15-3775

United States Court of Appeals
for the Second Circuit

MELISSA ZARDA, co-independent executors 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, doing business as Skydive Long Island, RAY MAYNARD,

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of New York

BRIEF FOR AMICI CURIAE STATES OF NEW YORK, CONNECTICUT, AND VERMONT IN SUPPORT OF APPELLANTS

BARBARA D. UNDERWOOD
Solicitor General
STEVEN C. WU
Deputy Solicitor General
ANDREW W. AMEND
Senior Assistant Solicitor General of Counsel
JORDAN GOLDBERG
Law Intern
(*Additional counsel listed on signature page*)

ERIC T. SCHNEIDERMAN
Attorney General
State of New York
120 Broadway
New York, NY 10271
(212) 416-8020

Dated: June 26, 2017

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INTEREST OF THE AMICI STATES

The States of New York, Connecticut, and Vermont file this brief as amici curiae in support of plaintiffs-appellants pursuant to Federal Rule of Appellate Procedure 29(a)(2).

The amici States—the three States that comprise this Circuit—share a strong commitment to ending discrimination on the basis of sexual orientation. Such discrimination has no legitimate basis, and in the employment context harms gay, lesbian, and bisexual people by limiting their ability to function at work or denying them jobs altogether. These outcomes cause tangible economic and other harms to the amici States and their residents.

The amici States thus share a strong interest in construing Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*., to bar sexual-orientation discrimination. The additional federal remedies and procedures afforded by Title VII complement state and local protections, and by so doing assist the States in pursuing their goal of eradicating and remedying invidious discrimination against gay, lesbian, and bisexual people.

QUESTION PRESENTED

Does Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2, prohibit discrimination on the basis of sexual orientation through its prohibition of discrimination "because of . . . sex"?

BACKGROUND

This case presents the question whether Title VII's broad prohibition on sex discrimination encompasses discrimination based on sexual orientation. This Court has held that it does not, creating a legal distinction between discrimination based on a person's nonconformity with gender stereotypes, which is prohibited by Title VII, *see Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), and discrimination based on sexual orientation, which this Court has said is not. *See Simonton v. Runyon*, 232 F.3d 33, 37 (2d Cir. 2000). Recently, however, this Court has noted the elusiveness of that distinction, observing that stereotypes about proper gender roles will often "necessarily blur" into similar (or identical) stereotypes regarding heterosexuality and homosexuality, and that attempting to disentangle gender stereotyping from sexual-orientation discrimination "can easily present problems for an

adjudicator." *Dawson v. Bumble & Bumble*, 398 F.3d 211, 218 (2d Cir. 2005) (quotation marks omitted).

Most recently, this Court squarely called into question the viability of this distinction in *Christiansen v. Omnicom Group, Inc.*, 852 F.3d 195 (2d Cir. 2017) (per curiam). Although the panel there affirmed the dismissal of plaintiff's claim of sexual-orientation discrimination under *Simonton* and *Dawson*, *id.* at 199, Chief Judge Katzmann wrote a concurring opinion, joined by Judge Brodie of the United States District Court for the Eastern District of New York (sitting by designation), concluding that it would "it would make sense for the Court to revisit" *Simonton* "when the appropriate occasion presents itself," *id.* at 202 (Katzmann, C.J., concurring).

Chief Judge Katzmann noted in particular the "the changing legal landscape that has taken shape in the nearly two decades since *Simonton* issued." *Id.* Relevant developments include the Supreme Court's decisions recognizing increased legal protections for gay, lesbian, and bisexual people in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *United States v. Windsor*, 133 S. Ct. 2675 (2013); and *Lawrence v. Texas*, 539 U.S. 558 (2003). In addition, the Equal Employment Opportunity

Commission (EEOC) concluded in 2015 that Title VII prohibits sexual-orientation discrimination as a form of sex discrimination. *See Baldwin v. Foxx*, EEOC Appeal No. 0120133080, 2015 WL 4397641, at *5 (July 16, 2015). Chief Judge Katzmann outlined several arguments that supported the EEOC's conclusion and that had not been addressed by *Simonton* or *Dawson*. *Christiansen*, 852 F.3d at 202-06 (Katzmann, C.J., concurring).

Those same arguments were later adopted by the United States Court of Appeals for the Seventh Circuit in *Hively v. Ivy Tech Community College of Indiana*, 853 F.3d 339 (7th Cir. 2017) (en banc), issued one week after this Court decided *Christiansen*. *Hively* held that Title VII prohibits sexual-orientation discrimination as a species of sex discrimination, both as a logical consequence of the reasoning of *Price Waterhouse* and as a direct consequence of the "straightforward language" of the statute. *Id.* at 346, 350.

Following the Seventh Circuit's decision in *Hively*, this Court granted rehearing en banc in this case to reconsider its decisions in *Simonton* and *Dawson*. (Order (May 25, 2017), ECF No. 271.) This particular appeal arises from a lawsuit filed by Donald Zarda, a gay man who alleged that he was fired because of his sexual orientation. *See Zarda*

v. Altitude Express, 855 F.3d 76, 79 (2d Cir. 2017) (per curiam). Relying on *Simonton* and *Dawson*, the United States District Court for the Eastern District of New York (Bianco, J.) granted defendant's motion for summary judgment on Zarda's Title VII claim for sexual-orientation discrimination. *Id.* at 79. A panel of this Court affirmed on the basis of *Simonton*. *Id.* at 82.

