No. 16-748

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ANONYMOUS,

Plaintiff,

MATTHEW CHRISTIANSEN,

Plaintiff-Appellant,

v.

OMNICOM GROUP, INCORPORATED; DDB WORLDWIDE COMMUNICATIONS GROUP, INCORPORATED; JOE CIANCIOTTO; PETER HEMPEL; AND CHRIS BROWN,

Defendants-Appellees.

On Appeal from the U.S. District Court for the Southern District of New York
Hon. Katherine Polk Failla, Judge

BRIEF OF *AMICUS* LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC. IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

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

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INTERESTS OF *AMICUS CURIAE*[1]

Amicus curiae Lambda Legal is the nation's largest and oldest nonprofit legal organization committed to achieving full recognition of the civil rights of lesbian, gay, bisexual, and transgender ("LGBT") people and people living with HIV through impact litigation, education, and policy advocacy. Lambda Legal has served as counsel of record or *amicus curiae* in some of the most important cases regarding the rights of LGBT people and people living with HIV. *See, e.g.*, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *United States v. Windsor*, 133 S. Ct. 2675 (2013); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Bragdon v. Abbott*, 524 U.S. 624 (1998); *Romer v. Evans*, 517 U.S. 620 (1996). Lambda Legal also has striven to ensure employment fairness for LGBT people by serving as counsel of record or *amicus curiae* in litigation addressing the application of federal law to discrimination against LGBT individuals. *See, e.g.*, *Zarda v. Altitude Express, Inc.*, No. 15-3775 (2d Cir.) (*amicus*); *Hively v. Ivy Tech Cmty. Coll.*, No. 15-1720 (7th Cir.) (counsel); *Evans v. Georgia Reg'l Hosp.*, No. 15-15234 (11th Cir.) (counsel); *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011) (counsel); *Hall v. BNSF Ry. Co.*, No. C13-2160, 2014 WL 4719007 (W.D. Wash. Sept. 22, 2014) (*amicus*); *TerVeer v. Billington*, 34 F. Supp. 3d 100 (D.D.C. 2014) (*amicus*); *Lopez*

[1] Pursuant to Federal Rule Appellate Procedure 29(c)(5) and Local Rule 29.1, counsel for *Amicus* state that no counsel for a party authored this brief in whole or in part, and that no person other than *Amicus*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

v. River Oaks Imaging & Diagnostic Grp., 542 F. Supp. 2d 653 (S.D. Tex. 2008) (counsel).

All parties have consented to the filing of this brief. Fed. R. App. P. 29(a).

ARGUMENT SUMMARY

This case presents the question of whether the sex discrimination prohibition contained in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*., encompasses discrimination on the basis of sexual orientation. *Amicus* is hopeful that the arguments of Appellant and other *amici curiae* will convince the Court that the answer is yes. The purpose of this brief is to explain why the carefully-reasoned decision of the Equal Employment Opportunity Commission ("EEOC") in *Baldwin v. Foxx*, Appeal No. 0120133080, 2015 WL 4397641 (E.E.O.C. July 16, 2015), has simplified the Court's task. Because the EEOC's interpretation of the scope of Title VII's ban on sex discrimination is reasonable and was rendered in a federal sector adjudication pursuant to a specific Congressional grant of authority, deference to *Baldwin* is mandatory, as is the overruling of *Simonton v. Runyon*, 232 F.3d 33 (2d Cir. 2000), and its progeny.[2]

[2] In an *amicus curiae* brief submitted in another appeal pending before this Court, *Amicus* set forth additional reasons why a three-judge panel of this Court can and should reject *Simonton*'s holding on the application of Title VII to sexual orientation discrimination. *See* Mot. for Leave to File Brief as *Amicus Curiae*, in Support of Plaintiffs-Appellants and Reversal, of Lambda Legal Defense & Education Fund, Inc., *Zarda v. Altitude Express, Inc.*, No. 15-3775 (2d Cir., filed Mar. 18, 2016).

This brief contains three sections, one of which addresses the "two questions" prescribed by *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984): has Congress "directly addressed the precise question at issue," and if not, is "the agency's answer . . . based on a permissible construction of the statute?" *Id.* at 843. The EEOC's ruling in *Baldwin* that sexual orientation discrimination is necessarily sex discrimination under Title VII readily passes *Chevron*'s twofold inquiry. It is plain that Congress has not "directly addressed the precise question at issue" and, because the EEOC's resolution of the question is eminently reasonable, it is "a permissible construction of the statute."

The other sections address two key issues that have emerged since *Chevron*, eligibility for *Chevron* deference consideration, and the effect, when *Chevron* deference if afforded, on contrary law. An EEOC adjudication of a federal sector Title VII charge, like *Baldwin*, is eligible for *Chevron* deference consideration because Congress gave the EEOC both adjudicatory and rulemaking powers in federal sector cases with respect to the full array of issues that might arise, including the meaning of the statute's substantive discrimination prohibitions. As *Baldwin* is a carefully-considered decision that explicitly is intended to bind all executive agencies, and does so under the governing statute, it is due *Chevron* deference.

Supreme Court precedent mandates that the effect of such deference is generally to overrule contrary lower court rulings. *See Nat'l Cable & Telecomms. Assn. v. Brand X Internet Servs.*, 545 U.S. 967 (2005) ("*Brand X*"). Therefore, this Court must follow *Baldwin*, and not *Simonton*.

