15-3775

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

MELISSA ZARDA AND WILLIAM ALLEN MOORE, JR. AS CO- INDEPENDENT EXECUTORS OF THE ESTATE OF DONALD ZARDA,

Plaintiff-Appellant,

— against —

ALTITUDE EXPRESS dba SKYDIVE LONG ISLAND and RAYMOND MAYNARD,

Defendants-Appellees.

EN BANC REHEARING FROM THE PANEL OPINION REPORTED AT 855 F.3D 76 (2d Cir. 2017)

APPELLANT'S REPLY BRIEF

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I. Amicus Adam Mortara Offers a Crabbed Reading of Title VII and Suggests Dismantling Time-Honored Methods to Enforce It.

Amicus Adam Mortara ("Mortara") presents the Court arguments failing to engage the question presented. SPA.1-2. He does not even cite *Christiansen v. Omnicom Grp., Inc*., 852 F.3d 195 (2d Cir. 2017), but mentions Judge Diane Sykes eleven times. He invents odd or weary scenarios involving "black nail polish" and opposite-sex use of single-sex restrooms (the bathroom antic is also employed by our Department of Justice). Mortara complains of "verbal calisthenics" but to parse his arguments requires the dexterity of a Yogi Master. Concealed in his points about discrimination laws *per se*, is the unveiled denial that the best cases are sometimes found among ordinary people just trying to make a buck.[1] But he is not joking (in his mind) to suggest "considerable calisthenics may be required" to rejoin "intent [with] intentional discrimination." Br. at 12. He assumes intent is inordinately difficult to prove. But discrimination plaintiffs don't win without evidence and strong inferences.

[1] Mortara's perpetual indulgence in the term "homosexual," with no concession to the slightest bit of elegant variation, is annoying: he should know "homosexual" is disfavored. Linguist Nicholas Subtirelu notes that "homo," a slur, makes the word ugly. It also focuses on the sexual, rather than the human. The Week, June 15, 2015. "Homosexual" is associated with the opprobrious "homosexual agenda." Think of Oriental – a word we've all abandoned. Similarly, "homosexual" "has the ring of 'colored,' as your grandmother might have said" (and my grandfather did). New York Times, March 21, 2014, "The Decline and Fall of the 'H' Word," quoting historian George Chauncy.

Mortara wants scientific proof, barring valid legal theories. Discrimination, he argues, is about America's original sin. However, his analysis wouldn't detect racial sin with skilled lawyering. Close cases count, and Title VII deters bias.

Mortara begins with the shaded premise that proving discrimination should be limited to "outliers," not everyday claims like Zarda's from the "mine run" - of common grade. Don's claim was from the "mine run," but in the offing he lost his job, livelihood and professional identity because he acknowledged himself as gay. Discrimination, according to Mortara, should not be prosecuted unless gapingly obvious and scientifically verified by regression analysis, because the employer's position is of great importance. But he misrepresents *Watson v. Fort Worth Bank & Tr.*, 487 U.S. 977 (1988), which does not hold that "disparate treatment analysis" does not combat subconscious prejudices; it holds that disparate impact analysis might be *better* because "a facially neutral practice, adopted without discriminatory intent, may have effects . . . indistinguishable from intentional[]" discrimination. *Id.* at 990. Disparate-impact analysis, however, often requiring expensive expert proof, is usually inapplicable to small samples, and shuts most aggrieved employees out of court. If she's gay, she can't even find a lawyer in Upstate New York or Connecticut, because the laws there don't pay fees. A federal employee has no protection at all.

Mortara prefers hard data and scientific confirmation, as well as the strict rules of post-conviction proceedings; but his views would be dangerous. His intellectual

patron, Judge Sykes, provided the soil for his analysis, which refuses to recognize the usefulness of sex-stereotyping *á la Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) to ferret out discriminatory intent.[2] Would it were so that we could prove and rid society of subconscious bias; deep down, the self-reflective recognize it in ourselves. Discrimination – let alone subconscious bias – cannot always be proven. But the Supreme Court has developed tests to find it in certain scenarios. To suggest that only the most obvious cases proceed, or those that can be proven scientifically is crass, an affront to nationwide jurisprudence; it scoffs at the idea that *all* discrimination, even that from the mine run, is abhorrent. We acknowledge it often can't be proven under the tests we employ, and that many aggrieved employees are wounded in ways the law doesn't protect. But that is what lawyering and legal analyses are for: a fair examination as to what "really happened."

"What actually motivated an employer's decision" is best explained by the employer, Mortara contends. Br. at 12. (This position would probably disallow a trial every time.) He derives this analysis, improperly, from a phrase in *Reeves v. Sanderson Products,* 530 U.S. 133 (2000), br. at 11, which held, "it is permissible for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation." 530 U.S. at 147. Reading this case and interpreting it for the opposite of what it stands for abandons reason.

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[2] Despite Mortara's faithful use of "(plurality opinion)" following his citations to *Price Waterhouse,* the case is binding as codified. 42 U.S.C. § 2000e-2(m).

II. Title VII Prohibits Discrimination Against the LGB under Sex Stereotyping.

We don't advocate a Title VII "exception" to statutory interpretation, but not all statutes are bound by Crazy Glue or governed by definitions found in grimy dictionaries. Courts interpret statutes variously; their meanings change, and some statutes are interpreted more liberally than others. Habeas cases often go nowhere because of procedural waivers, but the High Court just extended equity to an immigrant who immaterially fibbed on a citizenship application. *Maslenjak v. United States*, 137 S. Ct. 1918 (2017). Purely criminal laws are resolved with lenity when they can be read in dissimilar ways. *Rewis v. United States,* 401 U.S. 808, 812 (1971). Most importantly, courts read Title VII broadly. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975); *DeMasters v. Carilion Clinic*, 796 F.3d 409, 424 (4th Cir. 2015) (Title VII must be construed "as a broad remedial measure."); *Johnson v. University of Cincinnati*, 215 F.3d 561, 579 (6th Cir. 2000). First came the words "because of . . . sex"; then came sex stereotypes as a means to define discrimination; then came gay people, now constitutionally protected, demanding again a right to be read into accepted statutory interpretation. We suggest Mortara's analysis is the exception. *See generally*, Richard Posner, Divergent Paths; Robert Katzmann, Reading Statutes, 2014.

