15-3775

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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

Plaintiffs-Appellants,

v.

ALTITUDE EXPRESS, INC., doing business as SKYDIVE LONG ISLAND;
and RAY MAYNARD,

Defendants-Appellees.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

CHAD A. READLER
TOM WHEELER
Acting Assistant Attorneys General
HASHIM M. MOOPPAN
Deputy Assistant Attorney General
CHARLES W. SCARBOROUGH
STEPHANIE R. MARCUS
Attorneys
U.S. Department of Justice
950 Pennsylvania Avenue N.W.
Washington, D.C. 20530
(202) 514-1633

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Cases: **Page(s)**

Statutes:

Regulations:

Rule:

Legislative Materials:

INTRODUCTION AND INTEREST OF THE UNITED STATES

The United States files this amicus brief pursuant to 28 U.S.C. 517 and Federal Rule of Appellate Procedure 29(a). This case presents the question whether, under Title VII of the Civil Rights Act of 1964, the statute's prohibitions on employment discrimination because of sex include discrimination because of sexual orientation.

The United States, through the Attorney General, enforces Title VII against state or local government employers, 42 U.S.C. 2000e-5(f)(1), and the United States is also subject to Title VII in its capacity as the Nation's largest employer. 42 U.S.C. 2000e-16. The United States thus has a substantial and unique interest in the proper interpretation of Title VII. Although the Equal Employment Opportunity Commission (EEOC) enforces Title VII against private employers, 42 U.S.C. 2000e-5(f)(1), and it has filed an amicus brief in support of the employee here, the EEOC is not speaking for the United States and its position about the scope of Title VII is entitled to no deference beyond its power to persuade. *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 257-58 (1991).

The United States submits that the en banc Court should reaffirm its settled precedent holding, consistent with the longstanding position of the Department of Justice, that Title VII does not reach discrimination based on sexual orientation. Unlike the recent, contrary decision in *Hively v. Ivy Tech Community College*, 853 F.3d 339 (7th Cir. 2017) (en banc), this Court's well-established position correctly reflects the plain meaning of the statute, the overwhelming weight and reasoning of the case law,

and the clear congressional ratification of that interpretation. The question presented is not whether, as a matter of policy, sexual orientation discrimination should be prohibited by statute, regulations, or employer action. In fact, Congress and the Executive Branch have prohibited such discrimination in various contexts. *See, e.g.*, 18 U.S.C. 249(a)(2) (hate crimes); 42 U.S.C. 13925(b)(13)(A) (certain federal funding programs); Exec. Order 13,672 (July 21, 2014) (government contracting); Exec. Order 13,087 (May 29, 1998) (federal employment); 5 C.F.R. 300.103(c) (non-performance-related treatment under the Civil Service Reform Act, 5 U.S.C. 2302(b)(10)). The sole question here is whether, as a matter of law, Title VII reaches sexual orientation discrimination. It does not, as has been settled for decades. Any efforts to amend Title VII's scope should be directed to Congress rather than the courts.

STATUTORY BACKGROUND

Title VII of the Civil Rights Act of 1964 prohibits private employers from discriminating against an individual "because of," among other protected traits, "such individual's * * * sex." 42 U.S.C. 2000e-2(a). In 1972, Congress extended that prohibition to state and local government employers, *see* 42 U.S.C. 2000e(b), and it also enacted a similar prohibition on discrimination against federal government employees "based on * * * sex," 42 U.S.C. 2000e-16(a). Congress did not define the term "sex" when it enacted these antidiscrimination provisions. Indeed, "sex" was added as a protected trait in a floor amendment "at the last minute" before the House passed the 1964 bill. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 63-64 (1986).

In 1978, Congress amended Title VII's definition of "sex." Two years earlier, the Supreme Court had held that Title VII's prohibition on discrimination because of sex did not cover an employer's exclusion of pregnancy from coverage under a disability-benefits plan. *General Elec. Co. v. Gilbert*, 429 U.S. 125, 135-40 (1976). Congress abrogated that holding in the Pregnancy Discrimination Act by specifying that Title VII's prohibition on "sex" discrimination would be deemed to "include" discrimination "because of or on the basis of pregnancy, childbirth, or related medical conditions." 42 U.S.C. 2000e(k). Congress did not, however, otherwise delineate the scope of the term "sex."

In 1991, Congress further amended Title VII. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991). As detailed below, by that time, several courts of appeals had held that Title VII does not prohibit sexual orientation discrimination, and no court of appeals had held otherwise. Against the backdrop of that precedent, Congress neither added sexual orientation as a protected trait nor defined discrimination on the basis of sex to include sexual orientation discrimination—notwithstanding that Congress amended the provisions concerning sex discrimination in other respects and overruled numerous other judicial precedents with which it disagreed. In fact, every Congress from 1974 to the present has declined to enact proposed legislation that would prohibit discrimination in employment based on sexual orientation. *See* Addendum A.