ARGUMENT

I. *BALDWIN* SATISFIES "*CHEVRON* STEP ZERO."

Before even asking whether the statute in question is ambiguous and whether the agency's interpretation thereof is reasonable, a court must satisfy itself that the interpretation was made in a context, and via a method, entitled to *Chevron* deference in the first place, an inquiry referred to as "*Chevron* Step Zero." *See* Cass R. Sunstein, Chevron *Step Zero*, 92 Va L. Rev. 187, 191 (2006). The interpretation of sex discrimination in *Baldwin* passes this threshold, because Congress granted adjudicative authority to the EEOC in federal sector cases, and the decision was issued pursuant to that authority and is a carefully-reasoned ruling with the force of law.

Just recently, the Supreme Court observed that there is not a "single case in which a general conferral of rulemaking or adjudicative authority has been held insufficient to support *Chevron* deference for an exercise of that authority within the agency's substantive field." *City of Arlington v. F.C.C.*, 133 S. Ct. 1863, 1874 (2013). This standard, taken literally, would resolve the *Chevron* Step Zero

inquiry favorably for *Baldwin*. *Baldwin* is an exercise of the adjudicative authority Congress gave the EEOC in its substantive field of federal employment discrimination. While Congress did not give the EEOC either adjudicative or substantive rulemaking authority in ***private*** sector decisions, it gave both powers to the Commission in ***federal*** sector cases. The first part of 42 U.S.C. § 2000e-16 ("2000e-16") provides that "[a]ll personnel actions . . . shall be made free from any discrimination based on . . . sex[.]" The next subsection provides that "the [EEOC] shall have authority to enforce the provisions of subsection (a) . . . and shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section."[3] This type of language repeatedly has been held to be a sufficient delegation of interpretive power to warrant *Chevron* deference. *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 165 (2007) (sufficient delegation found in statute authorizing the Secretary of Labor "to prescribe necessary rules, regulations, and orders with regard to the amendments made by this Act"); *see also Am. Hosp. Ass'n v. N.L.R.B.*, 499 U.S. 606, 609-10 (1991) (grant of "'authority from time to time to make, amend, and rescind . . . such rules and regulations as may be necessary to

[3] That this provision authorizes adjudications is fundamental: the basic definition of an "order" is the culmination of an "adjudication." 5 U.S.C. § 551(7) ("'adjudication' means agency process for the formulation of an order.").

carry out the provisions" of the Act "was unquestionably sufficient to authorize the rule at issue . . ."); *Kruse v. Wells Fargo Home Mortg., Inc.*, 383 F.3d 49, 59 (2d Cir. 2004) (finding requisite delegation in "authoriz[ation] to prescribe such rules and regulations, [and] to make such interpretations . . . as may be necessary to achieve the purposes of" the statute.).[4]

A. *Baldwin* Satisfies The Delegation And "Force Of Law" Inquiries Under Step Zero.

In two major cases decided in 2001 and 2002, the Supreme Court helped define what agency interpretations are eligible for *Chevron* deference consideration. *See United States v. Mead Corp.*, 533 U.S. 218 (2001); and *Barnhart v. Walton*, 535 U.S. 212 (2002). Under *Mead*, *Barnhart*, and this Court's subsequent precedents, *Chevron* deference is appropriate where (1) there is a general delegation from Congress, and (2) the agency either engages in formal rulemaking or a formal adjudication, or acts with the force of law in a manner that "reflected sufficient agency consideration and application of expertise to merit

[4] It is of no moment that the EEOC, in *Baldwin* and elsewhere, has chosen case adjudications rather than rulemaking to render Title VII interpretations. *See I.N.S. v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999) (acting as authorized, agency received *Chevron* deference because "it gives ambiguous statutory terms 'concrete meaning through a process of case-by-case adjudication.'" (citation omitted)); *N.L.R.B. v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974) (when an agency is given both powers, the "choice between rulemaking and adjudication lies . . . within the Board's discretion.").

Chevron deference." *Cohen v. JP Morgan Chase & Co.*, 498 F.3d 111, 124 n.9 (2d Cir. 2007) (citing *Kruse*, 383 F.3d at 58–61).

Baldwin easily meets both of these criteria. First, there has been a general delegation from Congress, as required for *Chevron* deference to attach. *See* Part I, *supra*, at 5. Second, it is clear that, in *Baldwin*, the agency acted with the force of law. The "force of law" standard is satisfied when the agency acts broadly with an intent to bind parties other than those to the decision—sometimes called a "'lawmaking pretense in mind,'" *De La Mota v. U.S. Dep't of Educ.*, 412 F.3d 71, 79 (2d Cir. 2005) (quoting *Mead*, 533 U.S. at 233)—and such assumption of power has a basis in the Congressional delegation. *See also Schneider v. Feinberg*, 345 F.3d 135, 143 (2d Cir. 2003).