The amici States file this brief to urge the Court to overrule *Simonton* and join the Seventh Circuit and the EEOC in concluding that Title VII's ban on discrimination "because of . . . sex" includes discrimination based on sexual orientation.

SUMMARY OF ARGUMENT

Sexual-orientation discrimination is a form of sex discrimination that violates Title VII. That statute strikes broadly at all forms of disparate treatment based on an employee's sex, including punishing an employee's failure to conform to sex stereotypes. Yet sexual-orientation discrimination does just that: it penalizes employees for failing to conform to sex stereotypes, namely, that men should seek and form intimate relationships only with women, and women only with men. That

these stereotypes address intimate behavior—as opposed to other conduct subject to received notions of how men and women ought to behave—does not remove them from the broader category of sex stereotypes that employers may not impose without violating Title VII.

In addition, sexual-orientation discrimination impermissibly discriminates on the basis of sex by punishing employees for conduct that would be acceptable if they were of the opposite sex. In this regard, such discrimination is no different from penalizing an employee for an intimate association with a member of a different race, which this Court has held constitutes discrimination because of the employee's *own* race.

Both judicial and practical experience, moreover, demonstrate that sexual-orientation discrimination is ordinarily indistinguishable from other types of sex discrimination. For instance, a homophobic epithet can be an expression of animus against an employee's nonconformity with gender stereotypes about dress or behavior as well as an expression of animus against the employee's (actual or perceived) sexual orientation. Indeed, empirical and anecdotal evidence demonstrate that both types of animus frequently occur together. These points reinforce the profound difficulty of attempting to disentangle the two types of animus and

provide additional reason to recognize that Title VII's ban on discrimination "because of . . . sex" applies to both. And the lack of language in Title VII specifically identifying "sexual orientation" discrimination as a separate category from sex discrimination does not compel a different conclusion.

Title VII makes additional remedies and resources available to help prevent and remedy sex discrimination, beyond those provided by the amici States. The amici States welcome bringing those remedies and resources to bear on discrimination on the basis of sexual orientation, as a vital supplement to their own efforts to end such discrimination.

ARGUMENT

POINT I

TITLE VII'S BAR ON SEX DISCRIMINATION PROHIBITS DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION

Courts and commentators have identified several different reasons that discrimination on the basis of sexual orientation should be regarded as a species of sex discrimination within the meaning of Title VII. While some of these reasons start with the plain text of the statute, and others with judicial glosses on that text, they all end up in the same place:

discrimination on the basis of sexual orientation is not merely similar to sex discrimination—it is both logically and empirically indistinguishable from discrimination on the basis of sex.

A. Discrimination on the Basis of Sexual Orientation Is a Form of Sex Discrimination Because It Amounts to Discrimination for Failure to Conform to Conventional Gender Roles.

The Supreme Court has long recognized that Title VII's bar on discrimination "because of . . . sex," 42 U.S.C. § 2000e-2, prohibits disparate treatment based on an employee's failure to live up to gender stereotypes. *See Price Waterhouse*, 490 U.S. at 251 (plurality op.); *id.* at 261 (O'Connor, J., concurring in the judgment). In *Price Waterhouse*, for example, the female plaintiff had been denied a promotion because of her nonconformity with stereotypes about female demeanor, speech, and dress: she was told to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry," and was criticized for being too "macho." *Id.* at 235 (plurality op.). The Court held that Title VII's ban on sex discrimination extended to this type of discrimination, reasoning that Title VII prohibits employers from "assuming or insisting that [employees] match[ ] the stereotype

associated with their group." *Id.* at 251 (plurality op.); *see also City of Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 (1978) ("It is now well recognized that employment decisions cannot be predicated on mere 'stereotyped' impressions about the characteristics of males or females.").

Price Waterhouse thus established the principle that Title VII bars employers from disfavoring individuals because of their failure to conform to received notions of how a woman or a man ought to behave. That principle compels the conclusion that Title VII bars discrimination on the basis of sexual orientation. At base, such discrimination penalizes individuals for departing from conventions about how men and women should conduct themselves in intimate matters—namely, that men should desire and form intimate connections only with women, and women only with men. As the Seventh Circuit recently observed in *Hively*, homosexuality (or the homosexual component of bisexuality) represents the "*ultimate* case of failure to conform" to gender stereotypes, at least in "modern America, which views heterosexuality as the norm and other forms of sexuality as exceptional." 853 F.3d at 846 (emphasis added). "[T]he idea that men should be exclusively attracted to women

and women should be exclusively attracted to men" is thus "as clear a gender stereotype as any." *Christiansen*, 852 F.3d at 206 (Katzmann, C.J., concurring); *see also Boutillier v. Hartford Pub. Sch.*, 221 F. Supp. 3d 255, 269 (D. Conn. 2016) (calling homosexuality "the ultimate gender non-conformity"); *Centola v. Potter*, 183 F. Supp. 2d 403, 410 (D. Mass. 2002) (homosexuality triggers the "gender stereotype" that "'real' men should date women, and not other men").