ARGUMENT

I. TITLE VII'S BAR AGAINST DISCRIMINATION BECAUSE OF SEX IS NOT VIOLATED UNLESS MEN AND WOMEN ARE TREATED UNEQUALLY

The term "sex" is not defined in Title VII, but, as Judge Sykes observed in *Hively* without dispute from the majority, "[i]n common, ordinary usage in 1964—and now, for that matter—the word 'sex' means biologically *male* or *female*." 853 F.3d at 362 (dissenting op.) (citing dictionaries). As for the term "discrimination," the Supreme Court has held that Title VII requires a showing that an employer has treated "similarly situated employees" of different sexes unequally. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 258-59 (1981).

Under the paradigmatic Title VII "disparate treatment" claim, "[t]he central focus of the inquiry" is whether the employer has treated "some people less favorably than others because of their * * * sex." *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 569, 577 (1978). The requisite showing is thus that "an employer intentionally treated a complainant *less favorably* than employees with the complainant's qualifications but outside the complainant's protected class." *Young v. United Parcel Serv.*, 135 S. Ct. 1338, 1345 (2015) (emphasis added and quotation marks omitted).

Likewise, a Title VII "sexual harassment" claim may be brought, for either opposite-sex or same-sex harassment, if and only if the harassment constitutes "*discriminat[ion]* * * * because of * * * sex." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998) (quoting 42 U.S.C. 2000e-2(a)(1)). Harassment is thus not

"automatically discrimination because of sex merely because the words used have sexual content or connotations." *Id.* Instead, "[t]he critical issue, Title VII's text indicates, is whether members of one sex are exposed to *disadvantageous terms or conditions* of employment to which members of the other sex are not exposed." *Id.* (emphasis added).

So too for a claim of "sex stereotyping" under Title VII. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (plurality op.). Although an employer cannot "evaluate employees by assuming or insisting that they match[ ] the stereotype associated with their group," "[t]he plaintiff must show that the employer actually relied on her [or his] gender in making its decision." *Id.* For example, "an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender," because that particular sort of "sex-based consideration[ ]" of gender stereotypes results in "*disparate treatment* of men and women." *Id.* at 242, 250-51 (emphasis added); *see also id.* at 251 ("An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not.").

By contrast, Title VII does not proscribe employment practices that take account of the sex of employees but do not impose differential burdens on similarly situated members of each sex. For example, employers necessarily consider the sex of their employees when maintaining and enforcing sex-specific bathrooms, but that

alone does not constitute per se discriminatory treatment. Such practices do not categorically violate Title VII because they do not *discriminate* between members of one sex and "similarly situated" members of the opposite sex. *See Michael M. v. Superior Ct.*, 450 U.S. 464, 469 (1981) (plurality op.).

II. DISCRIMINATION BECAUSE OF SEXUAL ORIENTATION IS NOT DISCRIMINATION BECAUSE OF SEX UNDER TITLE VII

As the Courts of Appeals and the EEOC had long interpreted Title VII until recently, when Congress prohibited sex discrimination, it did not also prohibit sexual orientation discrimination. And Congress has clearly ratified that interpretation of Title VII, in repeated and varied ways.

A. Until Recently, The Courts Of Appeals And The EEOC Had Uniformly Held That Sexual Orientation Discrimination Is Not Prohibited Sex Discrimination Under Title VII

As the courts have long held, discrimination based on sexual orientation does not fall within Title VII's prohibition on sex discrimination because it does not involve "disparate treatment of men and women." *See Price Waterhouse*, 490 U.S. at 251. Rather than causing similarly situated "members of one sex [to be] exposed to disadvantageous terms or conditions of employment [or employment actions] to which members of the other sex are not exposed," *see Oncale*, 523 U.S. at 80, it causes differential treatment of gay and straight employees for men and women alike.

Accordingly, this Court has repeatedly held that "Title VII does not proscribe discrimination because of sexual orientation" "[b]ecause the term 'sex' in Title VII refers only to membership in a class delineated by gender." *Simonton v. Runyon*, 232 F.3d 33, 36 (2d Cir. 2000); *accord Dawson v. Bumble & Bumble*, 398 F.3d 211, 217 (2d Cir. 2005). In *Simonton*, this Court rejected the plaintiff's argument that *Oncale* supports applying Title VII to sexual orientation discrimination, emphasizing that *Oncale* instead had reaffirmed that "[t]he critical issue * * * 'is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.'" *Simonton*, 232 F.3d at 36 (quoting *Oncale*, 523 U.S. at 80). Similarly, in *Dawson*, this Court rejected the plaintiff's attempt to use a gender stereotyping claim under *Price Waterhouse* to "bootstrap protection for sexual orientation into Title VII," emphasizing that *Price Waterhouse* instead had reaffirmed that the essential element is "disparate treatment of men and women." *Dawson*, 398 F.3d at 218, 220-21 (quoting *Price Waterhouse*, 490 U.S. at 251).

