliance with Title VII's mandate to "treat[] each of the enumerated categories exactly the same," *Price Waterhouse v. Hopkins*, 490 U.S. 228, 243 n.9 (1989) (plurality), *superseded by statute on other grounds*, 42 U.S.C. § 2000e-2(m), and fulfilling the Court's obligation to entertain *all* claims alleging adverse treatment in employment based on "sex-based considerations." *Id.* at 242.

ARGUMENT

After elaborating in Part I on the principal rationales supporting Title VII coverage of sexual orientation, Part II addresses and refutes recent counterarguments from a few judges in other cases, particularly in *Hively*.

I. SEXUAL ORIENTATION DISCRIMINATION IS A FORM OF SEX DISCRIMINATION.

For at least three reasons, "discrimination on the basis of sexual orientation is a form of sex discrimination." *Hively*, 853 F.3d at 341. First, under a basic sex

discrimination (or "sex-plus") theory,[2] such discrimination necessarily involves sex-based considerations because the discrimination endured by a man based on his attraction to men is not suffered by any woman with an identical attraction to men. Second, just as discrimination against an employee who is romantically involved with someone of a different race has universally been recognized as race discrimination barred by Title VII, discrimination against an employee who is attracted to someone of the same sex must be recognized as sex discrimination equally barred by that law. Finally, under a sex stereotyping theory, sexual orientation discrimination is sex discrimination because it rests on the sex-specific stereotype that men are or should be attracted only to women, and that women are or should be attracted only to men.

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

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." *Christiansen*, 852 F.3d at 202 (Katzmann, C.J.,

[2] "Sex-plus" is the term for discrimination occurring not categorically against all members of one sex, but only those members sharing a certain trait (for instance, having young children), when members of the other sex who share that trait suffer no discrimination. Title VII unquestionably bars sex-plus discrimination. *See Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971); *cf. Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 119 n.9 (2d Cir. 2004) ("any meaningful regime of antidiscrimination law must encompass" sex-plus claims).

concurring). That is because "sexual orientation is inseparable from and inescapably linked to sex." *Baldwin v. Foxx*, Appeal No. 0120133080, 2015 WL 4397641, at *5 (E.E.O.C. 2015).[3] Conceptually, this is a straightforward formulation. The Court need only ask whether the employee would have faced discrimination if the employee had been of a different sex. *See City of Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978) (articulating 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) (internal quotation marks omitted); *see also Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 682-83 (1983).[4] If the employee would have been treated differently had they been of the other sex, then the discrimination was based on sex.

Thus, where an employer fires a female employee because the employee is married to (or lives with, dates, or is attracted to) a woman but would not fire a male

[3] This is not to say that "sex" and "sexual orientation" are interchangeable concepts or terms, *see infra* Part II.A; the salient point is, rather, that an individual's sexual orientation is defined in relation to sex, and that antigay discrimination necessarily takes account of an individual's sex.

[4] While a plaintiff satisfying *Manhart*'s "but-for" test necessarily satisfies Title VII's causation requirement, Title VII plaintiffs may also prevail based on "the less stringent 'motivating-factor' test." *Zarda*, 855 F.3d at 81-82 (quoting *Vega v. Hempstead Union Free Sch. Dist.*, 801 F.3d 72, 86 (2d Cir. 2015)); *see also* 42 U.S.C. § 2000e–2(m).

employee for identical conduct with (or attraction to) a woman, the employer has engaged in "paradigmatic sex discrimination." *Hively*, 853 F.3d at 345. *See also Isaacs v. Felder Servs., LLC*, 143 F. Supp. 3d 1190, 1194 (M.D. Ala. 2015) ("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).

A growing number of courts have recognized the logic of this position. *See, e.g.*, *Hively*, 853 F.3d at 350-51; *id.* at 358 (Flaum, J., concurring); *Hall*, 2014 WL 4719007, at *3; *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, 1223 (D. Or. 2002); *see also Videckis v. Pepperdine Univ.*, 150 F. Supp. 3d 1151, 1161 (C.D. Cal. 2015); *Baldwin*, 2015 WL 4397641, at *5.

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

Second, sexual orientation discrimination is sex discrimination because it treats otherwise similarly-situated people differently because of their sex, viewed in relation to the sex of the individuals with whom they associate (or to whom they are attracted). *Christiansen*, 852 F.3d at 204 (Katzmann, C.J., concurring); *see also Hively*, 853 F.3d at 347-48; *id*. at 359 (Flaum, J., concurring).