As one commentator has put it, "[t]here is nothing esoteric or sociologically abstract in the claim that the homosexuality taboo enforces traditional sex roles"; indeed, "[m]ost Americans learn no later than high school that one of the nastier sanctions that one will suffer if one deviates from the behavior traditionally deemed appropriate for one's sex is the imputation of homosexuality." Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. Rev. 197, 235 (1994) (emphasis omitted). The gendered nature of certain epithets used to describe homosexuals reinforces this point: for instance, gay men are labeled "queens," and historically have been branded "nancies" or "gentlemisses," to highlight how their behavior, including their choices of intimate relationships, departs from traditional male

stereotypes.[1] Discrimination on the basis of sexual orientation is thus simply a subset of the broader category of discrimination based on gender nonconformity that *Price Waterhouse* held is prohibited by Title VII.

This Court has previously recognized that a gay man may pursue a Title VII claim under *Price Waterhouse* by alleging employment discrimination based on the fact that he overtly "behaved in a stereotypically feminine manner"—e.g., acted or dressed or spoke in a particular way. *Simonton*, 232 F.3d at 38; *see also Christiansen*, 852 F.3d at 200-01 (allowing such a claim to proceed based on gay plaintiff's allegations "that he was perceived by his supervisor as effeminate and submissive and that he was harassed for these reasons"). But this Court declined to recognize that Title VII applied to employment discrimination on the basis of sexual orientation alone. *Simonton*, 232 F.3d at 37. There is no principled basis for this distinction. Discrimination on the basis of sexual orientation is just as much a reaction to gender nonconformity as discrimination on the basis of an employee's overtly nonconformist

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[1] *See Merriam-Webster's Collegiate Dictionary*, s.v. queen, at 1020 (11th ed. 2003); Lester V. Berrey and Melvin Van Den Bark, *The American Thesaurus of Slang: A Complete Reference Book of Colloquial Speech* § 405, at 372-73 (1942).

behavior. Simply put, gender stereotypes apply not just to traditional notions of appropriate dress or hobbies or other behavior for men and women, but also to traditional notions of the types of intimate relationships appropriate for men and women. An employer who fires a male employee for wearing feminine clothes is acting on the same bias against nonconformity as an employer who fires a male employee for putting up a picture of his male spouse. Put another way, heterosexuality is itself is a gender stereotype that employers may not impose—any more than they may impose any other gender stereotype—without violating Title VII.

B. Discrimination on the Basis of Sexual Orientation Is a Form of Sex Discrimination Because It Treats Similarly Situated Men and Women Differently.

Discrimination on the basis of sexual orientation also impermissibly discriminates on the basis of sex for the closely related reason that it ascribes different consequences to men and women who engage (or desire to engage) in the same conduct. Because such discrimination reacts to a person's choice of intimate relationships "in a manner which but for that person's sex would be different," *Manhart*, 435 U.S. at 711 (quotation marks omitted), it violates Title VII.

Specifically, if two hypothetical employees, a man and a woman, are each in an intimate relationship with another woman but only the female employee is fired for this relationship, it is plain that the woman's treatment "would have been different" but for her sex. *Christiansen*, 852 F.3d at 203 (Katzmann, C.J., concurring). As *Hively* likewise observed, the lesbian plaintiff there had identified "paradigmatic sex discrimination" by alleging that "if she had been a man married to a woman (or living with a woman, or dating a woman) and everything else had stayed the same," her employer "would not have refused to promote her and would not have fired her." 853 F.3d at 345. Because sexual-orientation discrimination thus visits consequences for behavior on individuals that they would not suffer if they were of the opposite sex, it is discrimination "because of . . . sex," 42 U.S.C. § 2000e-2, in violation of Title VII.

This and other courts have long recognized that penalizing an individual because of an interracial relationship impermissibly discriminates on the basis of race because it punishes conduct that would be permissible if the actor were of a different race. A half-century ago, in *Loving v. Virginia*, the Supreme Court held that anti-miscegenation laws discriminate on the basis of race in violation of the Equal Protection

Clause by outlawing certain relationships (i.e., marriages) with a person of a different race. *See* 388 U.S. 1, 7-12 (1967). Along similar lines, this Court has more recently upheld claims of race discrimination under Title VII based on allegations that an individual was penalized because of an interracial relationship. As the Court explained in *Holcomb v. Iona College*, "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"—specifically, because of the fact that the employee is of a different race from his or her partner. 521 F.3d 130, 139 (2d Cir. 2008); *accord Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 892 (11th Cir. 1986) ("Where 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.").

Because discrimination based on the race of the partners in a relationship constitutes race discrimination, it follows that discrimination based on the sex of such partners constitutes sex discrimination. In each case, people are subject to adverse treatment because of their intimate associations with members of a particular race or sex; they

therefore suffer discrimination on the basis of race or sex. "[I]f it is race discrimination to discriminate against interracial couples, it is sex discrimination to discriminate against same-sex couples." *Christiansen*, 852 F.3d at 204 (Katzmann, C.J., concurring); *see also Hively*, 853 F.3d at 349 (Title VII "draws no distinction, for this purpose, among the different varieties of discrimination it addresses"). The EEOC has come to the same conclusion, observing that "an employee alleging discrimination on the basis of sexual orientation is alleging that his or her employer took his or her sex into account by treating him or her differently for associating with a person of the same sex." *Baldwin*, 2015 WL 4397641, at *6 (emphasis omitted). This reasoning further reinforces that discrimination on the basis of sexual orientation is discrimination "because of . . . sex," and thus is prohibited by Title VII, 42 U.S.C. § 2000e-2. *See also Christiansen*, 852 F.3d at 204 (Katzmann, C.J., concurring) (noting "it makes little sense to carve out same-sex relationships as an association" that Title VII does not protect, in light of recent Supreme Court decisions finding a constitutional right to same-sex marriage).