Likewise, until the Seventh Circuit's en banc decision in *Hively* earlier this year, the ten other Courts of Appeals to have addressed the issue had uniformly joined this Court in holding that Title VII's prohibition on sex discrimination does not encompass sexual orientation discrimination. *See, e.g.*, *Evans v. Georgia Reg'l Hosp.*, 850 F.3d 1248, 1255 (11th Cir. 2017), *rehearing en banc denied* (July 6, 2017); *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 763 (6th Cir. 2006); *Medina v. Income Support Div.*, 413 F.3d 1131, 1135 (10th Cir. 2005); *Hamm v. Weyauwega Milk Prods., Inc.*, 332 F.3d

1058, 1063 (7th Cir. 2003), *overruled by Hively*, *supra*; *Bibby v. Philadelphia Coca Cola Bottling Co.*, 260 F.3d 257, 261 (3d Cir. 2001); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999); *Wrightson v. Pizza Hut*, 99 F.3d 138, 143 (4th Cir. 1996); *Williamson v. A.G. Edwards & Sons*, 876 F.2d 69, 70 (8th Cir. 1989); *DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327, 329-30 (9th Cir. 1979), *abrogated in part on other grounds*, *Nichols v. Azteca Restaurant Enterpr., Inc.*, 256 F.3d 864, 874-75 (9th Cir. 2001); *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979).

The EEOC also until recently had "consistently held that discrimination based on sexual orientation is not actionable under Title VII," including after the Supreme Court decided *Price Waterhouse* and *Oncale*. *Angle v. Veneman*, EEOC Doc. 01A32644, 2004 WL 764265, at *2 (April 5, 2004); *accord Marucci v. Caldera*, EEOC Doc. 01982644, 2000 WL 1637387, at *2-*3 (Oct. 27, 2000); *Dillon v. Frank*, EEOC Doc. 01900157, 1990 WL 1111074, at *3 (Feb. 14, 1990); *but see Baldwin v. Foxx*, EEOC Doc. 0120133080, 2015 WL 4397641 (July 15, 2015) (reversing course and holding that sexual orientation discrimination is per se sex discrimination).

B. Congress Has Repeatedly Ratified The Settled Understanding That Title VII Does Not Bar Sexual Orientation Discrimination

1. It is a well-established interpretive principle that "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Lorillard v. Pons*, 434 U.S. 575, 580 (1978); *see Faragher v. City of Boca Raton*, 524 U.S. 775, 792 (1998)

("[T]he force of precedent here is enhanced by Congress's amendment to the liability provisions of Title VII since the *Meritor* decision, without providing any modification of our holding.").

The Supreme Court recently applied this principle in *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 (2015). The Court there observed that, when Congress in 1988 amended the Fair Housing Act (FHA), 42 U.S.C. 3601 *et seq.*, it "was aware of th[e] unanimous precedent" of multiple Courts of Appeals holding that the FHA authorized disparate impact claims, and "with that understanding, [Congress] made a considered judgment to retain the relevant statutory text." *Id.* at 2519. The Court explained that, "[a]gainst this background understanding in the legal and regulatory system, Congress' decision in 1988 to amend the FHA while still adhering to the operative language * * * is convincing support for the conclusion that Congress accepted and ratified" that understanding: "[if] a word or phrase has been * * * given a uniform interpretation by inferior courts * * *, a later version of that act perpetuating the wording is presumed to carry forward that interpretation." *Id.* at 2520. Finally, the Court found further "confirmation of Congress' understanding" in "the substance of the 1988 amendments," which the Court believed "logical[ly] * * * presupposed" that disparate impact was available under the pre-1988 version of the FAA. *Id.*; *but see id.* at 2540-41 (Alito, J., dissenting) (describing the 1988 amendments instead as "a compromise among [three] factions").

2. When Congress enacted the Civil Rights Act of 1991, *supra*, it ratified the settled understanding that Title VII does not bar sexual orientation discrimination. Compared to *Inclusive Communities*, the argument for ratification here is at least as strong, if not stronger, for four reasons.

First, Congress undoubtedly "was aware of th[e] unanimous precedent" of multiple Courts of Appeals holding that Title VII does not prohibit sexual orientation discrimination. *Inclusive Communities*, 135 S. Ct. at 2519. Four Courts of Appeals had already so held by 1991, and this Court had strongly so suggested. *See Williamson*, 876 F.2d at 70; *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984); *DeSantis*, 608 F.2d at 329-30; *Blum*, 597 F.2d at 938; *see also DeCintio v. Westchester Cnty. Med. Ctr.*, 807 F.2d 304, 306-07 (2d Cir. 1986) (holding that sex discrimination barred by Title VII "must be a distinction based on a person's sex, not on his or her sexual affiliations"). Notably, although a few more Courts of Appeals than that had ruled at the time of the 1988 FHA amendments, *Inclusive Communities*, 135 S. Ct. at 2519 (nine overall), the interpretive question there nevertheless was far more contested, because President Reagan expressly disagreed with all those courts when he signed the amendments, *id.* at 2540-41 (Alito, J., dissenting). By contrast, when President Bush signed the 1991 Title VII amendments, there is no indication that he disagreed with the uniform view of the Courts of Appeals—and the EEOC, *see, e.g.*, *Dillon*, 1990 WL 1111074, at *3; *Tyler v. Marsh*, EEOC Doc. 05890720, 1989 WL 1007268, at *1 (Aug. 10, 1989)—that the statute does not reach sexual orientation discrimination.