In *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339 (7th Cir. 2017) (*Hively II)*, Judge Posner's concurred, *id.* at 353, which echoed *Obergefell v.*

Hodges, 135 S. Ct. 2584 (2015) that the law is grounded in life as lived. Justice Kennedy held in *Obergefell,* "marriage is essential to our most profound hopes and aspirations [whose] centrality . . . to the human condition makes it unsurprising that the institution has existed for millennia . . . marriage has transformed strangers into relatives . . . . *but it has not stood in isolation from developments in law and society*. . . . That institution—even as confined to opposite-sex relations—has evolved over time." *Id.* at 619, 621 (emphases added). Judge Posner noted similarly his observation that if asked in 1964 if he'd ever met a gay man or lesbian, he would have said no. *Id*. at 353. Probably no members of Congress in 1964 were thinking about gay people, but neither were they thinking about how courts would interpret the sparse wording of Title VII in fifty years. Judge Posner's concurrence is compatible with *Obergefell* and what Chief Judge Katzmann wrote in Judging Statutes, 2014: "[T]he fundamental task for the judge is to determine what Congress' [purposeful act] . . .in passing the law[.]" *Id.* If Courts had not developed methods to interpret Title VII, discrimination could rarely be proven, the purpose of the statute defeated.

Yes, courts have rejected what we advocate, multiply. But courts have begun to smell the bacon and recently not been so stingy. *Bowers v. Hardwick,* 478 U.S. 186 (1986) was overruled in 2003, with Justice Kennedy noting that "*stare decisis* is essential . . . not, however, an inexorable command. . . . *Bowers* was not correct when

it was decided, and it is not correct today." *Lawrence v. Texas*, 539 U.S. 558, 578 (2003). *Bowers* inflicted harms, which still need amelioration. *Simonton v. Runyon,* 232 F.3d 33 (2d Cir. 2000) – certainly not to ascribe ill motives to the panel, whose intent we'll never know – took a bad pleading, and produced a decision *as now interpreted* that does not comport with contemporary freedom. Nor does *Simonton* mesh with valid analyses in proving discrimination or the Equal Protection conferred by the gay marriage cases, one of which originated here. *Windsor v. United States,* 699 F.3d 169 (2d Cir., 2012), *aff'd* 133 S. Ct. 2675 (2013). As the majority in *Hively II* reminded us, anti-miscegenation laws were always inherently racist. "But [in] 1967 . . . [after passage of Title VII, 16] states still had these

> laws . . . defended and understood as non-discriminatory because the legal obstacle affected *both* partners. . . . *Loving* recognized that equal application of a law that prohibited conduct only between members of different races did not save it. Changing the race of one partner made a difference in determining the legality of the conduct, and so the law rested on 'distinctions drawn according to race,' which were . . . discriminatory. So too, here. If we were to change the sex of one partner in a lesbian relationship, the outcome would be different. This reveals that the discrimination rests on distinctions drawn according to sex.

Hively II, 853 F.3d at 348-49 (7th Cir. 2017). Mortara dismisses *Loving* with no explanation other than a unexplained assertion that it doesn't apply.

This case also has much to do with associational discrimination, which Mortara and DOJ think non-existent or applicable only to races, not sexes. But from where does that interpretation arise? A man who is treated differently for associating with a woman – or a man – is treated differently because of sex. This analysis applies to a

straight bartender who worked in a gay establishment and is fired for being straight as much as a skydiver who is fired for identifying as gay.

Judge Posner's concurrence is but an honest breath away from recognizing this socio-statutory discord when he offered a candid account of the court's interpretations of aged laws in his concurrence, echoing Divergent Paths: Statutes cannot be interpreted reflexively, eternally, but must be construed in light of modernity: "I would prefer . . . that today we . . . avoid placing the entire burden of updating old statutes on the legislative branch." *Hively II,* 853 F.3d at 357. Same-sex love, attraction, and companionship were once illegal or opprobrious, but now same-sex marriage is constitutionally protected. If Congress won't pass legislation, courts cannot resist a valid judicial solution.

Sandifer v. U.S. Steel Corp., 134 S. Ct. 870 (2014), a case under the Fair Labor Standards Act, involved the antiquated terms "donning and doffing," Mortara br. at 8. *Sandifer* includes perhaps the most elementary sentence ever seen in Supreme Court jurisprudence: "We begin by examining the meaning of the word 'clothes.'" 134 S. Ct. at 870. While the word "clothes" is simple, "discrimination" is "complex." *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517 (2013). In *Nassar,* a 5-4 Court found that retaliation under Title VII can be proved only by "but for" causation, while status discrimination may be proved by "motivating

factors." *Id.* at , 2521. This is high statutory interpretation, much more intricate – and deeply debated – than a definition of "clothes."[3]

Mortara's originalist approach fails. It is unremarkable that "sex" refers to "male and female human beings," br. at 6, but neither Mortara nor DOJ analyze that antigay discrimination constitutes sex discrimination under traditional male and female roles. *See Hively II* (lesbian "described paradigmatic sex discrimination," and "[t]o use the phrase from *Ulane*" *v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984), defendant "is disadvantaging her because she is a woman" associating with other women); *Christiansen*, 852 F.3d at 202; *see also Hively v. Ivy Tech Cmty. Coll.*, 830 F.3d 698 (7th Cir. 2016) *(Hively I)* (no need to expand the definition of 'sex discrimination' beyond the narrow understanding adopted in *Ulane* to conclude that LGB employees terminated for . . . sexual orientation have been discriminated against on the basis of sex."). Discrimination "because of . . . sex" is not self-evident from this analysis, Mortara suggests. Br. at 8. To so suggest, however, overlooks the Supreme Court's corrections of unduly restrictive readings of "sex." *See Oncale v. Sundowner*