This Court and many others have already adopted this reasoning in the context of race discrimination. In *Holcomb v. Iona College*, 521 F.3d 130 (2d Cir. 2008), a case post-dating *Simonton* and *Dawson*, this Court held for the first time 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; *see also id.* (citing district and appellate decisions endorsing this reasoning). *Holcomb's* holding that discrimination based on an employee's interracial associations constitutes race discrimination cannot "be legitimately reconciled" with an argument that discrimination based on a worker's same-sex intimate relationships is *not* sex discrimination. *Boutillier v. Hartford Pub. Sch.*, 221 F. Supp. 3d 255, 268 (D. Conn. 2016).

It bears emphasizing that, notwithstanding the sometimes considerable difference, historically and socially, among the kinds of discrimination prohibited under Title VII, the Supreme Court has made clear that courts should treat discrimination under the enumerated traits the same, because the statue "on its face treats each of the enumerated categories exactly the same."[5] *Price Waterhouse*, 490 U.S. at 243 n.9; *see also Faragher v. City of Boca Raton*, 524 U.S. 775, 787 n.1

[5] The statute delineates limited, narrow exceptions to this rule that are not relevant here. *See* 42 U.S.C. § 2000e–2(e); *Christiansen*, 852 F.3d at 204 n.1 (Katzmann, C.J., concurring).

(1998); *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 66 (1986); *Manhart*, 435 U.S. at 709; *Williams v. Consol. Edison Corp. of N.Y.*, 255 F. App'x 546, 549 n.2 (2d Cir. 2007); *cf. Oncale v. Sundower Offshore Servs.*, 523 U.S. 75, 78 (1998) (rejecting attempt to exclude all same-sex harassment from Title VII's scope, noting that "we have rejected any conclusive presumption that an employer will not discriminate against members of his own race").

Accordingly, this Court should apply *Holcomb*'s straightforward and widely accepted reasoning to claims under Title VII's sex-discrimination provision, and hold that Title VII protects employees from employment discrimination based on their association with persons of a particular sex, just as it protects against discrimination based on interracial association.

C. Tite VII Protects All Employees, Including LGB Employees, From Discrimination Based On Sex Stereotypes.

Finally, sexual orientation discrimination is sex discrimination "because such discrimination is inherently rooted in gender stereotypes," *Christiansen*, 852 F.3d at 205 (Katzmann, C.J., concurring), and because discrimination based on such stereotypes indisputably violates Title VII. *See Price Waterhouse*, 490 U.S. at 251 ("As 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."); *Christiansen*, 852 F.3d at 200; *Sassaman v. Gamache*, 566 F.3d 307, 312-13 (2d Cir. 2009); *Back*, 365 F.3d at 130.[6]

An individual's same-sex attraction "represents the ultimate case of failure to conform to [a sex] stereotype (at least as understood in a place such as modern America, which views heterosexuality as the norm and other forms of sexuality as exceptional)." *Hively*, 853 F.3d at 346; *see also Christiansen*, 852 F.3d at 205 (Katzmann, C.J., concurring); *Evans*, 850 F.3d at 1264 (Rosenbaum, J., dissenting). It is thus untenable to suggest that Title VII does not cover discrimination based on this attraction.

D. The Statutory Text And The Changed Legal Landscape Support Title VII Coverage of Sexual Orientation.

Hively and the *Christiansen* concurrence not only endorsed each of the three arguments discussed above for Title VII coverage of sexual orientation, but they also noted the flaw in arguments that emphasize what words are *not* in the statute, rather than "the scope of the language that already is in the statute." *Hively*, 853 F.3d at 344-49; *see also Christiansen*, 852 F.3d at 207 (Katzmann, C.J., concurring) (criticizing reliance on subsequently proposed, unenacted bills to interpret Title VII). Focusing on non-statutory considerations contravenes *Oncale*, which emphasized

[6] While *Back* was brought under 42 U.S.C. § 1983, this Court made clear that the analysis was the same under Title VII. *See also Sassaman*, 566 F.3d at 313 (relying on *Back* in Title VII case).

that "it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." 523 U.S. at 79.

The above three arguments for coverage also "reflect the evolving legal landscape since [*Simonton* and *Dawson*]," *Christiansen*, 852 F.3d at 202 (Katzmann, C.J., concurring), including the changed "backdrop of the Supreme Court's decisions . . . in the area of broader discrimination on the basis of sexual orientation." *Hively*, 853 F.3d at 349; *see also Roberts v. United Parcel Serv., Inc.*, 115 F. Supp. 3d 344, 348 (E.D.N.Y. 2015).