Second, "[a]gainst this background understanding," Congress "amend[ed] [Title VII] while still adhering to the operative language." *Inclusive Communities*, 135 S. Ct. at 2520. Whereas Congress added new provisions that used the term "sex" in the course of setting forth methods and burdens of proof for sex discrimination claims, it neither included sexual orientation within the definition of sex nor added it as an independently protected trait. *See*, *e.g.*, Pub. L. No. 102-166, §§ 105-107, 105 Stat. 1071, 1074-75 (1991) (adding subsections (k)(1)(A), (l), and (m) to 42 U.S.C. 2000e-2).

Third, further "confirmation of Congress' understanding" exists in "the substance of the [1991] amendments." *Inclusive Communities*, 135 S. Ct. at 2520. Namely, those amendments left standing the judicial decisions that had rejected Title VII's application to sexual orientation discrimination while expressly abrogating several other Title VII decisions that Congress believed had "sharply cut back on the scope and effectiveness" of the statute. *Ricci v. DeStefano*, 557 U.S. 557, 624 (2009) (quoting H.R. Rep. No. 102-40, pt. 2, at 2 (1991)). For example, Congress modified the framework for disparate-impact claims in response to *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), *see* 42 U.S.C. 2000e-2(k), and for mixed-motive claims in response to *Price Waterhouse*, *see* 42 U.S.C. 2000e-2(m), 2000e-5(g)(2). Moreover, this prompt abrogation of narrow judicial readings of Title VII followed in the footsteps of Congress's abrogation of the 1976 *Gilbert* decision in the 1978 Pregnancy Discrimination Act. *Supra* at p. 3. In short, it is telling that Congress elected not to disturb the cases holding that Title VII does not bar sexual orientation discrimination,

because Congress "has not been shy in revising other judicial constructions" of Title VII that it has deemed unduly narrow. *See General Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 594 n.7 (2004).

Finally, the 1991 Congress also declined to enact proposed legislation that would have expressly amended Title VII to bar discrimination based on "sex, affectional or sexual orientation." 137 Cong. Rec. 6162. As its sponsors themselves recognized, the proposed legislation was necessary because sex discrimination is different from sexual orientation discrimination and there was an "absence of Federal laws" prohibiting the latter. 137 Cong. Rec. 5261, 6161 (statements of Sen. Cranston and Rep. Weiss). In fact, Congress had rejected multiple prior efforts to enact such laws. *See, e.g.*, *Ulane*, 742 F.2d at 1085 & n.11.

3. After the Civil Rights Act of 1991, Congress has continued to confirm that Title VII does not bar sexual orientation discrimination.

First, every subsequent Congress since 1991 (as well as every prior Congress going back to 1974) has declined to enact proposed legislation that would prohibit discrimination in employment based on sexual orientation. *See* Addendum A. And Congress did so even as the number of Courts of Appeals holding that Title VII does not reach such discrimination grew to a unanimous eleven. *Supra* at pp. 7-8. Such "congressional silence after years of judicial interpretation supports adherence to the traditional view." *Cline*, 540 U.S. at 594; *see also Simonton*, 232 F.3d at 35 ("Although congressional inaction subsequent to the enactment of a statute is not always a helpful

guide," the sheer number of unsuccessful attempts to amend the statute in the face of such a uniform body of law "is strong evidence of congressional intent.").

Second, Congress expressly prohibited sexual orientation discrimination in several other statutes that separately prohibit sex discrimination. *See, e.g.*, 18 U.S.C. 249(a)(2) (enhanced penalties for crimes motivated by "gender" or "sexual orientation"); 42 U.S.C. 13925(b)(13)(A) (no discrimination based on "sex" or "sexual orientation" under certain federally funded programs); *see also* 42 U.S.C. 3716(a)(1)(C) (federal aid to state or local investigations of crimes motivated by "gender" or "sexual orientation"). Moreover, in each of these statutes, Congress listed "sexual orientation" discrimination *in addition to* "sex" or "gender" discrimination, rather than deeming "sexual orientation" discrimination to be *"include[d]" within* "sex" discrimination, as it did for pregnancy discrimination. 42 U.S.C. 2000e(k) (emphasis added). This demonstrates both that Congress considers "sexual orientation" discrimination to be distinct from, rather than a subset of, "sex" or "gender" discrimination, and also that Congress knows how to cover "sexual orientation" discrimination separately from "sex" or "gender" discrimination when it so chooses.[1]

[1] Conversely, Congress expressly excluded "homosexuality" from disability discrimination statutes that were passed in 1973 and 1990. *See* 29 U.S.C. 705(20)(E); 42 U.S.C. 12211(a). Given that each of these statutes was passed within a year of amendments to Title VII's prohibitions on sex discrimination, *supra* at pp. 2-3, it is particularly implausible to interpret those prohibitions as including sexual orientation discrimination implicitly.