[3] *Sandifer* also considered a range of interpreting factors, like statutory context, the jurisprudential, practical consequences of alternative interpretations, and earlier FLSA holdings. 134 S.Ct. at 877-881. While the Justices considered the burden of proffering interpretations to the judiciary, they opted to "give the [statutory] text . . . a meaning that avoids . . . inconsequential judicial involvement in a 'morass of difficult, fact-specific determinations'" *Id.* at 881 (citation omitted). Analogous factors in *Zarda* weigh in favor of our contentions, because while each discrimination claimant is unhappy, each is unhappy in his own way – whether outliers or from the mine run. Each case requires a factually specific definition of the aggrievance claimed and the category of discrimination, both of which require individual definitions.

Offshore Servs., Inc., 523 U.S. 75, 79-81 (1998). Mortara says we cannot rely on *Oncale* alone. Thus, we present *Lewis v. City of Chicago, Ill.*, 560 U.S. 205 (2010): "It is not for us to rewrite the statute so that it covers only what we think is necessary to achieve what we think Congress really intended." *Id.* at 215.

> Mortara derides "creative legal reasoning" and the application of . . .
>
> hypothetical[s] that the employer never even considered do not make firing an employee for being a homosexual into firing that employee for being a man. Deploying the comparative test to interpret Title VII . . . to supplant an employer's opposition to homosexuality . . . with another motive loses the plot entirely. It substitutes the useless results of a thought experiment . . . for what the Supreme Court *has said really matters.*

Br. at 12. How Mortara would know what any employer "never even considered" is purely speculative, but he then cites the *Hively II* dissent rather than the Supreme Court. He suggests that that use of "comparators is a rigged game," br. at 11-12, but what does this mean? If an employer fires a man because he's obviously queer, but not a "Marlboro Man" co-worker, that's a sex stereotype: men are traditionally expected not to be, or act, queer. It's known as "sex plus" discrimination, as held in *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107 (2d Cir. 2004), where the Court found discrimination because a woman with children was perceived a less efficient worker; she had no comparators. What the Supreme Court has said "really matters" is that discrimination is illegal; it has recognized the difficulty in its identification and proof and recognizes the use of comparators, depending on the case: Mr. Oncale had no comparators. Intent is usually inferred by circumstantial evidence;

as such, the High Court recognized sex stereotyping in *Price Waterhouse*, many years after it *invented* the burden-shifting approach in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). *McDonnell-Douglas* will or will not allow a plaintiff get to the jury, which decides intent and whether the violation, an outlier or from the mine run, violates Title VII.

The DOJ founders in maintaining that Title VII requires a sex-discrimination plaintiff to identify similarly situated employees of the other sex who have been treated more favorably. *See* DOJ Brief at 4. In *Back*, however, the Court held that identifying similarly situated employees might help a plaintiff prove her case, but "there is no requirement that such evidence be adduced," because "the ultimate issue is the reasons for the *individual plaintiff's* treatment, not the relative treatment of" others. 365 F.3d at 121.

"Clothes" is probably more easily defined than race, sex, religion, etc., but Mortara's analysis of Title VII is simultaneously overthought and overly simplistic. Intent can almost never be proven with certainty but proving discrimination would nigh be impossible if "creative legal reasoning and . . . hypothetical[s]" could not be used in enforcing the law. The categories in the statute are not at issue *per se,* but how, as Judge Katzmann called "The Purposive Approach," Judging Statutes, pp. 32-35, courts effect Congress' purpose in protecting discrimination against these categories. "Creative legal reasoning" has found ways to ferret out discrimination. This Court

knows that the majority of employment cases go down ablaze because plaintiffs cannot gather enough (or any) inferences of discrimination. But throw out these theories and you can forget about enforcement of any anti-bias laws, all of which deter discrimination without a lawsuit.[4]

Mortara, an intelligent outsider looking in, clarifies something one steeped in the practice might not see: The words in Title VII might be defined easily to civil-rights practitioners, but the bases advanced to *prove* a violation in the statute are not. But if they are absent and not applied to a hypothetical set of facts under a creative legal theory, Title VII means nothing. Proof of discrimination requires a meticulous search for clues: that's why those cases from the "mine run" might be the best. A plaintiff must construe the evidence to fit within one of these theories, or will lose. No matter how simple the words are defined, without these theories in *application* of Title VII, the Civil Rights Act is nothing but ink on paper. The theories allow for prohibition of sexual orientation discrimination under the associational theory, and sex stereotyping under *Price Waterhouse*. The majority in *Hively II* got it right and we urge this court to follow Chief Judge Wood. But we acknowledge that an outsider's view is a gift requiring heavy thought in its refutation.

[4] If anything, cases from the mine run are often more important than the outliers, because employers who govern the mine run often flout the law, or don't know how to enforce it.

III. Associational Discrimination Is Not Limited to Race.

Discrimination by association is discrimination. Mortara, *see* br. at 14, and DOJ, br. at 21-22, try to escape from this theory by suggesting it only applies to race, not sex – or, implicitly, any other categories in Title VII. But Mortara refutes himself, citing a nun's claim that she was discriminated against based on association with "Spanish" persons. *Reiter v. Ctr. Consol. Sch.*, 618 F. Supp. 1458 (D. Colo. 1985). "Spanish" is an ethnicity or National Origin. *Id.* at 1459. Both opponents also ignore *Boutlier v. Hartford Pub. Sch.*, 221 F. Supp. 3d 255 (D. Conn. 2016), which applies associational discrimination to sex, which we held high in our opening brief.