For example, while the right of same-sex couples to marry is now recognized as fundamental, *see Obergefell*, 135 S. Ct. at 2604-05, not a single state recognized same-sex marriage at the time *Simonton* was decided. Indeed, *Simonton* predates even *Lawrence*, 539 U.S. 558, before which intimate relations between same-sex couples could be criminalized. It is thus not surprising that courts at that time did not consider the arguments advanced here. *Cf. Foray v. Bell Atlantic*, 56 F. Supp. 2d 327, 329-30 (S.D.N.Y. 1999) (noting support for plaintiff's claim that benefits eligibility based on one's sex in relation to the sex of one's partner is actionable sex discrimination under Title VII if same-sex and different-sex couples were similarly situated with respect to marriage, which was not the case in 1999). In the post-*Lawrence*, post-*Obergefell* world, however, such perspectives must be reconsidered. *See Christiansen*, 852 F.3d at 204 (Katzmann, C.J., concurring) ("[I]t makes little

sense to carve out same-sex relationships as an association to which [Title VII's] 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.'" (quoting *Obergefell*, 135 S. Ct. at 2602)).

Moreover, *Simonton*'s and *Dawson*'s sexual orientation analysis under Title VII is inconsistent with, and raises constitutional concerns under this Court's ruling in *Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012), *aff'd*, 133 S. Ct. 2675 (2013), adopting heightened constitutional protection for lesbians and gay men. *Id.* at 181-82.[7] It would be untenable for this Court, having deemed sexual orientation classifications "quasi-suspect," *id.*, to perpetuate a judicial bar on otherwise viable sex-stereotyping and associational-gender claims *precisely because* they involve sexual orientation discrimination, or to again single out sex-discrimination claims by "avowedly homosexual" plaintiffs as a "problem." *Dawson*, 398 F.3d at 218.[8]

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[7] *Windsor*'s test for heightened scrutiny remains the law in this circuit, *see Adkins v. City of New York*, 143 F. Supp. 3d 134, 139–40 (S.D.N.Y. 2015), even if the Supreme Court was not explicit about the application of heightened scrutiny when affirming this Court's decision on the merits. *See SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 480-84 (9th Cir. 2014) (interpreting Supreme Court's *Windsor* decision as requiring heightened scrutiny for sexual orientation).

[8] This Court's straightforward application of *Price Waterhouse* in *Sassaman*, 566 F.3d 307, 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

II. ARGUMENTS AGAINST TITLE VII'S COVERAGE OF SEXUAL ORIENTATION DISCRIMINATION ARE WITHOUT MERIT.

While a majority of appellate judges to have addressed the issue at bar within the last year have found convincing all or some of the above-noted arguments for Title VII coverage of sexual orientation,[9] the three dissenting judges in *Hively*, as well as the concurrence in *Evans*, raise opposing arguments that, while unconvincing, warrant analysis and refutation.

A. The *Hively* Dissent Poses the Wrong Questions, and Misapplies Doctrines of Statutory Interpretation.

The *Hively* dissent belabors the irrelevant point that "'sexual orientation'. . . is not synonymous with 'sex.'" *Hively*, 853 F.3d at 363 n.3 (Sykes, J., dissenting) (hereinafter "*Hively* dissent") (citing Sexual Orientation, Oxford English Dictionary (2009 ed.)); *see also id.* at 363 ("The two terms are never used interchangeably . . . ."). The issue before this Court, however, is whether antigay discrimination is *discrimination because of* a person's sex. To prevail on that issue, it is wholly unnecessary for Plaintiffs-Appellants to demonstrate that "sexual orientation" and "sex" are synonyms or that they are interchangeable concepts or terms. The terms

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F.3d at 218.

[9] This includes not only Chief Judge Katzmann (joined by District Judge Brodie), *see Christiansen*, 852 F.3d at 204-07 (Katzmann, C.J., concurring), and eight of eleven judges in *Hively*, *see* 853 F.3d at 345-59, but also Judge Rosenbaum of the Eleventh Circuit, who called on her circuit to reconsider the issue en banc, *see Evans*, 850 F.3d at 1261-73 (Rosenbaum, J., dissenting).