Baldwin, on its face, applies to all federal executive agencies:

> Agencies should treat claims of sexual orientation discrimination as complaints of sex discrimination under Title VII and process such complaints through the ordinary Section 1614 process. . . . Agencies may maintain, and employees may still utilize, [separate] procedures if they wish. . . . Agencies should make applicants and employees aware that claims of sexual orientation discrimination will ordinarily be processed under Section 1614 as claims of sex discrimination unless the employee requests that the alternative complaint process be used.[5]

[5] *See also* Press Release, EEOC, *EEOC Files First Suits Challenging Sexual Orientation Discrimination as Sex Discrimination* (Mar. 1, 2016), *available at* http://1.usa.gov/28TqEZE ("On July 15, 2015, EEOC, in a federal sector decision, determined that sexual orientation discrimination is, by its very nature,

2015 WL 4397641at *10. The EEOC's intent in *Baldwin* to bind all executive agencies is supported by the delegation given to it in 2000e-16(b): "The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions[.]"

This Court has held that the fact that the proceeding leading to the interpretation is not "formal" will not deprive it of *Chevron* deference if "the agency interpretation *is intended* to carry 'the force of law.'" *Schneider*, 345 F.3d at 142-43 (emphasis added). While a baseless assertion of binding authority would be problematic, courts do pay considerable attention to whether the agency purports to act in a binding way. *Schneider* afforded *Chevron* deference to tables promulgated without formal rule-making procedures because "[t]hey are *meant to* guide compensation" and because they "*exert* force of law over all claims." *Id.* at 143 (emphasis added); *see also Pesquera Mares Australes Ltda. v. United States*, 266 F.3d 1372, 1381 (Fed. Cir. 2001) ("Commerce *routinely considers* the legal interpretations announced in its prior . . . determinations *to be precedential*." (emphasis added)).

By contrast, the tariff letters in *Mead* failed the force-of-law inquiry principally because their precedential effect was so limited: The agency's letters were not binding at all on third parties, and they had only limited precedential

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discrimination because of sex. *See Baldwin v. Dep't of Transp.*, Appeal No. 0120133080 (July 15, 2015).").

effect with respect to the importers to whom they were issued. *Mead*, 533 U.S. at 232-33. Other agencies' actions have failed the force-of-law test for similar reasons. *See Fogo De Chao (Holdings) Inc. v. U.S. Dep't of Homeland Sec.*, 769 F.3d 1127, 1137 (D.C. Cir. 2014) ("the expressly non-precedential nature of the Appeals Office's decision conclusively confirms that the Department was not exercising through the Appeals Office any authority it had to make rules carrying the force of law."); *Martinez v. Holder*, 740 F.3d 902, 909-10 (4th Cir. 2014), *as revised* (Jan. 27, 2014) ("force of law" standard was not satisfied where agency interpretation "was issued by a single BIA member" and therefore did "not constitute a precedential opinion, as a precedential opinion may only be issued by a three-member panel"). An interpretive ruling does not satisfy the "force of law" standard where its "'binding character as a ruling stops short of third parties' and is 'conclusive only as between [the agency] itself and the [petitioner] to whom it was issued'" and the agency has "disclaimed any intent to set a rule of law." *Fogo de Chao*, 769 F.3d at 1137 (quoting *Mead*, 533 U.S. at 233); *see also Nathel v. C.I.R.*, 615 F.3d 83, 93 (2d Cir. 2010) (same for opinion on particular tax matters that "includes a disclaimer that it is 'not to be relied upon or otherwise cited as precedent by taxpayers'"); *The Wilderness Soc'y v. U.S. Fish & Wildlife Serv.*, 353 F.3d 1051, 1067 (9th Cir. 2003) (same where ruling arose "in a particular permitting context" and would not "have the force of law generally for others").

In short, *Mead*'s "force of law" inquiry is satisfied here, where the EEOC set out in *Baldwin* to declare, for all executive agencies, that sexual orientation discrimination is necessarily sex discrimination, and because its power to do so is supported by the Congressional delegation in 2000e-16.

B. Because *Baldwin* Is A Carefully-Considered Decision Within The EEOC's Expertise, It Is Eligible For *Chevron* Deference.

A year after *Mead*, the Supreme Court listed five additional factors for courts to consider in assessing whether an agency's action satisfies the *Chevron* Step Zero inquiry: "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time." *Barnhart*, 535 U.S. at 222. *Baldwin* fares well under the *Barnhart* factors. While the lack of complexity of Title VII militates slightly against deference, the other factors clearly militate in favor: the sexual orientation coverage question is interstitial; the agency possesses relevant expertise; the legal analysis is thorough and reflects careful consideration; and the interpretation is important to the administration of the statute, in that the EEOC is charged with processing almost every charge of discrimination under Title VII.

Notably, *Barnhart, Mead,* and subsequent Supreme Court cases support *Chevron* deference for *Baldwin* by rejecting reasons that some past courts have