Additionally, while not precisely on point, a New York court found a cause of action in association on the basis of religion. *Chiara v. Town of New Castle*, 2 N.Y.S.2d 132 (2d Dept. 2015). Also, the Americans with Disabilities Act codifies associational discrimination. 42 U.S.C. § 12112(b)(4). *Thompson v. N. Am. Stainless, LP*, 562 U.S. 170 (2011) even suggests that associational discrimination applies to a person aggrieved by retaliation; in that case, the plaintiff originally complained of sex discrimination. 562 U.S. at 172.

As much as our opponents would love to defeat this contention by the insistence that limits it to ugly, newsworthy race claims, with tiny exception, all categories within Title VII are interpreted equally. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 295 (1989). Associational discrimination harms person who associate with a particular

sex. Zarda associated with men on a level such that the mention of his ex-husband got him fired. That's associational discrimination and that alone allows this case to go back to the district court. DOJ and Mortara misperceive, misrepresent, or attempt to obfuscate this theory, but they cannot overcome this.

IV. Sexual Orientation Discrimination is Sex Discrimination Per Se.

We agree with *Hively II* that the plaintiff was disadvantaged because of her sex. 853 F.3d at 346: "It is critical, in applying the comparative method, to be sure that only the variable of the plaintiff's sex is allowed to change." Had Hively been a man, her attraction to women would have meant nothing, just as had Don Zarda been a woman, had he said, "I'm going home to my wife," as his supervisor Winstock said, no one would have complained about "personal information." It's not "misconduct" if a rule against disclosure applies to one who conforms to typical gender roles but not one who does not.

A year before *Simonton* was reaffirmed, misconstrued or clarified in *Dawson v. Bumble & Bumble,* 398 F.3d 211 (2d Cir. 2005), this Court decided *Back.*, holding that "[w]hat constitutes a 'gender-based stereotype' [under] *Price Waterhouse* . . . must be answered in [its] context . . . without undue formalization." 365 F.3d at 119-20. While *Back* was unexamined in *Dawson*, it must be examined now, especially given that the LGB are entitled to Equal Protection.

No Court should excise strapping, gay lumberjacks or lipstick lesbians from the entrée to sex discrimination claims: that is "undue formalism." By now, *Simonton* stands for one thing: Title VII does not protect against sexual orientation discrimination under any theory available to heterosexuals. This was held true just months ago. *Uddoh v. United Healthcare*, 2017 U.S. Dist. LEXIS 77460, *18 (E.D.N.Y. May 22, 2017) (Cogan, J.).

How did this jurisprudence originate? As far as we have researched, the first time a gay man reached a Circuit Court pleading discrimination as to his *race,* his case was transformed, *sua sponte,* into something non-actionable; nevertheless, it seemed as if he had colorable case of disparate treatment. *Williamson v. A.G. Edwards & Sons, Inc*., 876 F. 2d 69 (8th Cir. 1989) (comparing black and white comparators, no matter their sexual orientation). Call it "the legal inference that dare not speak its name." *Williamson* snowballed. Courts reached the conclusion that *Williamson* decided *sua sponte* (the reflexivity derided in Divergent Paths), often making dubious analogies to avoid LGB protection – and it started with one court's analysis of a gay man's claim that he didn't plead. In *Simonton, Williamson* was grouped with *De Cintio v. Westchester Cty. Med. Ctr.*, 807 F.2d 304 (2d Cir. 1986), a nepotism case based in heterosexual romance. *De Cintio* is easily distinguishable: "Nepotism of itself does not violate Title VII. To come within the [law], nepotism must somehow be

related to . . . discrimination based . . . [a] protected class." *Sogluizzo v. Int'l Bhd. of Teamsters*, 514 F. Supp. 277, 278-79 (S.D.N.Y. 1981) (Weinfeld, J).

As *De Cintio* (and other cases) were patched together to create *Simonton*, *Dawson* struck down any ambiguity for gays under Title VII. If *Back,* from 2004, holds that sex discrimination should not be interpreted with undue formalism, *Dawson* might have resolved the question differently; instead, it cemented the notion, arguably in *dictum,* that "a gender stereotyping claim should not be used to 'bootstrap protection for sexual orientation into Title VII.'" 398 F.3d at 218. If this were the sole lesson of *Simonton*, then *Dawson* overlooked *Back*'s caution against "undue formalism."

Chief Judge Katzmann, with Judge Margo Brodie, invoked *Back* in *Christiansen*, 852 F.3d at 205. (Tellingly, Judge Katzmann did not join Part II of *Simonton*.) Read a certain way, though, *Simonton* Part II dovetails with the Department of Justice's unexpected, nostalgic interpretation of "sex." But, though the language of the text speaks for itself, the oppositions' interpretations are retrograde, "undue formalisms"[5] that ignore Title VII's overarching purpose and, more importantly, how judicial interpretations hold sex discrimination may be proven.

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[5] "Because of . . . sex" under Title VII is easily interpreted to include sexual orientation, as *Hively II* held. The phrase "sexual harassment" is absent from the statute, see Lambda br. at 14, but it was initially rejected, even though "coverage of sexual harassment has been hornbook law for . . . decades." *Id.*

Furthermore, insofar as the DOJ and other amici mention "religious beliefs" and "family values" that is discrimination in itself. This is a secular nation that allows free exercise of religion, but for the government to invoke it so carelessly violates the Establishment Clause. (The Supreme Court will work out the religious tension in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission,* (U.S. Sup. Ct. No. 16-111), *cert. granted* June 26, 2017.) Insofar as "familial roles" are at stake, that feeds into our position that enforcing these traditions is the real reason for the opprobrium invited upon gay men and lesbians, as Professor Law explained in "Homosexuality and the Social Meaning of Gender," 1988 Wisc. L. Rev. 187: discrimination against sexual minorities has been a pretext for enforcing the traditional family unit and the subjugation of women.