"race" and "interracial marriage" are not synonyms and not used interchangeably; nevertheless, this Court and many others have recognized that "[w]here a plaintiff claims discrimination based upon an interracial marriage or association, he alleges, by definition, that he has been discriminated against because of *his* race." *Holcomb*, 521 F.3d at 139 (quoting *Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 892 (11th Cir. 1986)).[10]

The *Hively* dissent fares no better when it contends that subsequent legislative enactments expressly prohibiting discrimination based on both "sexual orientation" and "sex" somehow confirm that these types of discrimination do not overlap under Title VII.

For one, Title VII and the subsequent enactments to which the *Hively* dissent refers were not enacted in the same legal era. The first statutory provision cited in this section of the *Hively* dissent, for example, is 42 U.S.C. § 13925(b)(13)(A), enacted as part of the 2013 Violence Against Women Reauthorization Act. In contrast, Title VII passed in 1964, when the practice of expressly and separately

[10] The *Hively* dissent also insists on adherence to Title VII's "original public meaning"—employing a phrase popular among some professors but wholly absent from the Supreme Court's voluminous Title VII jurisprudence. *See Hively* dissent, 853 F.3d at 360, 362. Ascertaining Title VII's "original public meaning" is not, moreover, the simple exercise that the *Hively* dissent assumes. *See generally* Cary Franklin, *Inventing the "Traditional Concept" of Sex Discrimination*, 125 Harv. L. Rev. 1307 (2012). And even under a narrow definition of sex discrimination, sexual orientation discrimination fits the definition. *See Hively*, 853 F.3d at 345-46.

enumerating "sexual orientation" in civil rights legislation had not yet emerged. The first ordinance and state statute expressly banning such discrimination in private employment were passed respectively in East Lansing, Michigan in 1972, and in Wisconsin in 1982. Gary Mucciaroni, Same Sex, Different Politics: Success and Failure in the Struggles over Gay Rights 213 n.12 (2008). But even though a particular manifestation of discrimination covered by Title VII has become so pronounced or well-understood that it now has a separate designation ("sexual harassment," "Islamaphobia," "sexual orientation discrimination"), that does not change the coverage analysis or require specific, separate statutory enumeration. *See Hively*, 853 F.3d at 350 n.5.[11] It is anachronistic to rely on recent legislation specifically enumerating "sexual orientation" to justify a narrow interpretation of a broadly worded statutory provision from fifty years ago that prohibits discrimination "because of . . . sex." *See Fabian v. Hosp. of Cent. Conn.*, 172 F. Supp. 3d 509, 527 n.12 (D. Conn. 2016) (interpreting sex discrimination provision in Connecticut state law to cover discrimination against transgender individuals even before specific

[11] "Sexual harassment" was not in the legal or social lexicon in 1964, and four of the first five courts to consider whether sexual harassment was discrimination "because of . . . sex" answered in the negative. *See Tomkins v. Pub. Serv. Elec. & Gas Co.*, 422 F. Supp. 553, 556 (D.N.J. 1976) (noting that, of the first five cases deciding whether Title VII covers sexual harassment, *Williams v. Saxbe*, 413 F. Supp. 654 (D.D.C. 1976), stood alone as the only court holding in the affirmative). Nevertheless, Title VII's coverage of sexual harassment has been hornbook law for over three decades.

amendment "that added 'gender identity or expression' to the list of protected classes" because the added "language does not require the conclusion that gender identity was not already protected by the plain language of the statute, because legislatures may add such language to clarify or to settle a dispute about the statute's scope rather than solely to expand it.").

Arguing that discrimination "because of . . . sex" in Title VII excludes sexual orientation discrimination could possibly make sense if, for example, Title II, passed the same year, had proscribed discrimination based on both "sex" and "sexual orientation." There are occasions when significance *may* be attached to the fact that the *same* statute uses two terms in a way suggesting they are mutually exclusive, s*ee Smiley v. Citibank N.A.*, 517 U.S. 735, 746 (1996), but of course, that is not the case here. As *Smiley* explained, a "word often takes on a more narrow connotation when it is expressly opposed to another word: 'car,' for example, has a broader meaning by itself than it does in a passage speaking of 'cars and taxis.'" 517 U.S. at 746. But "sex" in Title VII "is not used in contradistinction to" the term "sexual orientation," and therefore, "there is no reason why" discrimination because of an individual's sex "cannot include" sexual orientation discrimination. *Id.* at 746-47.