4. Accordingly, this is not a situation where "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils." *Oncale*, 523 U.S. at 79. When adopting Title VII's ban on sex discrimination in 1964, and especially when amending it in 1991, Congress was well aware of the distinct practice of sexual orientation discrimination and chose not to ban it also.

To be sure, there have since been notable changes in societal and cultural attitudes about such discrimination, but Congress has consistently declined to amend Title VII in light of those changes, despite having been repeatedly presented with opportunities to do so. And more fundamentally, even unforeseen circumstances do not present courts with a license to "rewrite a constitutionally valid statutory text under the banner of speculation about what Congress might have done" to implement a clear statute's policy objectives. *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017). Although such an "evolution * * * might invite reasonable disagreements on whether Congress should reenter the field and alter the judgments it made in the past," the Supreme Court has resoundingly reaffirmed that "the proper role of the judiciary [is] to apply, not amend, the work of the People's representatives." *Id.* at 1725-26.

III. THE THEORIES ADVANCED BY THE EEOC AND THE SEVENTH CIRCUIT LACK MERIT, LET ALONE SUFFICIENT MERIT TO OVERCOME CONGRESS'S RATIFICATION OF THE CONTRARY INTERPRETATION

The EEOC's amicus brief, which is based on its decision in *Baldwin*, presents three theories why sexual orientation discrimination is barred under Title VII: (1) it is necessarily sex discrimination as it would not occur "but for" the sex of the gay employee; (2) it is per se sex-stereotyping; and (3) it is gender-based associational discrimination. EEOC Br. at 4; *Baldwin*, 2015 WL 4397641 at *5-10. The Seventh Circuit majority in *Hively* largely adopted the EEOC's theories. 853 F.3d at 343-52. These theories are inconsistent with Congress's clear ratification of the overwhelming judicial consensus that Title VII does not prohibit sexual orientation discrimination. And even viewed solely on their own terms, none of these theories is persuasive.

A. "But For" The Employee's Sex

The EEOC and the Seventh Circuit majority contend that sexual orientation discrimination is necessarily sex discrimination because the employer allegedly flunks "'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.'" EEOC Br. at 6 (quoting *City of L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978)); *see Hively*, 853 F.3d at 345-46. For instance, they hypothesize a male employee who is discriminated against because he has a male partner, but who would not have been discriminated against if he were a woman with the same male partner, and they thus

conclude that such an employee would not have been discriminated against "but for" his sex. EEOC Br. at 6; *Hively*, 853 F.3d at 345. This analysis commits two fundamental errors in applying the "but for" test for sex discrimination.

First, as the Seventh Circuit dissent correctly observed, the but-for "comparison can't do its job of *ruling in* sex discrimination as the actual reason for the employer's decision * * * if we're not scrupulous about holding *everything* constant except the plaintiff's sex." *Hively*, 853 F.3d at 366 (Sykes, J., dissenting). The EEOC and the Seventh Circuit majority fail to hold everything else constant because their hypothetical changes both the employee's sex (from male to female) *and* his sexual orientation (from gay to straight). The proper comparison would be to change the employee's sex (from male to female) but to keep the sexual orientation constant (as gay). In that hypothetical, the employer satisfies *Manhart*'s "simple test," because the employee would be adversely affected *regardless of sex* (whether as a gay man or a gay woman).

Second, even if the EEOC and the Seventh Circuit majority were properly applying the "but for" test, that test does not establish "disparate treatment of men and women," *Price Waterhouse*, 490 U.S. at 251, where an employer addresses a circumstance that "the sexes are not similarly situated," *Michael M.*, 450 U.S. at 469. Again, a simplistic application of the "but for" test would mean that sex-specific bathrooms are always unlawful sex discrimination, because a man would never be prohibited from using the women's room if he were a woman (or vice versa). That,

of course, is not the law—an employer does not engage in sex discrimination when it accounts for a sex-based difference without treating either sex worse than the other.