C. Sexual-Orientation Discrimination Is Ordinarily Indistinguishable from Other Forms of Sex Discrimination Prohibited by Title VII.

Both practical and judicial experience confirm that sexual-orientation discrimination is merely a variant of sex discrimination. Indeed, the two types of discrimination are in practice often indistinguishable.

For example, decisions from this Court and others have attempted to draw a line between noncognizable Title VII claims of sexual-orientation discrimination, and cognizable Title VII claims by gay, lesbian, or bisexual employees for discrimination on the basis of nonconformity with sex stereotypes. The problem, as courts have repeatedly recognized, is that both types of claim often stem from acts of abuse or harassment that target employees for failing to conform to traditional gender stereotypes in a number of ways, and it is difficult if—not impossible—to disentangle gender stereotyping involving an employee's publicly observable behavior from gender stereotyping involving an employee's private intimate associations.

As the Seventh Circuit remarked in a pre-*Hively* decision, "a perception of homosexuality itself may result from an impression of

nonconformance with sexual stereotypes." *Hamm v. Weyauwega Milk Prods., Inc.*, 332 F.3d 1058, 1065 n.5 (7th Cir. 2003). Judge Posner observed in *Hamm* that "[h]ostility to effeminate men and to homosexual men, or to masculine women and to lesbians, will often be indistinguishable as a practical matter," and that attempting to differentiate these forms of hostility is "beyond the practical capacity of the litigation process." *Id.* at 1067 (Posner, J., concurring). Similarly, the majority opinion observed that a "homophobic epithet like 'fag'" may be "as much of a disparagement of a man's perceived effeminate qualities as it is of his perceived sexual orientation," making it impossible to "rigidly compartmentalize the types of bias that these types of epithets represent." *Id.* at 1065 n.5 (majority op.).

Examples from other cases reinforce the profound practical difficulty of attempting to parse whether bias is motivated by an employee's sexual orientation or his sex. For instance, in *Prowel v. Wise Business Forms, Inc.*, a gay man who had a high voice and exhibited certain other stereotypically feminine traits suffered harassment that included being called "Princess" and "Rosebud" (as well as "fag" and "faggot") and having a "a pink, light-up, feather tiara with a package of

lubricant jelly" left at his workstation. 579 F.3d 285, 287-88, 291-92 (3d Cir. 2009). The Third Circuit allowed plaintiff's Title VII claims to proceed on a sex-stereotyping theory, but noted that it was "possible that the harassment" he identified "was because of his sexual orientation, not his effeminacy," *id.* at 292, and observed that, "[a]s this appeal demonstrates, the line between sexual orientation discrimination and discrimination 'because of sex' can be difficult to draw," *id.* at 291.

By contrast, in *Spearman v. Ford Motor Co.*, the Seventh Circuit held (pre-*Hively*) that a gay man did *not* have a viable Title VII claim where, among other things, he was called a "bitch" and publicly compared to the drag performer RuPaul; even though he had not disclosed his sexual orientation at work, the court deemed the harassment attributable solely to his coworkers' hostility to his "apparent homosexuality." 231 F.3d 1080, 1082 n.1, 1085-86 (7th Cir. 2000). Similarly, in *Dawson*, this Court upheld the grant of summary judgment against a lesbian plaintiff with a stereotypically masculine appearance where, among other things, the plaintiff's coworkers accused her of "wearing her sexuality like a costume" and repeatedly called her by the name "Donald." 398 F.3d at 222 (quotation marks omitted). In holding

these comments insufficient to raise a triable issue, this Court observed that they provided "ambiguous support for a gender stereotyping claim" because they could be interpreted as statements about the plaintiff's sexuality (which would not be actionable) or her appearance (which would), or both.[2] *Id.* at 221-22.

As these cases illustrate, real-world examples of discrimination typically frustrate any effort to "rigidly compartmentalize" types of bias, *Hamm*, 332 F.3d at 1065 n.5, distinguishing animus against homosexuality, on the one hand, from animus against other types of gender nonconformity, on the other. Social-science research confirms that both types of animus will often be present together. "Social psychologists have documented that hostility toward homosexuals is linked to other traditional, restrictive attitudes about sex roles." Koppelman, *supra*, at 237*; see also id.* at 238-39 (collecting studies); Carol M. Doyle et al.,

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[2] *See also*, *e.g.*, *Howell v. North Central Coll.*, 320 F. Supp. 2d 717, 723 (N.D. Ill. 2004) (noting inconsistencies in Seventh Circuit's pre-*Hively* case law and recognizing difficulty posed by hypothetical case of "a female plaintiff exhibiting masculine traits" subject to "a full complement of lesbian epithets"); *Centola*, 183 F. Supp. 2d at 410 (coworkers' act of placing "a picture of Richard Simmons 'in pink hot pants'" in plaintiff's work area could show that they deemed him "impermissibly feminine" or gay, or both).