invoked for not following EEOC interpretations. Both *E.E.O.C. v. Arabian Am. Oil Co.*, 499 U.S. 244, 256-257 (1991), and *General Electric Co. v. Gilbert*, 429 U.S. 125, 140-146 (1976), rejected EEOC interpretations of substantive Title VII law, relying in part on the absence of a delegation of rulemaking power to the EEOC in private sector cases. But *Barnhart* and *Mead* clarify that interpretations reached in proceedings other than formal rulemaking or formal adjudications can qualify for *Chevron* deference. *Barnhart*, 535 U.S. at 222 (citing *Mead*, 533 U.S. at 229-234). This Court cited both those precedents in affording *Chevron* deference to agency actions that were neither formal rulemaking nor formal adjudications. *Kruse*, 383 F.3d at 59 (HUD Policy Statement); *Schneider*, 345 F.3d at 143 (presumed award tables to administer the September 11th Victim Compensation Fund). It bears heavy emphasis that what makes *Baldwin* an "informal adjudication" under administrative law—the fact that it is not on the record with certain due process safeguards—has no bearing on whether the EEOC's interpretation is logical, well-reasoned, and deserving of deference. *See Izaak Walton League of Am. v. Marsh*, 655 F.2d 346, 361 n.37 (D.C. Cir. 1981) ("Informal adjudication is a residual category including all agency actions that are not rulemaking and that need not be conducted through 'on the record' hearings."); *see also Doe v. Leavitt*, 552 F.3d 75, 80 (1st Cir. 2009) (upholding interpretation under either *Chevron* or *Skidmore* deference; expressing view that *Chevron*

deference is not precluded by absence of "trial-like procedures characteristic of formal agency adjudications."); Sunstein, *supra*, at 227 (questioning whether agencies should be "encouraged to use more formal procedures" that are burdensome where it is unclear "how much, exactly, is gained by resorting to more formal processes"). Indeed, *Mead* itself recognizes that "we have sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded." 533 U.S. at 230. [6]

Arabian Oil and *Gilbert* also castigated the proffered EEOC interpretations as "neither contemporaneous with [the statute's] enactment nor consistent" over time. *Arabian Oil*, 499 U.S. at 257-58; *accord Gilbert*, 429 U.S. at 142. But since *Gilbert* and *Arabian Oil*, the Supreme Court repeatedly and unanimously has affirmed that *Chevron* deference is not lost because the proffered interpretation is recent or reflects a change in the agency's position. "'Neither antiquity nor contemporaneity with [a] statute is a condition of [an interpretation's] validity.'" *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 55 (2011) (quoting *Smiley v. Citibank (South Dakota), N. A.*, 517 U.S. 735, 740 (1996)). Indeed, an agency interpretation more recent in time, and thus by definition further

[6] It is plain that no such formality was required by Congress for EEOC federal sector adjudications. While Congress provided that EEOC issuance of procedural regulations must be in accord with APA requirements, *see* 2000e-12(a), no such requirement was attached to the issuance of "substantive rules, regulations, orders and instructions" authorized under 2000e-16.

removed in time from the passage of the statute, takes precedence over a contrary, earlier Court of Appeals interpretation, because agencies should not be dissuaded "from revising unwise judicial constructions of ambiguous statutes." *Ucelo-Gomez v. Gonzales*, 464 F.3d 163, 170 n.5 (2d Cir. 2006) (quoting *Brand X*, 545 U.S. at 983 (internal quotations omitted)).

In *Mayo*, a unanimous Supreme Court emphasized that it had "repeatedly held" that "agency inconsistency is not a basis for declining to analyze the agency's interpretation under the *Chevron* framework." 562 U.S. at 55 (alterations, citations and quotations omitted). *Mayo* echoed the Court's unanimous holding two years earlier that "a change in regulatory treatment . . . is not a basis for declining to analyze the agency's interpretation under the *Chevron* framework." *United States v. Eurodif, S.A.*, 555 U.S. 305, 316 (2009).[7] This is especially the case when a recent change in the agency's interpretation from its 1990's decisions to the contrary[8] is explained by an important change in the law, to wit, *Oncale v. Sundowner Offshore Services*' holding that Title VII covers all

[7] Inconsistency is "at most" an argument against the reasonableness of the agency's decision. *Eurodif*, 550 U.S. at 316 n.7.

[8] See *Baldwin*, 2015 WL 4397641, at n.13 (citing *Morrison v. Dep't of the Navy*, Appeal No. 01930778, 1994 WL 746296, at *3 (EEOC June 16, 1994), and *Johnson v. U.S. Postal Serv.*, Appeal No. 01911827, 1991 WL 1189760, at *3 (EEOC Dec. 19, 1991)). Both the *Johnson* and *Morrison* decisions rely on *DeSantis v. Pac. Tel. & Tel. Co.*, 608 F.2d 327 (9th Cir. 1979), which ruled that protection for lesbians and gay men was beyond the Congressional intent in passing Title VII "to place women on an equal footing with men." *Id*. at 329.

adverse employment actions and hostile work environments that occur "because of . . . sex" irrespective of whether Congress in 1964 set out to cover such situations. *See* 523 U.S. 75, 80 (1998).

C. Full Commission Federal Sector Decisions Have The Hallmarks Of Agency Actions Afforded *Chevron* Deference.

While *Baldwin* was the first decision of the full Commission to hold that sexual orientation discrimination is sex discrimination under Title VII, lesbian, gay, and bisexual federal employees had been prevailing for years before *Baldwin* in decisions by the EEOC's Office of Federal Operations ("OFO"). *See Baldwin*, 2015 WL 4397641, at *7 n.9 (citing over a half-dozen such OFO decisions since 2011); *see generally* 29 C.F.R. § 1614.405 (delegating to OFO the authority to adjudicate decisions "on behalf of the Commission").[9] OFO decisions provide an important contrast to full Commission decisions like *Baldwin*.[10] For example, of the EEOC's "thousands of decisions in 2012, the vast majority of which were issued by" the OFO. Chai Feldblum, *Law, Policies in Practice and Social Norms: Coverage of Transgender Discrimination Under Sex Discrimination Law*, 14 J. L. Society 1, 2 (2013). "The Office of Federal Operations decides what cases should

[9] This Court has denied *Chevron* deference when the agency to whom Congress delegated interpretive authority in turn had delegated such authority to lower-level persons within the agency. *See Ucelo-Gomez*, 464 F.3d at 168 (citation omitted).