Notably, outside the context of sexual orientation discrimination, other Courts of Appeals have rejected the mechanical use of the "but for" test urged by the EEOC and the Seventh Circuit majority. For example, the en banc Ninth Circuit has emphasized that it and other Circuits have "long recognized that companies may differentiate between men and women in appearance and grooming policies" so long as the policy "does not unreasonably burden one gender more than the other," even though this means that individual employees who fail to comply with the policy's "sex-differentiated requirements" would not have been disciplined but for their sex. *Jespersen v. Harrah's Operating Co., Inc.*, 444 F.3d 1104, 1109-10 (9th Cir. 2006) (en banc). Moreover, the Fourth Circuit recently held that an employer may use "physical fitness standards that distinguish between the sexes on the basis of their physiological differences but impose an equal burden of compliance on both men and women," because "[a] singular focus on the 'but for' element * * * skirts the fundamental issue of whether those normalized requirements treat men in a different manner than women." *Bauer v. Lynch*, 812 F.3d 340, 351 (4th Cir. 2016).

In sum, an employer who discriminates based on sexual orientation alone does not treat similarly situated employees differently but for their sex. Gay men and women are treated the same, and straight men and women are treated the same. Of course, if an employer fired only gay men but not gay women (or vice versa), that

would be prohibited by Title VII—but precisely because it would be discrimination based on sex, not sexual orientation.

B. Per Se Sex-Stereotyping

The EEOC and the Seventh Circuit majority also contend that sexual orientation discrimination necessarily involves sex stereotyping because it allegedly targets an employee's failure to conform to the gender norm of opposite-sex attraction. EEOC Br. 13; *Hively*, 853 F.3d at 346. For instance, they assert that lesbianism is "the ultimate case of failure to conform to the female stereotype." EEOC Br. 13 (quoting *Hively*, 853 F.3d at 346). Again, this analysis commits two fundamental errors in applying the sex-stereotyping theory.

First, it erroneously presumes that sexual orientation discrimination always reflects a gender-based stereotype. When bringing a sex-stereotyping claim, an employee "must show that the employer actually relied on her [or his] gender in making its decision." *Price Waterhouse*, 490 U.S. at 251. What this means is that, "if we asked the employer at the moment of the decision what its reasons were and if we received a truthful response, one of those reasons would be that the applicant or employee was a woman [or man]." *Id.* at 250. In *Price Waterhouse*, for example, the "employer who act[ed] on the basis of a belief that a woman cannot be aggressive, or that she must not be, ha[d] acted on the basis of gender." *Id.*

But where an employer discriminates against a female employee solely because she is gay (without regard to whether, for instance, she has masculine manners or

clothing), it is not necessarily true that the employer has "actually relied on her gender in making its decision." *Price Waterhouse*, 490 U.S. at 251. Rather, the employer may have treated homosexuality differently for reasons such as moral beliefs about sexual, marital, and familial relationships that need not be based on views about gender at all. *See Hively*, 853 F.3d at 370 (Sykes, J., dissenting). That may be impermissible treatment under other statutes or rules, but it is not covered by Title VII's ban on "sex" discrimination.

Second, even if sexual orientation discrimination can sometimes or always be conceptualized as a gender-based stereotype, it is not the sort of stereotype barred by *Price Waterhouse*. As the Court explained, Title VII bars "sex stereotypes" insofar as that particular sort of "sex-based consideration[ ]" causes "disparate treatment of men and women." 490 U.S. at 242, 251. There, for example, the stereotype against aggressive women treated businesswomen worse than similarly situated businessmen: "[a]n employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not." *Id.* at 251.

By contrast, the opposite-sex attraction "stereotype" relied upon by the EEOC and the Seventh Circuit majority does not result in disparate treatment of the sexes because men are treated no better or worse than similarly situated women. Indeed, treating such gender-neutral "stereotypes" as prohibited by Title VII would lead to absurd results. For example, one could just as easily, if not more easily, assert that

"the ultimate case of failure to conform to the female stereotype" (EEOC Br. at 13) is a woman's failure to use the woman's bathroom. Again, though, no one can seriously contend that *Price Waterhouse* outlawed sex-specific bathrooms.

That said, Title VII of course prohibits employers from applying impermissible sex stereotypes to homosexual employees. Namely, gay employees, just like straight employees, may invoke *Price Waterhouse* if they are subjected to gender-based stereotypes—*e.g.*, that a particular homosexual man is too effeminate—that cause them to be treated worse than similarly situated employees of the opposite sex. *See Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 290 (3d Cir. 2009). Critically, though, that is because such gender stereotyping truly is sex discrimination rather than sexual orientation discrimination: the same claim could be brought by a heterosexual male whom the employer likewise deemed too effeminate. *See id.* As this Court has emphasized, homosexual individuals "do not have *less* protection under *Price Waterhouse* against traditional gender stereotype discrimination" than do heterosexual individuals. *Christiansen v. Omnicon Grp., Inc.*, 852 F.3d 195, 200-01 (2d Cir. 2017).[2]

[2] As a factual matter, there sometimes may be a "difficult question" whether discriminatory treatment against a gay plaintiff "was because of his homosexuality, his effeminacy, or both." *See Prowel*, 579 F.3d at 291. Nevertheless, the plaintiff may prevail if it can satisfy the burden to "marshal[ ] sufficient evidence"—*e.g.*, through comparator employees or direct evidence of employer motive—"such that a reasonable jury could conclude that harassment or discrimination occurred" because of gender stereotypes rather than just because of sexual orientation. *See id.* at 292; *see also, e.g.*, *Dawson*, 398 F.3d at 216-23.