Perceptions of Same-Sex Relationships and Marriage as Gender Role Violations: An Examination of Gendered Expectations (Sexism), 62 J. of Homosexuality 1576, 1592 (2015) ("Our findings extend the previous research by demonstrating that it is the same-sex relationship behaviors themselves, not only the presumed cross-gender characteristics of gays and lesbians, that violate prescribed gender role expectations."). Indeed, some historians believe that "[t]he modern stigmatization of homosexuals" developed alongside a sexist backlash to the growing trend of gender equality, with both types of animus—against homosexuality and against women—representing a reaction to the upending of traditional masculine roles. Koppelman, *supra*, at 240.

Gay, lesbian, and bisexual individuals' personal experiences with discrimination similarly demonstrate the degree to which sex discrimination and sexual-orientation discrimination conflate. For example, long before gay boys engage in same-sex activity, many are "taunted and teased for 'acting queer' or 'looking like a faggot' simply because they are not as aggressive or masculine-appearing as other boys"—harassment that "demonstrates the sex stereotyping roots of anti-gay animus." Anthony E. Varona and Jeffrey M. Monks, *En/Gendering*

Equality: Seeking Relief Under Title VII Against Employment Discrimination Based on Sexual Orientation, 7 Wm. & Mary J. Women & L. 67, 67-68, 86 (2000). In one particularly striking example, the plaintiff in *Montgomery v. Independent School District No. 709* was subjected to severe harassment because of his perceived sexual orientation starting from the time he was just five years old. *See* 109 F. Supp. 2d 1081, 1084 (D. Minn. 2000) (discussed in Varona and Monks, *supra*).

Such harassment forcefully demonstrates the "degree to which sexual orientation is commingled in the minds of many with particular traits associated with gender." *Christiansen*, 852 F.3d at 205-06 (Katzmann, C.J., concurring). That commingling reinforces the impracticality of differentiating sexual-orientation discrimination from sex discrimination, and provides further support for interpreting Title VII's ban on discrimination "because of . . . sex" to include discrimination because of sexual orientation.

D. Congressional Inaction Does Not Compel a Different Reading of Title VII.

The absence of the term "sexual orientation" from Title VII sheds little, if any, light on the question presented here. Since sexual-orientation discrimination is a form of discrimination "because of . . . sex," there is no need for a separate statutory reference to sexual orientation.

To be sure, state antidiscrimination laws often expressly list sexual orientation, alongside sex, as an impermissible basis of disparate treatment. *See*, *e.g.*, Conn. Gen. Stat. § 46a-81c; N.Y. Exec. Law § 296; Vt. Stat. Ann. tit. 21, § 495. But many of these provisions were adopted years or decades ago, at a time when same-sex intimate contact was outlawed in many States, and other forms of sexual-orientation discrimination were generally assumed to be permissible both legally and socially. For instance, all three of the amici States adopted measures expressly barring employment discrimination based on sexual orientation before 2003,[3] when the Supreme Court overruled its holding in *Bowers v. Hardwick* that States were free to "criminalize homosexual

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[3] Connecticut's measure dates from 1991, Vermont's from 1992, and New York's from 2002.

sodomy."[4] *See* 478 U.S. 186, 190 (1986), *overruled by Lawrence v. Texas*, 539 U.S. 558 (2003). That legislatures and courts previously had "made assumptions defined by the world and time of which" they were "a part," *Obergefell*, 135 S. Ct. at 2598, does not mean that this Court is bound by such assumptions today—including the assumption that sexual-orientation discrimination is distinct from, rather than a form of, sex discrimination. *See Hively*, 853 F.3d at 347 (criticizing argument that sexual-orientation discrimination is different from sex discrimination for "assuming the conclusion it sets out to prove").[5]

There also is no significance to the fact that Congress may not have been focused on sexual-orientation discrimination when it enacted Title VII. In *Oncale v. Sundowner Offshore Services, Inc.*, the Supreme Court held that Title VII extended to the novel context of male-on-male sexual

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[4] This Court's decision in *Symonton*, issued in 2000, comes from the same era.

[5] *See also Bolling v. Sharpe*, 347 U.S. 497, 498-500 (1954) (holding that racially segregated public schools in District of Columbia violated Constitution); *cf.* Br. for Resp. at 12-13, *Bolling*, 347 U.S. 497 (No. 8), 1952 WL 47280 (arguing that such segregation was permissible based on Congress's provisions for segregated schools contemporaneously with adoption of Fourteenth Amendment).

harassment despite acknowledging that such harassment "was assuredly not the principal evil Congress was concerned with when it enacted Title VII." 523 U.S. 75, 79-80 (1998). As the Court explained, "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils." *Id.*

This conclusion is not altered by Congress's subsequent failures to amend Title VII to add "sexual orientation" discrimination as a distinct category of impermissible discrimination. As the Supreme Court has repeatedly emphasized, "subsequent legislative history is a hazardous basis for inferring the intent of an earlier Congress," and it is a "particularly dangerous ground on which to rest an interpretation of a prior statute" when such history concerns a proposal that "does not become law." *Pension Ben. Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) (quotation marks omitted). "Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change." *Id.* (quotation marks omitted); *see also Zuber v. Allen*, 396 U.S. 168, 185 n.21 (1969) ("It is at best treacherous to find in congressional silence alone the adoption of a

controlling rule of law.'" (quoting *Girouard v. United States*, 328 U.S. 61, 69 (1946))); *United States v. Price*, 361 U.S. 304, 310-11 (1960) ("[N]on-action by Congress affords the most dubious foundation for drawing positive inferences."). Indeed, there are "idiosyncratic reasons that many bills do not become law, and those reasons may be wholly unrelated to the particular provision of a bill that a court is assessing." *Christiansen*, 852 F.3d at 206 (Katzmann, C.J., concurring).