[10] This brief takes no position on the deference due OFO decisions, as that question need not be resolved in order for the Court to recognize the deference due the full Commission decision in *Baldwin*.

receive extra review and be voted on by the [full] Commission, based on the issues in question. In 2012, the Commission reviewed and voted on only 13 cases[.]" *Id.* Thus, full Commission decisions do not implicate the concern in *Mead* that sheer volume and decentralized decision-making undermine a claim that a decision has the force of law. *See Mead*, 533 U.S. at 233 ("Any suggestion that rulings intended to have the force of law are being churned out at a rate of 10,000 a year at an agency's 46 scattered offices is simply self-refuting.").

While it would be imprudent to automatically equate quantity with quality, there is a pronounced disparity in the depth of analysis in *Baldwin* compared to the early OFO decisions upholding a Title VII claim based on sexual orientation discrimination. *See, e.g.*, *Veretto v. Postmaster General*, Appeal No. 0120110873, 2011 WL 2663401 (EEOC July 1, 2011). *Veretto* cited two court decisions that concerned sex discrimination based on Title VII. *Baldwin*, by contrast, cited at least 16 favorable decisions regarding Title VII sex discrimination interpretations and at least another half dozen cases favorably interpreting sex discrimination under analogous provisions of federal law. *Veretto* clearly bespoke of a binding nature on the Postmaster General, but there was no mention of its effect on any other agency. While logically persuasive in its own right, *Veretto* did not address contrary authority or arguments, and *Veretto* did not announce a rule (as *Baldwin* did) that all sexual orientation discrimination was necessarily sex discrimination

under Title VII. *Baldwin*, unlike *Veretto*, reflects on its face a "lawmaking pretense," *De La Mota*, 412 F.3d at 79, and this Court has shown respect for agencies' own classifications as to whether its interpretations should be deemed precedential. *Ucelo-Gomez*, 464 F.3d at 170 ("When we remand because the BIA has not yet spoken with sufficient clarity, it will often be up to the BIA to decide whether to issue a precedential or non-precedential opinion.").

Thus, *Baldwin* satisfies the affirmative criteria set forth in *Mead* and *Barnhart* (and certainly *City of Arlington*). *Baldwin* is a carefully considered decision issued with the force of law, and rendered pursuant to a specific Congressional grant of power to the EEOC to issue orders in federal sector adjudications.

D. Past Decisions Denying *Chevron* Deference To The EEOC's Actions Are Not Relevant.

To be sure, while there are cases denying *Chevron* deference to some EEOC interpretations of Title VII, there is almost no authority on the key question of the deference due federal sector adjudications, which are rendered pursuant to an explicit grant of Congressional authority. Where Congress has delegated interpretive power to the EEOC, such as with the ADEA and the ADA, courts have afforded *Chevron* deference to EEOC interpretations. *See, e.g.*, *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 79 (2002) (ADA); *E.E.O.C. v. Seafarers Int'l Union*, 394 F.3d 197, 202 (4th Cir. 2005) (ADEA). Thus, the deference question

turns not on the identity of the agency, but instead on what delegation Congress made under the statutory scheme in question, and what mechanism the agency used in arriving at the interpretation.[11] It is also a misunderstanding of the *Chevron* principle to say categorically "the EEOC is entitled only to *Skidmore* deference." *See, e.g.*, *El v. Se. Pa. Transp. Auth.*, 479 F.3d 232, 244 (3d Cir. 2007); *see* Jeremy Greenberg, *Not a "Second Class" Agency: Applying Chevron Step Zero to EEOC Interpretations of the ADA and ADAAA*, 24 Geo. Mason U. Civ. Rts. L.J. 297, 303 (2014) ("The Supreme Court's pronouncements on deference to agency interpretations have turned on the language of the statutes at issue and not on specific agencies.").

Amicus is aware of only one Supreme Court case in which *Chevron* deference was sought for EEOC Title VII federal sector adjudications and, while it does not expressly address the *Chevron* Step Zero inquiry, it does militate in favor of deference here. In a footnote in *Ledbetter v. Goodyear Tire & Rubber Co*., 550 U.S. 618 (2007), *superseded by statute*, Pub. L. No. 111-2, 123 Stat. 5 (2009), the Court denied *Chevron* deference to the EEOC's interpretations of when a claim for sex discrimination arises. The Court quickly rejected, based on clear precedent,

[11] Although this Court has held certain EEOC interpretations to receive "so-called *Skidmore* deference—i.e., "deference to the extent it has the power to persuade," *Vill. of Freeport v. Barrella*, 814 F.3d 594, 607 n.47 (2d Cir. 2016), *Amicus* is aware of no decision of this court addressing the deference due to an EEOC interpretation reached in a federal sector adjudication.

the notion that interpretations in compliance manuals qualified. *Id*. at 642 n.11. But as to the federal sector adjudications, the Court skipped the Step Zero inquiry and relied on Steps 1 and 2 to deny deference: the lack of ambiguity in the statute and the EEOC's basic mistake in misreading Supreme Court precedent. *See Ledbetter*, 550 U.S. at 642 n.11 ("Nor do we see reasonable ambiguity in the statute itself[.]"); *id*. ("The EEOC's views in question are based on its misreading of *Bazemore*.").