The DOJ suggests "moral beliefs" are also at hand. Br. at 20. "Morality" is undefined but, in this context, our government unashamedly implies that being gay is immoral. Most Americans think not, but for a secular government to argue so nakedly in an appellate brief crosses the line into bigotry.[6] We hope the Court explicitly rejects AG Sessions' narrow moral vision, especially coming from a public official. The time has arrived to allow Zarda's interpretation(s) to take hold, to overrule *Simonton* and

[6] The Attorney General opines against this case, but perhaps his world differs than those who don't consider LGBT marriage, nor gay orientation, remotely "immoral." *See* Pew Forum, http://www.pewforum.org/fact-sheet/changing-attitudes-on-gay-marriage/. The DOJ exercises discretion whether to enforce discrimination laws against local governments, and this Court interprets laws irrespective of his sensibilities. *Marbury v. Madison*, 5 U.S. 137, 167 (1803).

simply recognize the obvious truth that same-sex attraction is associational discrimination and the ultimate sex-stereotype: it is as immutable as heterosexuality, or as any person's physical, affectional or romantic attraction (or lack thereof) to another person. Justice Edwin Cameron of the South African High Court spoke for every young gay man growing up in a world hostile to his humanity: struggling with shame for his "immorality" and pretending to be what he was not. Justices: A Personal Account, 19.

Undefined "morality" is not a reason to deny any appeal,[7] nor are religious beliefs as to what constitutes family.[8] In supporting these dubious contentions, the DOJ relies on overruled cases,[9] an abrogated disposition,[10] *Williamson* (the race

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[7] Are AG Sessions' views on "sex," influenced by his view of the "morality" of being LGB? We won't opine, merely report these historical facts: As Alabama Attorney General, he thrice fought LGB students' attempts to assemble and discuss their rights and HIV prevention. *Gay Lesbian Bisexual Alliance v. Sessions*, 930 F. Supp. 1492, 1498 (M.D. Ala. 1996) (injunction enforced); *Id.*, 917 F. Supp. 1558, 1560-61 (M.D. Ala. 1996) (fees to plaintiffs exceeding $81,500); *Chandler v. James*, 998 F. Supp. 1255, 1261 (M.D. Ala. 1997) (Sessions "was particularly concerned about [meetings concerning] 'safe sex' and" STD's).

[8] A belief that the law must align with religion was the basis for denying the Loving's of *Loving v. Virginia* the right to marry in their home state: "Almighty God created the races white, black, yellow, Malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix." 388 U.S. 1, 3 (1967) (quoting Virginia court).

[9] *Ulane v. Eastern Airlines,* 742 F.2d 1081 (7th Cir. 1984); *Hamm v. Weyauwega Milk*, 332 F.3d 1058 (7th Cir. 2003), both overruled by *Hively II*.

[10] *DeSantis v. Pacific Tel.,* 608 F.2d 327 (9th Cir. 1979), noted as abrogated in *Nichols v. Azteca Rest. Enters.*, 256 F.3d 864, 875 (9th Cir. 2001).

discrimination case involving gay men), a statutory rape case,[11] cases not on point or no longer followed, and an almost forgotten 1979 decision that pre-dated *Price Waterhouse*: *Blum v. Gulf Oil Corp*., 597 F.2d 936 (5th Cir. 1979). But law and life have changed since 1979 and 1964. Let us emerge from what *Hively II,* characterized as a "hodge-podge of cases," 853 F.3d at 342. quickly and decisively.

Blum is what the Eleventh Circuit majority resurrected from its predecessor circuit in *Evans v. Georgia Reg'l Hosp*., 850 F.3d 1248 (11th Cir. 2017), *reh'g denied* (July 6, 2017). But, oddly, the Eleventh Circuit years ago decided that transgender plaintiffs state a sex-stereotyping cause of action. *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011). Transgender discrimination is now considered a well-settled question under Title VII and 42 U.S.C. §1983, yet LGB discrimination is not – at least not yet. Why? Perhaps history scholars will tell us, but these cases are inconsistent with cases that gerrymander the LGB out of a sex-stereotyping theory of discrimination that applies and would find discriminates against them because of sex. What do our opponents say about this contradiction? Nothing. Perhaps they didn't notice, but a static view of Title VII with a comparison to wage laws and a definition of "clothes," an abstruse academic analysis and "give me some of that ol' time religion just cannot suffice in distinguishing these cases."[12]

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[11] *M. v. Superior Court*, 450 U.S. 464 (1981).

[12] This is why we omit "T" after "LGB." The "T" deserve protections, however, and after *Oncale,* federal courts interpreting statutes proscribing sex

Blum, the olden basis for *Evans* exhumed from the grave, was decided well before *Price Waterhouse*, as noted by Judge Rosenbaum in dissent, who pointed out the intellectual inconsistency between Judge William Pryor's joining *Glenn,* yet refusing to extend the same analysis to *Evans*. 850 F.3d at 1256. This Court should not do with *Simonton* what the Eleventh Circuit did with *Blum. Simonton* has indeed influenced other Circuits – most recently in *Evans* – but many other courts – including, quietly, the Third Circuit – have moved further towards plaintiff in allowing even a "guy's guy" attracted to men access to Title VII. Despite *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 262-63 (3d Cir. 2001), several courts of that Circuit have taken a 180-degree turn. *Bibby* affirmed the dismissal of a complaint

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discrimination found protection for transgender individuals, even if other cases in support of lesbians, gay men, or bisexuals failed. *See Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1039 (7th Cir. 2017); *Smith v. Salem; Schwan, Rosa v. Park West Bank & Trust*, 214 F.3d 213 (1st Cir. 2000); *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011); *Schwan v. Hartford*, 204 F.3d 1187 (9th Cir. 2000); *Evan Cho v. Pine-Richland Sch. Dist.*, 2017 U.S. Dist. LEXIS 26767 (WD. Pa. Feb. 27, 2017); *Valentine Ge v. Dun & Bradstreet, Inc.*, 2017 U.S. Dist. LEXIS 9497 (M.D. Fla. Jan. 24, 2017); *Fabian v. Hosp. of Cent. Conn.*, 172 F. Supp. 3d 509 (D. Conn. 2016) (noted in *Hively II*); *Roberts v. Clark City SC. Dist.,*, 215 F. Supp. 3d 1001, 1014 (D. Nev. 2016); *E.E.O.C. v. R.G. & G.R. Harris Funeral Homes, Inc.*, 100 F. Supp. 3d 594 (E.D. Mich. 2015); *Finkle v. Howard Cty., Md.*, 12 F. Supp. 3d 780 (D. Md. 2014); *Lopez v. River Oaks Imaging & Diagnostic Grp., Inc.*, 542 F. Supp. 2d 653 (S.D. Tex. 2008); *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008).