The *Hively* dissent's logic would also disrupt other areas of Title VII law. For example, the dissent cites 20 U.S.C. § 1092(f)(1)(F)(ii) as evidence that Congress distinguishes between discrimination based on "sex" and discrimination based on

"sexual orientation," noting that this statute enumerates the traits separately. But that statute also enumerates "ethnicity" separately from "race" and "national origin." Under the *Hively* dissent's logic, therefore, Title VII—which does not enumerate "ethnicity"—should not be interpreted to cover discrimination based on ethnicity. This is untenable under Second Circuit precedent. *See Vill. of Freeport v. Barrella*, 814 F.3d 594, 606-607 (2d Cir. 2016) (holding "that discrimination based on ethnicity, including Hispanicity or lack thereof, constitutes racial discrimination under Title VII.").

B. The Correct Comparator to a Man Attracted to Men is a Woman Attracted to Men.

When using a comparator analysis to determine whether discrimination against a gay person is based on sex, the proper comparator to a gay man, i.e. a man attracted to men, is a woman attracted to men, as Chief Judge Katzmann noted in his *Christiansen* concurrence. *See* 852 F.3d at 203. The counterargument espoused by the *Hively* dissent, 853 F.3d at 366, that the correct comparator to a gay man fired because of his attraction to men is a lesbian, cannot be squared with logic or well-settled law, including *Loving v. Virginia*, 388 U.S. 1 (1967), and *Manhart*, 435 U.S. at 711.

1. Analogies to Interracial Association Cases Are Apt.

Contrary to the *Hively* dissent's contention, analogies to cases on interracial

association, including *Loving*, are apt.[12] As the *Christiansen* concurrence recognized, the Supreme Court held that treating all members of interracial relationships the same, but less favorably than members of intraracial relationships, was a race–based classification. 852 F.3d at 203 (Katzmann, C.J., concurring) (alteration in original). "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." *Id.*

Loving invalidated Virginia's anti-miscegenation law not only because it endorsed "White Supremacy," 388 U.S. at 11, but also based on the racial classification on the law's face, *see id.* at 8-9. And, *Loving* was preceded by *McLaughlin v. Florida*, 379 U.S. 184 (1964), which invalidated a Florida law criminalizing interracial cohabitation—without any discussion of "White Supremacy." *See id.* at 188, 191-92, 195 (holding that law impermissibly classified based on race even though law applied equally to "all whites and [blacks] who engage in the forbidden conduct"). As one scholar has explained, "*McLaughlin* did not rely on any claims whatsoever about the motive for the law or about the class

[12] As noted above, *see* Part I.B, *supra*, support for Title VII coverage of sexual orientation discrimination by analogy to discrimination against those in interracial relationships has enjoyed wide and enthusiastic judicial support. *See, e.g.*, *Hively*, 853 F.3d at 359 (Flaum, J., concurring); *Boutillier*, 221 F. Supp. 3d at 268; *Scott Med. Health Ctr., P.C.*, 217 F. Supp. 3d at 840 n.5; *Isaacs v. Felder Servs., LLC*, 143 F. Supp. 3d 1190, 1193-94 (M.D. Ala. 2015).

that was harmed by the law," yet "noted that there was a racial classification and applied heightened scrutiny"; the "sex discrimination argument for protecting gays from discrimination requires nothing more." Andrew Koppelman, *Defending the Sex Discrimination Argument for Lesbian and Gay Rights*, 49 U.C.L.A. L. Rev. 519, 522-23 & n.19 (2001) (footnote omitted).

In any event, the *Hively* dissent ignores decades of constitutional and statutory case law by suggesting that a law or policy that draws distinctions based on race or sex should not be analyzed as a racial or sex-based classification unless it aims to promote racial supremacy or the subjugation of women. *See, e.g.*, *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 226-27 (1995) (holding that "all racial classifications" by governmental actors trigger strict judicial scrutiny, regardless of motive).

Finally, while the above-noted reasoning more than suffices to expose the error in the *Hively* dissent's *Loving* analysis, it is also worth pointing out that the dissent's error runs even deeper: By claiming that "[n]o one argues that sexual-orientation discrimination aims to promote or perpetuate the supremacy of one sex," 853 F.3d at 368, the *Hively* dissent overlooks decades of extensive scholarship and advocacy—and numerous judicial opinions—exploring the relationship between antigay oppression and the gender norms that have traditionally privileged men and masculinity. *See, e.g.*, Andrew Koppelman, *Why Discrimination Against Lesbians*

and Gay Men Is Sex Discrimination, 69 N.Y.U. L. Rev. 197, 234-257 (1994) (discussing "[t]he connection between sexism and the homosexuality taboo"); *Centola v. Potter*, 183 F. Supp. 2d 403, 410 (D. Mass. 2010); *Videckis*, 150 F. Supp. 3d at 1160.