In short, because *Baldwin* is not only an exercise of the EEOC's "authority within [its] substantive field" pursuant to a Congressional "conferral of [] adjudicative authority," *City of Arlington*, 133 S. Ct. at 1874, but also a carefully-reasoned decision that reasonably purports to have—and does have—the force of law, it easily passes *Chevron* Step Zero.

II. THE *BALDWIN* DECISION IS NOT ONLY REASONABLE BUT PERSUASIVE.

Baldwin easily passes *Chevron* Steps One and Two, because Congress did not directly address the precise question of Title VII's coverage of sexual orientation discrimination, and because *Baldwin* is an eminently reasonable interpretation of Title VII's sex discrimination provision.

A. Congress Did Not Directly Address The Precise Question Of Title VII's Coverage Of Sexual Orientation Discrimination.

In banning discrimination on the basis of sex, Congress did not directly address whether that prohibition extended to discrimination on the basis of sexual orientation. Some early, now-discredited ways of interpreting sex discrimination would have undermined the approach in *Baldwin*. For instance, the Fifth Circuit rejected the notion of "sex-plus discrimination" in holding that "Ida Phillips was not refused employment because she was a woman nor because she had pre-school age children. It is the coalescence of these two elements" that cost her the job, and that was not sex discrimination in the court's eyes. *Phillips v. Martin Marietta Corp.*, 411 F.2d 1, 4 (5th Cir. 1969), *rev'd*, 400 U.S. 542 (1971). Similarly *Baldwin* would be undercut if employees had to prove not only that their gender was a cause of mistreatment, but also that recognition of their particular claim is "consistent with the underlying concerns of Congress." *See Goluszek v. Smith*, 697 F. Supp. 1452, 1456 (N.D. Ill. 1988) (plaintiff "easily" adduced evidence of harassment "because of his sex," but the court rejected this "wooden application of" the statutory words). But the Supreme Court has rejected both of those paradigms, holding that the relevant question in a Title VII sex discrimination case is "the simple test of whether the evidence shows 'treatment of a person in a manner which but for that person's sex would be different.'" *City of Los Angeles Dep't of Water & Power v. Manhart*, 435

U.S. 702, 711 (1978); *see also Oncale*, 523 U.S. at 78-80 (holding that a claim is viable if there was discrimination because of sex, irrespective of whether Congress specifically intended that result).

Baldwin carefully follows this and other Supreme Court guidance on the proper scope of sex discrimination law under Title VII. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (employers cannot "evaluate employees by assuming or insisting that they match[] the stereotype associated with their" gender). Thus, the agency's interpretation is arguably the only permissible reading of the statute, under governing precedent. At a minimum, it is clear that the statute does not unambiguously foreclose the agency's reading of the statute's ban of discrimination on the basis of sex.[12] Thus, under either approach to determining whether *Chevron* deference applies, deference is appropriate.

B. *Baldwin* Is An Eminently Reasonable Interpretation Of Title VII's Sex Discrimination Provision.

Baldwin easily passes *Chevron* Step Two, because it is an eminently reasonable interpretation of Title VII's sex discrimination prohibition, grounded in Supreme Court precedent.

[12] Part of *Simonton*'s error lay in its accurate, but irrelevant, holding that "sex" in Title VII does not mean "sexual affiliations." 232 F.3d at 36 (citing *DeCintio v. Westchester Cty. Med. Ctr.*, 807 F.2d 304 (2d Cir. 1986)). Thus, on its face, *Simonton* fails to appreciate the legal underpinnings of *Baldwin*, which is not that "sex" in Title VII protects same-sex activity per se, but that discrimination against a man, but not women, because of an attraction to men is sex discrimination.

Baldwin properly refocused the coverage inquiry as turning on whether the discrimination can be deemed to be on the basis of sex under Supreme Court precedent, even though in common parlance it would be called sexual orientation discrimination. 2015 WL 4397641 at *4. *Baldwin* acknowledged that, because "sexual orientation" is not mentioned in Title VII, there is no reason for courts to concern themselves with whether the discrimination can be characterized on that basis.[13] *Id.* It correctly explained, however, that the question should be whether a man is discriminated against for a reason (attraction to men) that is not held against woman, or for violating a gender norm—that men should be attracted only to women. Id. at **5-8.

This Court in *Simonton*, and others, have exalted the fact that Congress has not passed ***explicit*** sexual orientation protections as a reason not to interpret the statute according to Supreme Court precedent commanding that courts entertain all Title VII claims that "meet[] the statutory requirements." *Oncale*, 523 U.S. at 80. *Baldwin* explains the perils of relying on congressional goals generally and especially in light of *Oncale*, and even points out the EEOC's own erroneous pre-*Oncale* decisions relying on cases that interpreted Title VII to cover only the

[13] The absence of "sexual orientation" from Title VII carries no significance, because the concept of sexual orientation discrimination was not present in the law at that time. If in 1964 there had been other statutes proscribing discrimination based on "sex" and "sexual orientation," the failure to mention "sexual orientation" in Title VII might be significant, but since there were no such laws, it is not. *See Smiley*, 517 U.S. at 746.

conduct that the 1964 Congress sought to proscribe. *See Baldwin*, 2015 WL 4397641 at n.13.