These cases involving transgender men and women, courts did what we ask for here with no "undue formalism" – deciding whether a transgender person fits under a category in the statute, as interpreted, and, if so, should the court entertain the claim?" The answer to the question was uniformly "yes." So should it should be here: May the court not parse the alleged strictness of definitions in a statute that should be interpreted "broadly."

by a gay man, but held, as *Simonton* might have, that "a plaintiff may be able to prove that same-sex harassment [is] discrimination because of sex by presenting evidence that the harasser's conduct was motivated by a belief that the victim did not conform to the stereotypes of his or her gender." *Id.* But the plaintiff in *Bibby* – as in *Simonton* – did not plead his claim properly: he merely argued sexual orientation was a protected class under Title VII *vel non.* We agree it is not, but it may be actionable if pled, argued and proved properly as "sex discrimination" as a sex stereotype (or an associational bias). *See also Burnett v. Union R.R. Co.,* 2017 U.S. Dist. LEXIS 97825 (W.D. Pa. June 26, 2017), which allowed a sex-stereotyping claim to proceed where the plaintiff "was subjected to ongoing and pervasive harassment by co-workers and supervisors referring to him as 'fag,' 'butthole Burnett,' . . . 'hot anus,' and 'hot butt fagot' [sic] and being asked whether he 'was taking it up the ass . . . lately.'" *Id*. at *11. There was no allegation that, in addition to this harassment, he possessed a "woman's touch." Indeed, it was unclear if he were even gay, and the decision did not even focus on that issue. *Id.* at **2-3. *Accord, EEOC v. Scott*, 217 F. Supp. 3d 834, 839-40 (W.D. Pa. 2016) ("The Supreme Court has consistently applied a broad interpretation of the 'because of sex' language in Title VII [which by extension] prohibits discrimination on the basis of sexual orientation. . . . *The Court sees no meaningful difference between sexual orientation discrimination and discrimination 'because of sex*.'") (Emphasis added.)

Thus, the question is whether a person is perceived and discriminated against on the basis of sex stereotypes, not whether that person is or is not LGB, even though the perception and knowledge dovetail since same-sex attraction is the ultimate sex stereotype whether it is suspected or held in the open. Any distinction is a gerrymander originating from a race discrimination case, a distinction without a difference, disparate treatment and a denial of Equal Protection. We cannot live in a country where getting legally married can legally get one fired. Indeed, recent district court decisions get it right: a new generation of judicial thought and contemporary habits is changing the legal landscape. *See, e.g., Thompson v. Chi Health Good Samaritan Hosp*. 2016 U.S. Dist. LEXIS 132331, at *5 (D. Neb. Sep. 27, 2016) (plaintiff proceeds in a sex-stereotyping and associational discrimination theory of discrimination because he "is a male who does not conform to sexual stereotypes . . . [and] was subjected to discriminatory and stereotypical language and treated poorly after appearing at a social event with a male rather than a female.") In *Spellman v. Ohio DOT*, 2017 U.S. Dist. LEXIS 41636 (S.D. Ohio, Mar. 22, 2017), the court allowed the case to go to trial, holding that statements and conduct of plaintiff's co-workers "were harassment 'because of . . . sex' [in that] they concerned [Spellman's] sexual orientation *or* gender non-conforming behavior." *Id.* at *24-25.[13] *See also*

[13] *Spelman* declined to follow *Vickers v. Fairfield Med. Ctr*., 453 F.3d 757 (6th Cir. 2006), and instead invoked the EEOC's persuasive, perhaps decisive decision in *Baldwin v. Foxx*, 2015 EEOPUB LEXIS 1905 (July 15, 2015). *Vickers* had refused

Terveer v. Billington, 34 F. Supp. 3d 100, 116 (D.D.C. 2014) (where plaintiff's sexual orientation was inconsistent with the defendant's perception of acceptable gender roles, plaintiff states a claim of sex discrimination); *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212, 1222 (D. Or. 2002) ("[n]othing in Title VII suggests that Congress intended to confine the benefits of that statute to heterosexual employees alone"); *Videckis v. Pepperdine Univ*., 150 F. Supp. 3d 1151, 1159 (C.D. Cal. 2015) ("the line between sex discrimination and sexual orientation discrimination . . . "does not exist, save as a lingering and faulty judicial construct.")

This "faulty judicial construct" and "the simple test," *City of Los Angeles, Dep't of Water & Power v. Manhart,* 435 U.S. 702, 711 (1978), simply do not jive.

V. Speculation about Non-Passage of Legislation Is Arbitrary and Injudicious.

Legislative non-action can be used to support nearly any position. William Eskridge, "Interpreting Legislative Inaction," 87 Michigan Law Review 67 (1988). How can that help any Court? Justice Scalia, never considered a cheerleader for the "homosexual agenda," *Lawrence,* 539 U.S. at 602, rejected this construction as well: "The Constitution gives legal effect to the 'Laws' Congress enacts . . . not the objectives members aimed to achieve in voting for them." *Graham Cty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 302 (2010).

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a similar Title VII claim to proceed. 453 F.3d at 764. Contrary to DOJ's assertion, the Supreme Court has held that the EEOC is entitled to deference to interpret its own regulations, *Fed. Express v. Holowecki*, 522 U.S. 775 (1998).