For example, as the Seventh Circuit observed in *Hively*, the federal agency "most closely associated with" Title VII, the EEOC, has already concluded that "sex" includes "sexual orientation" for purposes of Title VII, and Congress has not acted to "to carve sexual orientation *out* of the statute." 853 F.3d at 344. Moreover, Congress's separate references to "sex" and "sexual orientation" in the Violence Against Women Act and federal hate crimes statute could reflect a "belt and suspenders" approach despite significant overlap between the two concepts. *See id*. Thus, as the Seventh Circuit concluded, "we have no idea what inference to draw from congressional inaction or later enactments." *Id.* And, given the strength of the considerations in favor of reading "sex" to include "sexual orientation," the "fact that the enacting Congress may not have

anticipated a particular application" of Title VII's ban on sex-based discrimination "cannot stand in the way" of the statute "on the books." *Id.* at 344-45.

* * *

In sum, Title VII's prohibition of employment discrimination "because of . . . sex" encompasses sexual-orientation discrimination for at least two closely related reasons: such discrimination punishes individuals for their failure to adhere to sex stereotypes about the intimate relationships that men and women should have; and such discrimination impermissibly punishes individuals for relationships that would be acceptable if they were of the opposite sex. Both practical and judicial experience confirm that sexual-orientation discrimination is often indistinguishable from sex discrimination. By contrast, a constricted reading of Title VII that would permit sexual-orientation discrimination would ignore the central role that an employee's sex plays when such discrimination occurs. *See Hively*, 853 F.3d at 350 (recognizing the "considerable calisthenics" required to "remove the 'sex' from 'sexual orientation'"). This Court should accordingly interpret Title VII to prohibit sexual-orientation discrimination.

POINT II

READING TITLE VII TO EXCLUDE SEXUAL-ORIENTATION DISCRIMINATION WOULD PREJUDICE IMPORTANT STATE INTERESTS AND LIMIT ENFORCEMENT ACTIVITIES AGAINST HARMFUL ACTS OF DISCRIMINATION

A correct reading of Title VII to encompass sexual-orientation discrimination is important for the amici States to ensure that their residents receive the full panoply of legal protections against harmful discrimination. Because the line between sexual-orientation discrimination and other types of sex discrimination is so elusive (and very frequently impossible to draw, see *supra* at 16-21), a rule that purports to exempt the former from Title VII makes gay, lesbian, and bisexual employees peculiarly vulnerable. Under such a rule, employers may defend against Title VII claims by asserting that discriminatory conduct—such as the use of homophobic epithets—was actually based on an employee's (actual or perceived) sexual orientation rather than his or her failure to conform to sex stereotypes. Reading Title VII in this way exposes the residents of amici States, and the States themselves, to serious harm and improperly removes the protections that Title VII was intended to establish against discrimination "because of . . . sex." Recognizing that Title VII's ban on sex discrimination includes sexual-

orientation discrimination, meanwhile, means the addition of important federal remedies and resources to the amici States' efforts to combat invidious discrimination and its attendant harms.

A. Sexual-Orientation Discrimination Harms the Amici States and Their Residents.

More than 800,000 adults residing in the amici States identify as lesbian, gay, bisexual or transgender (LGBT), with a greater proportion of adults identifying as LGBT in Vermont than in any other State, and with the New York City metropolitan area having a larger gay and lesbian population than any other in the country.[6] The amici States have important interests in the welfare of these residents, extending "beyond mere physical interests to economic and commercial interests," and to an interest in protecting them "from the harmful effects of discrimination." *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 609 (1982) (calling this interest "substantial").

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[6] *See* Movement Advancement Project, *LGBT Populations* (June 22, 2017); Williams Inst., *LGBT Data and Demographics* (2017); *see also* Gallup, Inc., *Vermont Leads States in LGBT Identification* (Feb. 6, 2017); David Leonhardt, *New York Still Has More Gay Residents Than Anywhere Else in U.S.*, N.Y. Times, Mar. 23, 2015. URLs for sources available online are provided in the table of authorities.

Unfortunately, such discrimination continues to be a pervasive aspect of life for LGBT people, with resulting harms to them and the amici States. Recent studies show that sexual minorities face "widespread and continuing employment discrimination," resulting in a lack of promotions, lower wages, and in some cases, the loss of employment.[7] For instance, a 2014 study revealed that between 11 and 28 percent of LGBT workers nationwide reported losing a promotion because of their sexual orientation.[8] A 2008 survey found that 16% of respondents had lost a job at some point in their lives because of their sexual orientation.[9] The same survey found that more than 40% of all people identifying as lesbian, gay, or bisexual had experienced at least one instance of sexual-orientation discrimination in employment at some

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[7] Brad Sears and Christy Mallory, *Documented Evidence of Employment Discrimination and its effects on LGBT People* 1,4 (Williams Inst. 2011).