In sum, an employer who discriminates based on sexual orientation alone does not apply the sort of sex stereotype proscribed by *Price Waterhouse*. Rather than a gender-based norm that causes employees of one sex to be treated worse than similarly situated employees of the other sex, sexual orientation discrimination per se applies to both sexes alike.

C. Associational Discrimination

The EEOC and the Seventh Circuit majority finally contend that sexual orientation discrimination is "associational discrimination" on the basis of sex. EEOC Br. at 10; *Hively*, 853 F.3d at 348-49. Relying on cases addressing discrimination against interracial relationships, the EEOC and the Seventh Circuit majority reason that Title VII similarly prohibits discrimination based on the sex of those with whom an employee associates. EEOC Br. at 10; *Hively*, 853 F.3d at 348-49. This analogy to racial discrimination is fundamentally inapposite.

Title VII prohibits an employer from discriminating against an employee in an inter*racial* relationship, *not* because that constitutes "associational discrimination" as such, but rather because that constitutes discrimination against the "individual [employee] * * * because of such individual's race." 42 U.S.C. 2000e-2(a). In particular, the employer is treating an employee of one race differently from similarly situated employees of the partner's race, solely because the employer deems the employee's own race to be either *inferior* or *superior* to the partner's race. For example, in *Holcomb v. Iona College*, 521 F.3d 130 (2d Cir. 2008), this Court held that a white

employee could bring a claim that he was treated worse for marrying a black woman, as that was discrimination "because of the employee's *own* race," especially in light of evidence that he himself was "insult[ed] * * * in public" as "a [n-word] lover." *Id.* at 134, 138-40. By contrast, an employer who discriminates against an employee in a same-sex relationship is not engaged in sex-based treatment of women as inferior to similarly situated men (or vice versa), but rather is engaged in sex-neutral treatment of homosexual men and women alike.

* * *

At bottom, none of the theories advanced by the EEOC and the Seventh Circuit can overcome Title VII's plain text and the longstanding precedent of this Court and others. The essential element of sex discrimination under Title VII is that employees of one sex must be treated worse than similarly situated employees of the other sex, and sexual orientation discrimination simply does not have that effect. Moreover, whatever this Court would say about the question were it writing on a blank slate, Congress has made clear through its actions and inactions in this area that Title VII's prohibition of sex discrimination does not encompass sexual orientation discrimination. Other statutes and rules may prohibit such discrimination, but Title VII does not do so as a matter of law, and whether it should do so as a matter of policy remains a question for Congress to decide.

CONCLUSION

This Court should reaffirm its precedent holding that Title VII does not prohibit discrimination because of sexual orientation.

Respectfully submitted,

CHAD A. READLER
TOM WHEELER
Acting Assistant Attorneys General
HASHIM M. MOOPPAN
Deputy Assistant Attorney General

/s/ Charles W. Scarborough
CHARLES W. SCARBOROUGH
STEPHANIE R. MARCUS
Attorneys
U.S. Department of Justice
950 Pennsylvania Avenue N.W.
Washington, D.C. 20530
(202) 514-1633

JULY 2017

CERTIFICATE OF COMPLIANCE

I hereby certify this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font. According to the word count of Microsoft Word, the brief contains 5,619 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii).

/s/ Charles W. Scarborough
Charles W. Scarborough

CERTIFICATE OF SERVICE

I hereby certify that on July 26, 2017, I electronically filed the foregoing brief with the Clerk of this Court by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Charles W. Scarborough
Charles W. Scarborough

Attachment A

Proposed Legislation From 1974 To Present That Would Bar Employment Discrimination Based On Sexual Orientation

1970s

- Equality Act of 1974, H.R. 14752, 93d Cong. (1974)
- Civil Rights Amendments of 1975, H.R. 166, 94th Cong. (1975)
- A Bill to Prohibit Discrimination on the Basis of Sex, Marital Status, Affectional or Sexual Preference, H.R. 2667, 94th Cong. (1975)
- Civil Rights Amendments of 1975, H.R. 5452, 94th Cong. (1975)
- Civil Rights Amendments of 1975, H.R. 10389, 94th Cong. (1975)
- Civil Rights Amendments of 1976, H.R. 13019, 94th Cong. (1976)
- Civil Rights Amendments of 1975, H.R. 451, 95th Cong. (1977)
- Civil Rights Amendments of 1977, H.R. 2998, 95th Cong. (1977)
- Civil Rights Amendments of 1977, H.R. 4794, 95th Cong. (1977)
- Civil Rights Amendments of 1977, H.R. 5239, 95th Cong. (1977)
- Civil Rights Amendments Act of 1977, H.R. 7775, 95th Cong. (1977)
- Civil Rights Amendments Act of 1977, H.R. 8268, 95th Cong. (1977)
- Civil Rights Amendments Act of 1977, H.R. 8269, 95th Cong. (1977)
- Civil Rights Amendment Act of 1979, H.R. 2074, 96th Cong. (1979)
- A Bill to Prohibit Employment Discrimination on the Basis of Sexual Orientation, S. 2081, 96th Cong. (1979)