The DOJ's response: Unsophisticated contradiction that doesn't carry a response. The Employment Non-Discrimination Act (or other incarnations) have not passed so many Congresses, so that disproves their theory, they argue. But where is DOJ's answer to *Pension Ben. Guar. Corp. v. LTV Corp*., 496 U.S. 633 (1990)? *LTV* plainly derides the negative legislative history method of statutory interpretation, but is undistinguished. Given *LTV,* it is reasonable to infer – and not impossible to disprove – that a majority of those who don't vote for particular legislation took that position because they believed it was covered by other legislation, as *LTV* specifically holds? 496 U.S. at 650. Given that legislative inaction can be used to support any proposition, the DOJ asks this Court to engage in results-oriented jurisprudence. But the modern weight of authority has spoken, somewhat loudly. A couple of cases like *Evans* and *Uddoh* grasp for one last stab at the (hopefully) moribund *Simonton*, but even defense counsel admits that case is gasping its final breaths. As the majority aptly noted in *Hively I,* "Society cannot "continue to condone a legal structure in which employees can be fired, harassed, demeaned, singled out for undesirable tasks, paid lower wages, demoted, passed over for promotions, and otherwise discriminated against solely based on who they date, love, or marry." 830 F.3d at 718.

DOJ also cites *Lorillard v. Pons*, 434 U.S. 575 (1978), for the proposition that "Congress is presumed to be aware of. . . [a] judicial interpretation of a statute and to adopt that interpretation when it re-enacts that statute without change." *Id.* at 580. Its

argument is that sexual orientation didn't get added to Title VII when the Civil Rights Act was amended, so therefore Congress was aware of previous judicial interpretations of that statute. Br. at 8-9. We suggest this is simplistic reasoning but will agree, and the argument feeds perfectly into our line of reasoning: *Price Waterhouse* had been decided just two years prior to the amendment, and sex stereotyping was born of that decision. Congress was aware of that interpretation and thus the inference that sexual orientation discrimination could be combatted by a sex-stereotyping theory allows the perfectly sensible inference as to why Congress did not reference sexual orientation in the amended statute in 1991: It was already there under "sex."[14]

VI. Defendants Have Waived their Opposition

A. No Argument Appears in Defendants' En Banc Brief.

The parties were to brief a particular question. SPA.1-2. Defendants failed in this, other than to concede that *Simonton* is "undeniably outmoded." Def's Br. at 18. We appreciate their intellectual evolution, but it is not enough for defendants to reference its panel brief, as it does. *Id*. at 15-16. Appellate rules require that litigants

[14] The DOJ cites hairstyle and bathroom cases, but these comparisons are fallacious. While, for example, *Tavora v. New York Mercantile*, 101 F.3d 907 (2d Cir. 1996), held that *Manhart*'s "simple test" will not extend to matters that the court deems "trivial," *id.* at 908, this limited exception cannot excuse sexual orientation discrimination, as this and the Supreme Court's decisions in *Windsor* and *Obergefell*, grounded in the Constitution, foreclose the inference that sexual orientation is a "trivial" matter.

lay out arguments in their briefs. *Ernst Haas Studio, Inc. v. Palm Press, Inc.,* 164 F.3d 110, 112 (2d Cir. 1999) (citing Fed. R. App. P. 28.) These requirements are mandatory, so the defense is in default. *Ernst Haas Studio.*

Defendants also refer to arguments raised before the panel, but this tactic is improper. *See Brown v. Mortg. Elec. Registration Sys.,* 738 F.3d 926, 934 n.8 (8th Cir. 2013) (We do not address [the] arguments [raised below], however, because [appellant] failed to meaningfully argue them in her opening brief.") *Accord United States v. Patterson*, 713 F.3d 1237, 1250 (10th Cir. 2013) ("adopt[ing] district court filings would . . . effective[ly]. . . circumvent[] the page limitations on briefs . . . and . . . complicate the task of an appellate judge.'").

B. Plaintiff Did Not Waive his Sex Discrimination Claim

Defendants argue that Zarda seeks an "advisory opinion" because he did not raise his "putative sexual orientation discrimination claim arising under Title VII" until his motion for reconsideration in the district court. Def's Br. at 19. We did suggest the judge allow the jury to give an advisory verdict, but this Court doesn't give advisory opinions, especially in the rare *en banc.* So defendants are plainly wrong. Zarda did not allege in his EEOC charge that he suffered "sexual orientation" discrimination, *id*. at 20-24, but "sex discrimination" based on sex stereotyping. The Amended Complaint does the same. *Id*. at 28-29. In his EEOC charge, Zarda checked the box for "sex," SA.2, and there is no box for sexual orientation. Our argument on

this rehearing is that sexual orientation is an aspect of sex discrimination. Any omissions in the charge were logical, as in 2010 the EEOC had not yet found sexual orientation violated Title VII. *Baldwin. See Fowlkes v. Ironworkers Local 40*, 790 F.3d 378, 386 (2d Cir. 2015) (extending equitable tolling because transgender discrimination charge would have been futile at an earlier time).

In his EEOC narrative, Zarda claimed he suffered gender discrimination because he was treated differently because of his sexual orientation and because he did not conform to sex stereotypes. SA.3. He wrote, "My claim is because I did not conform my appearance and behavior to sex stereotypes, I suffered adverse employment action, and was discriminated against, at least in part because of my sex." *Id*. at ¶ 2. He went on, "it was known at work that I am gay and . . . open about it. My boss, however . . . was hostile to any expression of my sexual orientation that did not conform to sex stereotypes," from whence he cites specific examples. *Id*. at ¶¶ 3, 5. Moreover, Maynard "tolerated men discussing women and their physical attributes." *Id*. at ¶ 6. "Men often talked of their sexual exploits, and [Maynard] openly discussed his marriage. My mentioning . . . that I was gay to a passenger, however, got me fired." *Id*.