[8] Sarah McBride et al., *We the People: Why Congress and U.S. States Must Pass Comprehensive LGBT Nondiscrimination Protections* 7-8 (Ctr. for Am. Progress 2014).

[9] Sears & Mallory, *supra*, at 4.

point in their lives.[10] That number rose to 56% for those who were open about their sexual orientation in the workplace.[11]

This employment discrimination produces tangible harms to the victims of such treatment. According to the results of a dozen studies, gay men suffer a wage gap resulting in between 10% and 32% of comparable heterosexual men's earnings.[12] LGBT workers overall, and members of ethnic or racial minorities in particular, experience unemployment at a higher rate than other workers.[13] And rates of poverty[14] and homelessness[15] for LGBT people significantly exceed those of the population as a whole.

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[10] *Id.*

[11] *Id.*

[12] *Id.* at 14.

[13] Sarah McBride and Katie Miller, *High Stakes: LGBT Americans Cannot Afford to Lose Unemployment Insurance* (Ctr. for Am. Progress Jan. 14, 2014); Movement Advancement Project, Ctr. for Am. Progress, and Human Rights Campaign, *A Broken Bargain: Discrimination, Fewer Benefits, and More Taxes for LGBT Workers* (Condensed Version), at i, 3, 4-5 (2013).

[14] *See* Randy Albelda et al., *Poverty in the Lesbian, Gay, and Bisexual Community*, at i (Williams Inst. 2009).

[15] *See* HUD Exchange, *LGBT Homelessness* ("Members of the LGBT community are more likely to become homeless, and once homeless, more

The costs of such negative outcomes do not fall on the victims of sexual-orientation discrimination alone. In particular, they extend to the amici States in several ways relevant here.

First, economic harm to victims of sexual-orientation discrimination often translates into an increased burden on public benefits programs. For instance, the loss of private healthcare coverage often attends the loss of stable employment. This reality, combined with decreased economic opportunities for LGBT people due to discrimination, creates a scenario where LGBT people disproportionately face financial insecurity and therefore must rely on state-sponsored cash assistance, healthcare coverage, and other forms of public assistance.[16]

Second, disadvantaging people for reasons unrelated to their qualifications or job performance harms productivity and limits employers' ability to recruit and retain the most talented workforce

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likely to endure discrimination and harassment that extends their homelessness.").

[16] *See* M.V. Lee Badgett et al., *New Patterns of Poverty in the Lesbian, Gay, and Bisexual Community* 21-24 (Williams Inst. 2013); *cf.* Jody L. Herman, *The Cost of Employment and Housing Discrimination Against Transgender Residents of New York* 1 (Williams Inst. 2013) (noting comparable effects of discrimination against transgender people).

possible. This dynamic both harms the States in their capacities as employers and produces a drag on the States' economies and fiscs.

Data demonstrate that hostile and discriminatory work environments compromise employee efficiency, resulting in absenteeism, lower productivity, and "a less motivated, less entrepreneurial, and less committed workforce."[17] For example, a 2013 report concluded that "[f]irms that implemented LGBT-friendly policies experienced increases in firm value, productivity, and profitability. Firms that discontinued gay-friendly policies found they experienced decreases in the same performance measures."[18]

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[17] Crosby Burns et al., *Gay and Transgender Discrimination in the Public Sector: Why It's a Problem for State and Local Governments, Employees, and Taxpayers* 19 (Ctr. for Am. Progress & AFSCME 2012); *see also* Crosby Burns, *The Costly Business of Discrimination: The Economic Costs of Discrimination and the Financial Benefits of Gay and Transgender Equality in the Workplace* (Ctr. for Am. Progress 2012).

[18] Catalyst Information Ctr., *Why Diversity Matters* 6 (2013); *see also* M.V. Lee Badgett et al., *The Business Impact of LGBT-Supportive Workplace Policies* 23 (Williams Inst. 2013) ("[T]he more robust a company's LGBT-friendly policies, the better its stock performed over the course of four years (2002-2006), compared to other companies in the same industry over the same period of time.").

And, as 68 companies, including some of the country's largest, noted last year in an amicus brief supporting equality for transgender people, policies protecting LGBT employees offer tangible advantages for building and maintaining a strong workforce.[19] In terms of recruitment, both LGBT and non-LGBT workers prefer to work for employers and in communities with such protections. A 2014 study found that members of the "creative class" (roughly 50 million people including scientists, engineers, and entrepreneurs; researchers and academics; architects and designers; artists and entertainers; and professionals in business, media, management, healthcare, and law) use diversity as a proxy for determining whether a city would provide a welcoming home.[20] Another report found that individuals are increasingly likely to migrate from ideologically unfriendly communities to those that they perceive as more closely aligned with their beliefs.[21] Moreover, in terms of retention, the

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[19] Amicus Curiae Br. by 68 Companies Opposed To H.B. 2 & in Support of Pl.'s Mot. for P.I., *United States v. North Carolina*, No. 1:16-cv-425 (M.D.N.C. July 8, 2016), ECF No. 85-1.