1980s

- Civil Rights Amendments Act of 1981, H.R. 1454, 97th Cong. (1981)
- Civil Rights Amendments Act of 1981, H.R. 3371, 97th Cong. (1981)
- A Bill to Prohibit Employment Discrimination on the Basis of Sexual Orientation, S. 1708, 97th Cong. (1981)
- A Bill to Prohibit Employment Discrimination on the Basis of Sexual Orientation, S. 430, 98th Cong. (1983)
- Civil Rights Amendments Act of 1983, H.R. 427, 98th Cong. (1983)
- Civil Rights Amendments Act of 1983, H.R. 2624, 98th Cong. (1983)
- Civil Rights Amendments Act of 1985, H.R. 230, 99th Cong. (1985)
- Civil Rights Amendments Act of 1985, S. 1432, 99th Cong. (1985)
- Civil Rights Amendments Act of 1987, H.R. 709, 100th Cong. (1987)
- Civil Rights Amendments Act of 1987, S. 464, 100th Cong. (1987)
- Civil Rights Amendments Act of 1989, H.R. 655, 101st Cong. (1989)

- Civil Rights Amendments Act of 1989, S. 47, 101st Cong. (1989)

1990s

- Civil Rights Amendments Act of 1991, S. 574, 102d Cong. (1991)
- Civil Rights Amendments Act of 1991, H.R. 1430, 102d Cong. (1991)
- Civil Rights Amendments Act of 1993, H.R. 423, 103d Cong. (1993)
- Civil Rights Act of 1993, H.R. 431, 103d Cong. (1993)
- Employment Non-Discrimination Act of 1994, H.R. 4636, 103d Cong. (1994)
- Employment Non-Discrimination Act of 1994, S. 2238, 103d Cong. (1994)
- Civil Rights Amendments Act of 1995, H.R. 382, 104th Cong. (1995)
- Employment Non-Discrimination Act of 1995, H.R. 1863, 104th Cong. (1995)
- Employment Non-Discrimination Act of 1995, S. 932, 104th Cong. (1995)
- Employment Non-Discrimination Act of 1996, S. 2056, 104th Cong. (1996)
- Employment Non-Discrimination Act of 1997, H.R. 1858, 105th Cong. (1997)
- Employment Non-Discrimination Act of 1997, S. 869, 105th Cong. (1997)
- Civil Rights Amendments Act of 1998, H.R. 365, 105th Cong. (1998)
- Civil Rights Amendments Act of 1999, H.R. 311, 106th Cong. (1999)
- Employment Non-Discrimination Act of 1999, H.R. 2355, 106th Cong. (1999)
- Employment Non-Discrimination Act of 1999, S. 1276, 106th Cong. (1999)

2000s

- Civil Rights Amendments Act of 2001, H.R. 217, 107th Cong. (2001)
- Employment Non-Discrimination Act of 2001, H.R. 2692, 107th Cong. (2001)
- Employment Non-Discrimination Act of 2002, S. 1284, 107th Cong. (2001)
- Civil Rights Amendments Act of 2003, H.R. 214, 108th Cong. (2003)
- Employment Non-Discrimination Act of 2003, S. 1705, 108th Cong. (2003)
- Employment Non-Discrimination Act of 2003, H.R. 3285, 108th Cong. (2003)
- Civil Rights Amendments Act of 2005, H.R. 288, 109th Cong. (2005)
- Employment Non-Discrimination Act of 2007, H.R. 2015, 110th Cong. (2007)
- Employment Non-Discrimination Act of 2007, H.R. 3685, 110th Cong. (2007)
- Employment Non-Discrimination Act of 2009, H.R. 3017, 111th Cong. (2009)
- Employment Non-Discrimination Act of 2009, S. 1584, 111th Cong. (2009)

2010s

- Employment Non-Discrimination Act, H.R. 1397, 112th Cong. (2011)
- Employment Non-Discrimination Act of 2011, S. 811, 112th Cong. (2011)
- Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. (2013)
- Employment Non-Discrimination Act of 2013, H.R. 1755, 113th Cong. (2013)
- Equality Act, H.R. 3185, 114th Cong. (2015)
- Equality Act, S. 1858, 114th Cong. (2015)
- Equality Act, H.R. 2282, 115th Cong. (2017)
- Equality Act, S. 1006, 115th Cong. (2017)