That narrative is consistent with Plaintiff's position throughout this case: sexual orientation discrimination is sex discrimination, in part, because sexual orientation discrimination relies on the stereotypes that Title VII prohibits. Zarda placed the

EEOC, Defendants and the courts on notice that he was pursuing this claim, and years later, almost immediately after *Baldwin v. Foxx*, was handed down, 2015 EEOPUB LEXIS 1905 (July 15, 2015), he moved to reopen Title VII – a motion the lower court denied, given *Simonton*. Zarda need not have filed another amended complaint, as to do so would have been futile. SPA. 64-66.

Moreover, before the district court and three-judge panel, Defendants never argued waiver. Defendants have thus waived any waiver. *Medforms, Inc. v. Healthcare Mgmt. Sols., Inc.*, 290 F.3d 98, 109 (2d Cir. 2002).

VII. The Constitutional Question Cannot Be Ignored.

While DOJ speaks of "morality" – principles distinguishing between good and bad – Mortara laments with hyperbolic drama that to grant this appeal would be the death of liberty. Br. at 21. The most recent Oxford English Dictionary defines "liberty" as "the state of being free [in] society from oppressive restrictions imposed by authority on one's way of life, behavior, or political views[.]" That seems a fair summary of the word, which our nation has embodied into a Constitution, that includes Equal Protection. The LGB got that liberty years ago, yet may lose employment because of it if sex stereotyping is placed in a narrow box limited to race hatred, and only outlying cases easily proven. What "liberty" does Mortara suggest is breached? The tyranny of judicial interpretation of simplistic terms in the context of

accepted theories of discrimination? If so, Lady Liberty's scales don't seem to tip in favor of his interpretation.

Mortara wants the Court to reject *Hively II* insofar as the majority played "Scrabble" with *Price Waterhouse.* Judge Sykes' interpretation of *Price Waterhouse* and Judge William Pryor's personal views in the distinction between gay status and conduct will hopefully never hold sway, not even in their respective Circuits.[15] But speaking of word games, Mortara likes them too. He continually referred to "Zarda" as "she." Don was a "he." The Estate is an "it," and the executors, combined, are

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[15] *Evans v. Ga. Reg'l Hosp.*, 850 F.3d 1248, 1258-61 (11th Cir. 2017).

Amicus Christiansen with Professor Anthony Kreiss take issue with *Pryor* who argues that the "doctrine of gender nonconformity is, and always has been, behavior based," and therefore sexual orientation discrimination claims do not necessarily qualify as nonconformity because LGB persons do not inherently violate gender norms. *Id.* at 1258. "Deviation from a particular gender stereotype may correlate disproportionately with a particular sexual orientation, and plaintiffs who allege discrimination on the basis of gender nonconformity will often also have experienced discrimination because of sexual orientation." *Id.* "Some gay individuals adopt what various commentators have referred to as the gay "social identity" but experience a variety of sexual desires." *Id.*

Kreiss argues that the "status-conduct dichotomy belies the actual lives of the LGB and this logic . . . "tip toe[s] around the question." Br. at 11.

We agree to a point, but also thank the Judge for not using "homosexual." We ask, nevertheless, is this analysis not stereotyping in itself? Judge Pryor admits to a "disproportionate correlation" of gays non-conforming to sex stereotypes; Zarda fell within this statistical pool. What about one who covers his sexuality – perhaps because of "immorality" – and thereby disallows his behavior to be sex non-conforming? Judge Pryor's rule is thus swallowed by the exception. If such a circumstance presented in court, the plaintiff would lose, but should the pinky ring raise the pinky? We don't suggest every case will succeed, <u>but people who cover and avoid gay "social identity" for fear of discrimination is precisely the reason we seek relief</u>.

"they." Only Melissa Zarda is a "she." But Mortara had to poke at the pronouns to underscore that Don is dead, underscoring that the real plaintiff is not alive, despite our attempt to tell the story of a man who was denied his livelihood because he did not conform to what a man is expected to be.

If *Hively II* played Scrabble with *Price Waterhouse*, it was terrificly played. Its holding may not apply in *every* situation, but to establish a statutory apartheid, segregating the LGB from theories of discrimination available to the majority is the exact opposite of liberty. While the Seventh Circuit might have played Scrabble, Mortara wants the Court to play Risk, suggesting diplomacy by citing simple dictionary definitions found in statutes inapplicable, yet attempting to win the game by conflict and conquest: using his armies to occupy every space in his writing until the players can't see what has happened is merely a criticism of discrimination lawsuits in and of themselves, except for the most obvious: Wall off the inferences that can be made from existing jurisprudence, ignore *Back,* clothe yourself in the dubious logic of *Williamson*, the outdated holding in *Evans*, Mortara and AG Sessions suggest: The gays will continue to be excluded from what Title VII protects, but they can marry – <u>at least for now</u>. We urge every member of this Honorable Panel not to Risk engaging in this game.

CONCLUSION

The opposition presents this Court with an interpretation of Title VII that is precisely the opposite of liberty among which is the guarantee of Equal Protection. As such, the Court should remand to the dispute to the district court.

Dated: New York, New York
August 9, 2017

/s/
GREGORY ANTOLLINO
Attorney for Plaintiff-Appellant

Dated: New Paltz, New York
August 9, 2017

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CERTIFICATION UNDER FRAP 32(a)(7)(C)

Gregory Antollino, an attorney admitted to this Circuit and attorney for plaintiff, hereby certifies pursuant to Federal Rule of Procedure 32(a)(7)(C) that this brief contains 7997 words from Preliminary Statement to Conclusion as computed by the word processing program (Microsoft Word) used to prepare the reply brief, and the Court, Katzmann, J., granted us leave to file an oversized brief not to exceed 8000 words on August 8, 2017. The font is Times New Roman, a proportional font, at 14 point. The brief was scanned for viruses using AntiVirus Thor.

Dated: New York, New York
August 9, 2017

/s/
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