Baldwin reflects fidelity to Supreme Court precedent broadly interpreting Title VII's sex discrimination provision. *Baldwin*'s disagreement with this Court and other circuits is unremarkable, in that such independent assessment is what *Chevron* and its progeny command, as there is a sharp division between how agencies should treat Supreme Court precedent, as compared to precedent from lower courts. The Supreme Court has refused to defer to an agency interpretation that ran counter to its own interpretation of a substantially similar law, *see United States v. Home Concrete & Supply, LLC*, 132 S. Ct. 1836, 1843 (2012) ("[Our decision in] *Colony* has already interpreted the statute, and there is no longer any different construction that is consistent with *Colony* and available for adoption by the agency."). By contrast, the Court in *Nat'l Fed'n of Fed. Emp., Local 1309 v. Dep't of Interior*, 526 U.S. 86 (1999), considered an agency ruling that was based not on the agency's independent assessment of the statute's meaning, but instead "was occasioned by the D.C. Circuit's holding that the Statute must be read to impose on agencies a duty to bargain midterm." *Id*. at 100. The Court remanded to the agency to make its own, independent assessment of the statute's meaning, unconstrained by the logic of the D.C. Circuit's decision. *Id*. at 100-01.

Baldwin rendered a permissible interpretation of sex-based discrimination as including sexual orientation discrimination by faithfully applying the sex-plus and sexual stereotyping principles in Supreme Court decisions and by also properly analogizing to discrimination based on interracial relationships recognized by this Court and every other to consider the question.[14]

III. UNDER *BRAND X*, *BALDWIN* IS CONTROLLING PRECEDENT, IRRESPECTIVE OF CONTRARY CIRCUIT PRECEDENT.

Brand X generally mandates the overruling of a case that is at odds with an agency interpretation receiving *Chevron* deference. Thus, *Brand X* compels an overruling of *Simonton* here, as both *Baldwin* and *Simonton* arose under the federal sector discrimination provision in 2000e-16.

A. Pursuant To *Brand X*, *Simonton* Is Overruled By *Baldwin*.

Brand X provides that a prior ruling of a lower federal court will take precedence over a contrary agency decision receiving *Chevron* deference ***only*** if the judicial ruling was based on the unambiguous language of the statute. 545 U.S. at 982; *see also Mhany Mgmt., Inc. v. Cty. of Nassau*, 819 F.3d 581, 618-19 (2d Cir. 2016) (applying *Brand X* to adopt more recent agency interpretation rather than two prior Second Circuit interpretations where "we did not hold that the statute was unambiguous"). Instead, in immediate response to "Simonton

[14] *See Baldwin*, 2015 WL 4397641, at **6-7 (citing, *inter alia*, *Holcomb v. Iona Coll.*, 521 F.3d 130, 138 (2d Cir. 2008), and *Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 892 (11th Cir. 1986)).

argu[ing] that discrimination based on 'sex' includes discrimination based on sexual orientation," the *Simonton* court did not rely on the statute's unambiguous language but instead noted that "[a]dmittedly, we have 'little legislative history to guide us in interpreting the Act's prohibition against discrimination based on "sex."'" *Simonton*, 232 F.3d at 35 (citation omitted). Then, the Circuit cited "Congress's rejection, on numerous occasions, of bills that would have extended Title VII's protection to people based on their sexual preferences." *Id*. There is no discussion of what discrimination "because of . . . sex" means, let alone why it would unambiguously exclude antigay discrimination. Thus, the "unambiguous language of the statute" exception to *Brand X* does not apply, and *Brand X* requires that this Court follow *Baldwin* and overrule any case, like *Simonton*, to the contrary.

B. In the Context of Discrimination Against a Gay Man, There is No Difference in the Scope of 2000e-2 and 2000e-16.

For the reasons set forth above, this Court must accept the EEOC's determination that sexual orientation discrimination is necessarily discrimination "based on . . . sex" under the federal sector 2000e-16 provision; it then should assess whether any difference in the private sector provision, 42 U.S.C. § 2000e-2 ("2000e-2") (discrimination "because of . . . sex) permits a different result. Of course, no differential treatment can be justified, as reflected by this Court's reliance on *Simonton* in its *dicta* about Title VII's reach in the private sector case.

See Dawson v. Bumble & Bumble, 398 F.3d 211 (2d Cir. 2005).[15] Such equating of the two standards is correct: courts universally find the two discrimination bans to be substantively identical in scope. *Bundy v. Jackson*, 641 F.2d 934, 942 (D.C. Cir. 1981) ("Despite the difference in language . . . , we have held that Title VII places the same restrictions on federal . . . agencies as it does on private employers, and so we may construe the latter provision in terms of the former.") (citation omitted); *Page v. Bolger*, 645 F.2d 227, 233 (4th Cir. 1981) (*en banc*) (discussing section 2000e–16 and "comparable provisions of Title VII, most notably § 703(a)(1), 42 U.S.C. § 2000e–2(a)(1)"); *Jordan v. Clark*, 847 F.2d 1368, 1373 n. 3 (9th Cir.1988) (noting that the difference in language between § 2000e-2(a)(1) and § 2000e-16(a) is "immaterial"); *Thomas v. Miami Veterans Med. Center*, 290 F. Appx. 317, 319 (11th Cir. 2008); *Mosley v. United States*, 425 F. Supp. 50, 55 (N.D. Cal. 1977) ("The similarity in language and purpose of the two sections is manifest; it is unlikely that Congress intended any distinction in the ability of private and federal employees to establish the facts necessary to eradicate prohibited discrimination.").