[20] *See* Human Rights Campaign Found., *2014 Municipal Equality Index: A Nationwide Evaluation of Municipal Law* 6 (2014).

[21] *See* Matt Motyl et al., *How Ideological Migration Geographically Segregates Groups*, 51 J. Experimental Soc. Psychol. 1, 11-12 (2014).

stress of job-related discrimination and harassment causes LGBT workers to change or quit jobs, which has significant economic consequences for employers: one recent study found that "[i]t costs anywhere between $5,000 and $10,000 to replace a departing hourly worker and between an estimated $75,000 and $211,000 to replace an executive-level employee."[22]

In sum, employment discrimination on the basis of sexual orientation not only harms the victims of such discrimination, but also hurts employers and impairs the economies and fiscs of the amici States. A proper understanding of Title VII to prohibit sexual-orientation discrimination is critical to counteract such discrimination.

B. Reading Title VII to Prohibit Sexual-Orientation Discrimination Will Provide a Valuable Supplement to the Amici States' Efforts to Combat Invidious Discrimination.

As noted above (see *supra* at 22), the amici States have already adopted laws barring sexual-orientation discrimination in the workplace. But Title VII complements and extends the protections offered by state

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[22] Burns et al., *supra*, at 19.

law in important ways that make it a crucial adjunct to the amici States' efforts to root out invidious discrimination.

For instance, Title VII offers protection against discrimination by certain employers that are not generally subject to state and local antidiscrimination laws, including federal employers and certain multistate bodies. For these entities, federal law provides the sole remedy against employment discrimination. *See Rivera v. Heyman*, 157 F.3d 101, 105 (2d Cir. 1998) (federal employers); *Dezaio v. Port Auth. of N.Y. & N.J.*, 205 F.3d 62, 65-66 (2d Cir. 2000) (Port Authority of New York and New Jersey).

Furthermore, Title VII coverage offers substantial additional resources for the public enforcement of antidiscriminatory commands, even where the same command is contained in both state and federal law and an employer is subject to both (as most employers are). In particular, Title VII triggers the jurisdiction of a federal enforcer, the EEOC, that can work in parallel and coordinate with state agencies to prevent, investigate, and remedy invidious discrimination.

The experience of the amici States demonstrates the benefits of such overlapping federal-state enforcement authority. In 2015, for

instance, the EEOC and the New York State Office of the Attorney General reached a multimillion-dollar joint settlement agreement with Consolidated Edison Company of New York resolving allegations of sexual harassment at the company, among other acts of discrimination.[23] While sexual-orientation discrimination was not a part of this joint effort (in part because the settlement was reached only two months after the EEOC interpreted Title VII to prohibit such discrimination), this case demonstrates the value to the States of having a federal enforcer as a partner to investigate and remedy employment discrimination.[24]

In the context of private enforcement actions, Title VII also offers victims of discrimination broader remedies than may be available under state law. For instance, New York's Human Rights Law does not allow a

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[23] *See Con Edison Settles Sexual Harassment Lawsuit for $3.8 Million*, ABC Eyewitness News (New York, N.Y.) (Sept. 9, 2015).

[24] The federal government has similarly recognized in the arena of consumer protection the value of joint federal-state enforcement, which has the virtue of "bringing more allies to our fight." 153 Cong. Rec. H16,882 (daily ed. Dec. 19, 2007) (statement of Rep. Rosa DeLauro) (discussing state and federal authority to enforce federal Consumer Product Safety Improvement Act); *see also* 15 U.S.C. § 1477 (allowing state attorneys general to bring federal enforcement actions for violations of the Act affecting their States or their States' residents).

prevailing plaintiff to recover punitive damages, but Title VII does. *See* 42 U.S.C. § 1981a(b)(1). Title VII thus offers an additional incentive to employers to eliminate discrimination, and thereby may foster more effective enforcement of antidiscriminatory norms than state law would alone.

Thus, although the amici States have already adopted regimes for protecting their gay, lesbian, and bisexual residents from employment discrimination, the recognition that Title VII provides overlapping protection will contribute substantially to the States' efforts to end such discrimination.

CONCLUSION

This Court should hold that Title VII's bar on sex-based employment discrimination includes discrimination based on sexual orientation.

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Respectfully submitted,

GEORGE JEPSEN
Attorney General
State of Connecticut

55 Elm Street
Hartford, CT 06106
860-808-5318

THOMAS J. DONOVAN, JR.
Attorney General
State of Vermont

109 State Street
Montpelier, VT 05609
802-828-5500

ERIC T. SCHNEIDERMAN
Attorney General
State of New York

By: /s/ Andrew W. Amend
ANDREW W. AMEND
Senior Assistant Solicitor General

BARBARA D. UNDERWOOD
Solicitor General
STEVEN C. WU
Deputy Solicitor General
of Counsel

JORDAN GOLDBERG
Law Intern

120 Broadway, 25th Floor
New York, NY 10271
212-416-8020

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, Oren L. Zeve, an attorney in the Office of the Attorney General of the State of New York, hereby certifies that according to the word count feature of the word processing program used to prepare this brief, the brief contains 6,998 words and complies with the type-volume limitations of Rule 32(a)(7)(B).

/s/ Oren L. Zeve
Oren L. Zeve