2. Manhart *makes clear that the proper comparator in this case is a woman attracted to men.*

As Chief Judge Katzmann explains, "*Manhart* tells us that sex discrimination is treating someone 'in a manner which *but for* that person's sex would be different,'" *Christiansen*, 852 F.3d at 203 (Katzmann, C.J., concurring) (quoting *Manhart*, 435 U.S. at 711); this suggests that when we "evaluat[e] a comparator for a gay, lesbian, or bisexual plaintiff" to determine whether sex discrimination has occurred, "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." *Id.* Thus, when using a comparator method to determine whether an employer has discriminated against a gay male plaintiff because of sex, the relevant inquiry is whether the employer treats a man attracted to men differently than it treats a woman attracted to men.

Under the *Hively* dissent's reasoning, however, comparing a man attracted to a man with a woman attracted to a man involves changing "two variables—the plaintiff's sex and sexual orientation," and the comparison therefore fails, in the dissent's view, to "hold *everything* constant except the plaintiff's sex." 853 F.3d at

366 (citing majority opinion, 853 F.3d at 345-46). The logic of this counterargument, however, unravels on inspection: The dissent's framing is premised on the notion that a man attracted to men and a woman attracted to men have different sexual orientations, *see id.*; the dissent thus acknowledges (implicitly, and perhaps unwittingly) that a person's sexual orientation is necessarily defined, in part, by his or her own sex. That acknowledgment effectively concedes *Amicus*'s and the Chief Judge's point.

Put more simply, the *Hively* dissent cheats by including the "sum" in the equation. Consider this scenario: if you take vodka and orange juice, and then swap grapefruit juice for the orange juice, have two things changed, or just one thing? Under Chief Judge Katzmann's logic, the answer is clearly "one thing," while the *Hively* dissent would argue that what was a screwdriver is now a greyhound, so two things have changed. Thus, the *Hively* dissent's cute parlor trick, if adopted, could be used to defeat any application of the comparator method. For example, one could argue that a company's policy of firing women with small children cannot properly be compared to its policy of hiring men with small children, because such a comparison changes too many variables; rather than simply comparing women to men, it compares women who are *mothers* to men who are *fathers*. This absurd application of the comparator method, however, should and would fail. *See Phillips*, 400 U.S. at 544.

Perhaps recognizing that its argument falls flat, the *Hively* dissent denigrates the very exercise of comparator framing. *See* 853 F.3d at 366 ("the comparative method of proof is an evidentiary test; it is not an interpretive tool. It tells us *nothing* about the meaning or scope of Title VII." (emphasis omitted)). The dissent cites no support for its far-fetched theory that courts can learn "*nothing*" about Title VII's scope by comparing the treatment of men and women, and case law does not support it. There was no evidentiary dispute before the Court in *Phillips*, for example; rather, the Justices compared the employer's policy on women with small children to the employer's very different policy on men with small children, and held that the Fifth Circuit "erred in reading [Title VII] as permitting one hiring policy for women and another for men . . . ." 400 U.S. at 544. Under this Court's precedent, moreover, if an employer punishes a white man who marries a black woman but does not punish a similarly situated black man for marrying a black woman, the employer violates Title VII as a matter of law; this isn't a claim about facts or evidence, but about the "meaning and scope" of Title VII's protections, as determined in *Holcomb*, 521 F.3d at 139-40.[13]

[13] To the extent the *Hively* dissent merely believes that disputes over comparators are often an unnecessary distraction in Title VII cases, *Amicus* could not agree more. A plaintiff may prove discrimination even without the existence of comparators or "similarly situated" employees, *Back*, 365 F.3d at 121, "because the ultimate issue is the reasons for *the individual plaintiff's* treatment, not the relative treatment of different *groups* within the workplace." *Id.* (quoting *Brown v. Henderson*, 257 F.3d 246, 252 (2d Cir. 2001)).