[15] Any suggestion in *Dawson* that sexual orientation discrimination is not sex stereotyping discrimination, or not covered by Title VII, is *dicta* that does not bind this Court, because it was not relevant to the holding that *Dawson* failed to establish sexual orientation discrimination period, as reflected by the affirmance of summary judgment on her claims under state and local laws explicitly prohibiting sexual orientation discrimination. *See* 398 F.3d at 213, 224-25.

This Court will best apply Title VII's proscription of considering sex by deferring to *Baldwin* as the federal sector answer to the coverage question and asking whether there is any substantive difference in Congress's definitions of discrimination in the two statutes.[16] Under this approach, there is no merit to an argument that the court is deferring to an agency in an area where Congress intended no deference. And this is especially the case, given that the facial disparity between the EEOC's interpretive powers under 2000e-2 and 2000e-16 probably was not understood by Congress as such, when it added federal sector protections and gave the EEOC rulemaking and adjudicatory authority with respect to such claims. Prior to 1972, the EEOC had engaged in substantive Title VII rulemaking in the private sector concerning whether "employment tests [must] be job related." *Griggs v. Duke Power Co*., 401 U.S. 424, 436 (1971). The *Griggs*

[16] Any court assessing *Baldwin* should follow this approach, irrespective of whether its precedent on sexual orientation discrimination arose under 2000e-16 or 2000e-2. It is not uncommon for some of a court's interpretative inquiry to be answered by an agency definitively under *Chevron* because of what the agency did not do, or because the agency lacked the congressional delegation to resolve an issue definitively. *See generally Fed. Exp. Corp. v. Holowecki*, 552 U.S. 389 (2008). For example, two recent cases expressed agreement with the NLRB's interpretations of the NLRA it reached in a 2012 adjudication, but did not defer to the NLRB's conclusions about the interplay with the Federal Arbitration Act. *Lewis v. Epic Sys. Corp*., No. 15-2997, 2016 WL 3029464 (7th Cir. May 26, 2016); *D.R. Horton, Inc. v. N.L.R.B.*, 737 F.3d 344, 357 (5th Cir. 2013); Note, *Deference and the Federal Arbitration Act: The NLRB's Determination of Substantive Statutory Rights*, 128 Harv. L. Rev. 907, 928 (2015).

Court warmly embraced the EEOC's substantive interpretation of Title VII.[17] *See id.* at 433-34 ("The [EEOC], having enforcement responsibility, has issued guidelines interpreting s 703(h) . . . [that are] entitled to great deference.").[18] With this backdrop, the failure to amend 2000e-2 to state explicitly that the EEOC had interpretive authority in private sector cases is unremarkable. In short, "[t]he decision in *Griggs* may have convinced Congress [in 1972] that the Court viewed the EEOC as already having such authority." Rebecca Hanner White, *The EEOC, the Courts, and Employment Discrimination Policy: Recognizing the Agency's Leading Role in Statutory Interpretation*, 1995 Utah L. Rev. 51, 66 (1995). At most, it could be said that the statutory delegations reflect an acquiescence that courts and the EEOC ***might*** interpret substantive nondiscrimination protections differently – but not an encouragement of that result where it does not make sense.

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[17] It is difficult to overstate the importance of *Griggs* at the time of the 1972 legislation. In *Riley v. Bendix Corp.*, 330 F. Supp. 583 (M.D. Fla. 1971), *rev'd*, 464 F.2d 1113 (5th Cir. 1972), the District Court ignored *Griggs* completely and issued a 1971 ruling rejecting the validity of the EEOC "reasonable accommodation" interpretation as a legitimate exercise of its authority. 330 F. Supp. at 588. The Fifth Circuit reversed a year later, relying solely on *Griggs*' endorsement of EEOC rulemaking: "The appellee attacks the validity of the guidelines here invoked on behalf of Riley, but . . . the Supreme Court, in *Griggs*, *supra*, spoke with approval of such guidelines." 464 F.2d at 1116.

[18] And *Griggs* was far from the only case before 1972 that had deferred to EEOC interpretations of substantive Title VII law. *See, e.g.*, *Rosen v. Public Serv. Elec. & Gas Co.*, 328 F. Supp. 454, 462 (D. N.J. 1971), *remanded on other grounds*, 477 F.2d 90, 96 (3d Cir. 1973); *Hicks v. Crown Zellerbach Corp.*, 319 F. Supp. 314, 319 (E.D. La. 1970); *Int'l Chem. Workers Union v. Planters Mfg. Co.*, 259 F. Supp. 365, 366-67 (N.D. Miss. 1966).

Thus, there is no justification for this Court not to discharge its obligation under *Brand X* to overrule *Simonton*, and subsequent caselaw that relied on *Simonton*.

CONCLUSION

The judgment of the district court should be reversed.

Dated this 28th day of June, 2016.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

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