C. That Discrimination Based on Sex Stereotypes is Prohibited by Title VII is Firmly Settled Law.

Perhaps the *Hively* dissent's most radical argument is its challenge to *Price Waterhouse*'s universally-recognized and still current holding that Title VII prohibits discrimination based on sex stereotypes. It is simply wrong to suggest there was any daylight between the four-justice plurality and the two concurring justices regarding whether Ann Hopkins had proven discrimination based on impermissible stereotypes. *See Price Waterhouse*, 490 U.S. at 259 (White, J., concurring) ("her burden was to show that the unlawful motive was a substantial factor in the adverse employment action. . . . and I agree that the finding was supported by the record."); *id*. at 272 (O'Connor, J., concurring) ("Hopkins proved that Price Waterhouse 'permitt[ed] stereotypical attitudes towards women to play a significant, though unquantifiable, role in its decision not to invite her to become a partner,'" and thus "proved discriminatory input [in] the decisional process" (citation omitted)).

It is thus not surprising that this Court, and every other appellate court of which *Amicus* is aware, has agreed that Title VII condemns sex stereotyping discrimination. *See Christiansen*, 852 F.3d at 200 (observing that six Justices in *Price Waterhouse* endorsed view that discrimination based on sex stereotypes violates Title VII); *Back*, 365 F.3d at 119; *Sassaman*, 566 F.3d at 312-14; *see also EEOC v. Boh Bros.*, (5th Cir. 2014) (en banc); *Glenn*, 663 F.3d 1312.

D. Antigay Discrimination is Actionable Under Title VII Under a Simple Sex-Plus Theory.

Perhaps the weakest anti-coverage argument advanced is that sexual orientation discrimination does not involve wholesale discrimination against either gender, but only discrimination against a particular subset of a gender sharing the same attribute. This hasn't been a tenable argument since 1971, when the Supreme Court unanimously held that Martin Marietta's impressive track record of giving women jobs didn't save a policy whereby some women – those with young children – were fired, while men with young children kept their jobs. Thus the response to the *Hively* dissent's odd assertion of how difficult it would be to "explain . . . to a jury" that sex discrimination had occurred if Kim Hively had been replaced with heterosexual women, *see Hively* dissent, 853 F.3d at 373, would be to posit a scenario where six women were fired for refusing their supervisor's sexual demands. Even if all six positions were later backfilled by other women, no jury would struggle to grasp that the fired women had suffered discrimination *because of sex*. *See Connecticut v. Teal*, 457 U.S. 440, 455 (1982) ("It is clear that Congress never intended to give an employer license to discriminate against some employees on the basis of . . . sex merely because [it] favorably treats other members of the employees' group."); *Hively*, 853 F.3d at 346 n.3 ("A failure to discriminate against all women does not mean that an employer has not discriminated against one woman on the basis of sex.").

E. Statutory Stare Decisis Is Of Relatively Little Weight in the Context of Courts of Appeals Decisions and of No Relevance When Such Decisions Conflict With Supreme Court Precedent.

Statutory stare decisis carries little weight when one relies only on the authority of ***lower*** courts, in the face of conflicting, better reasoned lower court decisions and legal scholarship. As *Hively* points out, the Supreme Court, when pronouncing definitively the law of the land, has not been shy about rejecting the view of the law held by the overwhelming majority of lower courts. *See Hively*, 853 F.3d at 350 n.6. In a recent case that was a high water mark for endorsing statutory stare decisis, the Supreme Court made clear that it considered the principle to be applicable to *its* decisions. *Kimble v. Marvel Entertainment, LLC*, 135 S. Ct. 2401 (2015) (defining "statutory stare decisis" as when "*this Court* interprets and Congress decides whether to amend" and that the principle "assumes Congress will correct whatever mistakes *we* commit.") (emphasis added).

Among the many concerns regarding how much weight to give Congressional *inaction* is the constitutional problem associated with giving either house a "legislative veto" over an attempt to cure a judicial misinterpretation. Frank Easterbrook, *Stability & Reliability in Judicial Decisions*, 73 Cornell L. Rev. 422, 426-28 (1988). This concern is far from academic. In November 2013, the Senate passed, 64-32, legislation prohibiting sexual orientation discrimination (the

Employment Non-Discrimination Act, or "ENDA") that the President was willing to sign. However, the House of Representatives refused to act on the bill. *See* Matt Wilstein, *Boehner Calls LGBT Employment Non-Discrimination Act 'Unecessary,'* Mediaite (Nov. 14, 2013), *at* http://www.mediaite.com/tv/boehner-calls-lgbt-employment-non-discrimination-act-unnecessary.

Despite its acknowledgment that the Supreme Court has not "weigh[ed] in" on this issue, *see Hively* dissent, 853 F.3d at 361, the *Hively* dissent also makes the unsupported claim that four Supreme Court cases are "irreconcilable" with Title VII coverage of sexual orientation. *Id.* at 372 (citing *Romer*, 517 U.S. 620; *Lawrence*, 539 U.S. 558; *Windsor*, 133 S. Ct. 2675; and *Obergefell*, 135 S. Ct. 2584)). However, none of these decisions addressed—much less rejected—the argument that sexual orientation discrimination constitutes sex discrimination. The *Hively* dissent does not point to any language from any of the cases suggesting otherwise; instead, its argument appears to rest on the manifestly mistaken premise that the Supreme Court's endorsement of one constitutional argument to invalidate a legal provision necessarily implies the rejection of alternative arguments that were or could have been advanced in support of the Court's judgment. *See Hively* dissent, 853 F.3d at 372. This is not the law, as the very cases cited by the dissent make clear. For example, in holding that Texas's Homosexual Conduct Law violated the Due Process Clause, *Lawrence* did not expressly invoke the language of

"fundamental rights," nor did it adopt any of the equal protection rationales advanced by the parties and *amici*. *See* 538 U.S. at 574-75. None of this, however, stood in the way of the Court's fundamental-rights and equal-protection rulings in later cases recognizing constitutional protections for same-sex relationships. *See Obergefell*, 135 S. Ct. at 2604-05; *Windsor*, 133 S. Ct. at 2695-96. Similarly, while *Romer* and *Lawrence* declined to address whether discrimination based on sexual orientation triggers heightened scrutiny under the Equal Protection Clause, they did not preclude lower courts from addressing that issue themselves or from resolving it in favor of heightened scrutiny, as this Court made clear in *Windsor*. *See, e.g.*, *Windsor*, 699 F.3d at 179-185.

F. Courts Must Condemn All Discrimination "Because of . . . Sex," Irrespective of Whether the Discrimination is Motivated by a Person's Status, Behavior, Or Some Combination Thereof.

In his *Evans* concurrence, Judge William Pryor posits that Title VII cannot provide "relief based on status," because that "would undermine the relationship between the doctrine of gender nonconformity and the enumerated classes protected by Title VII." *Evans*, 850 F.3d at 1258 (Pryor, J., concurring). But case law makes clear that, if the employer is taking gender into account, it violates Title VII even if the discrimination also arises from a "status" that is covered in some antidiscrimination laws, but is not enumerated in Title VII. Plainly, the termination of married women in *Sprogis v. United Airlines*, 444 F.2d 1194 (7th Cir. 1971), and

of women with young children in *Phillips* and in *Back*, could also be deemed discrimination based on "marital status" or "parental status/familial status." Under Title VII, the relevance of "status" is that if men and women have the same status (*e.g.*, "married," or "with young children," or "in a relationship with a man"), an employer cannot treat the men having that status differently than the women having that status.

And contrary to the Evans's concurrence limited view of what constitutes sex stereotyping, many cases throughout Title VII's history reflect the broad understanding of sex stereotypes that the statute combats, including stereotypes about life choices about families and relationships. *See, e.g., 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).

Moreover, Judge Pryor's attempt at distinguishing between status and conduct in his *Evans* concurrence has been resoundingly repudiated by the Supreme Court. *See Christian Legal Soc. Chapter of the Univ. of California, Hastings Coll. of the*

Law v. Martinez, 561 U.S. 661, 689 (2010) ("Our decisions have declined to distinguish between status and conduct in this context.").

In short, the *Evans* concurrence's creation of a status/conduct distinction is another example of a judge-crafted exception to the full coverage of Title VII's proscription against sex discrimination, a trend that has been decried by the Supreme Court in *Oncale* and frequently thereafter. *See Lewis v. City of Chicago*, 560 U.S. 205, 215 (2010) (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."); *id.* at 217 (court's "charge is to give effect to the law Congress enacted" even if "effect was unintended"); *see also Thompson v. N. Am. Stainless, LP*, 562 U.S. 170, 175 (2011); *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2033 (2015).

CONCLUSION

Therefore, *Amicus* Lambda Legal respectfully urges the Court to hold that sexual orientation discrimination is a form of sex discrimination prohibited by Title VII.

Dated this 26th day of June, 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 petition complies with the type-volume limitation, as provided in Fed. R. App. P. 29(b)(4), because, exclusive of the exempted portions of the brief, the brief contains 6,845 words.

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Dated this 26th day of June, 2017.

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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 26th day of June, 2017. 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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