

15-3775

United States Court of Appeals For the Second Circuit

MELISSA ZARDA, co-independent executor of the estate of Donald Zarda; WILLIAM ALLEN MOORE, JR., co-independent executor of the estate of Donald Zarda,
Plaintiffs-Appellants,

v.

ALTITUDE EXPRESS, INC., d/b/a/ SKYDIVE LONG ISLAND; and RAYMOND MAYNARD,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF AMICI CURIAE NATIONAL WOMEN'S LAW CENTER; 9TO5, NATIONAL ASSOCIATION OF WORKING WOMEN; A BETTER BALANCE; CALIFORNIA WOMEN'S LAW CENTER; EQUAL RIGHTS ADVOCATES; GENDER JUSTICE; LEGAL MOMENTUM; LEGAL VOICE; NATIONAL ASSOCIATION OF WOMEN LAWYERS; NATIONAL ORGANIZATION FOR WOMEN FOUNDATION; NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES; SOUTHWEST WOMEN'S LAW CENTER; THE WOMEN'S LAW CENTER OF MARYLAND, INC.; WOMEN EMPLOYED; and WOMEN'S LAW PROJECT IN SUPPORT OF PLAINTIFFS-APPELLANTS' PETITION FOR REHEARING *EN BANC*

FATIMA GOSS GRAVES
NATIONAL WOMEN'S LAW CENTER
11 Dupont Circle, N.W., Suite 800
Washington, D.C. 20036
(202) 588-5180
fgraves@aclu.org

Attorneys for Amici Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 29, the undersigned counsel of record certifies that none of the *amici curiae* is a nongovernmental entity with a parent corporation or a publicly held corporation that owns 10% or more of its stock. This representation is made in order that the judges of this Court may evaluate possible disqualification or recusal.

Dated: May 9, 2017

s/ Fatima Goss Graves
FATIMA GOSS GRAVES
National Women's Law Center
11 Dupont Circle, N.W., Suite 800
Washington, D.C. 20036
(202) 588-5180
fgraves@nwlc.org

Attorney for Amici Curiae

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INTERESTS OF *AMICI CURIAE*¹

Amici are a coalition of civil rights groups and public interest organizations committed to preventing, combating, and redressing sex discrimination and protecting the equal rights of women in the United States. Detailed statements of interest are included in the accompanying appendix.

SUMMARY OF THE ARGUMENT

Sex discrimination in violation of Title VII occurs whenever an employer takes an employee's sex into account when making an adverse employment decision. Courts have applied this principle to countless forms of employer bias, and have refused to allow generalizations about men and women – or about certain types of men and women – to play any role in adverse employment decisions. The rich history of courts' interpretations of Title VII, in addition to the reasons stated by Plaintiffs-Appellants, inform why discrimination against lesbian, gay, and bisexual employees is discrimination "because of sex" in violation of Title VII.

¹ Pursuant to Rule 29(b)(4) of the Federal Rules of Appellate Procedure and Local Rule 29.1(b), counsel for *amici curiae* states that no counsel for a party authored this brief in whole or in part, and that no person other than *amici curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. This brief is filed with the consent of all parties.

Amici have sought leave to file an *amici curiae* brief in support of a petition for rehearing *en banc* in another case pending before this Court involving the application of Title VII to lesbian, gay and bisexual employees, *Christiansen v. Omnicom Group, et al.*, No. 16-748-cv, ECF No. 168.

This case presents an opportunity for the Court to reconsider its decision in *Simonton v. Runyon*, 232 F.3d 33 (2d Cir. 2000), where it held that harassment on the basis of sexual orientation is not sex-based discrimination. The Supreme Court previously held that employment decisions on the basis of sex stereotyping violate Title VII. *See Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). Sex stereotyping encompasses discrimination on the basis of sexual orientation. Continued reliance on *Simonton*'s categorical exclusion has led to cramped attempts to distinguish between sex stereotyping that does not implicate sexual orientation, which is prohibited by Title VII, and sex stereotyping that relates to an employee's sexual orientation. This Court should now hold, as other federal courts and administrative agencies have done, and as the concurring panel judges recognized in another case before this Court, that sexual orientation discrimination is discrimination "because of sex."

ARGUMENT

I. Since Title VII's enactment, courts consistently have adopted an expansive interpretation of what constitutes discrimination "because of sex."

In revisiting *Simonton v. Runyon*, 232 F.3d 33 (2d Cir. 2000), this Court should take into account the Supreme Court's expansive interpretation of Title VII's phrase "because of sex" during the past fifty years.

Title VII of the Civil Rights Act of 1964 forbids employers from making adverse decisions about hiring, firing, or the terms and conditions of employment because of sex. 42 U.S.C. § 2000e-2(a)(1). The prohibition against discrimination because of sex was added to the bill at the last minute, with few hours of floor debate and without congressional hearings. 110 Cong. Rec. 2577-84 (1964).

Given this history, it was left largely to the courts to define “because of sex.” Courts consistently have interpreted the plain meaning of Title VII’s prohibition against sex discrimination to cover a wide range of employer assumptions about women and men alike. *See City of L.A. Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978). The half-century of precedent interpreting “sex discrimination” has dismantled not just distinctions *between* men and women, but also those *among* men and *among* women – distinctions that for generations had confined individuals to strict sex roles at work, and in society.

In *Price Waterhouse*, the Supreme Court held that when an employer relies on sex stereotypes to deny employment opportunities, it unquestionably acts “because of sex.” There, the Court considered the Title VII claim of a woman who was denied promotion to partner because she was deemed “macho,” and was told to “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.” 490 U.S. at 235.

Price Waterhouse confirms that employees who fail to conform to all manner of sex stereotypes are protected by Title VII's sex provision, and the stereotype concerning to whom men and women "should" be romantically attracted is encompassed within this principle. That case was not the only instance in which an employer's stereotype-based decision-making was found to violate Title VII.

Among the earliest Title VII cases were those addressing – and disapproving of – the literal exclusion of women from employment opportunities because of longstanding assumptions about the kinds of jobs for which women (and men) were suited – physically, temperamentally, and even morally. Title VII was enacted at a time when the workforce was divided into “women’s jobs” and “men’s jobs,” stemming largely from state “protective laws” restricting women’s access to historically male-dominated fields, but also from the resulting cultural attitudes about the sexes’ respective abilities and preferences. Just as sex-specific job listings were found to violate Title VII, so too were a variety of other policies and practices that had the purpose or effect of judging employees by their sex, not their qualifications. *See, e.g., Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385 (5th Cir. 1971) (women-only rule for flight attendants); *Weeks v. S. Bell Tel. & Tel. Co.*, 408 F.2d 228 (5th Cir. 1969) (policy against women working as switchmen on grounds that job required heavy lifting). Within a few years of these decisions, the

Supreme Court ruled that the use of physical criteria that disproportionately exclude women applicants violates Title VII if they are premised on the flawed assumption that “bigger is better” when it comes to dangerous jobs. *See Dothard v. Rawlinson*, 433 U.S. 321 (1977).

The prohibition against discrimination “because of sex” has long been understood to ban discrimination against men as well, even though discrimination against men was not specifically discussed during the scant floor debate prior to Title VII’s passage. *See Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 681 (1983).

Title VII’s prohibition against sex discrimination also has been read to forbid discrimination against subsets of employees of a particular gender, even where other members of that gender were treated favorably, recognizing the diverse forms of sex-based bias prohibited by Title VII. *See, e.g., Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971) (*per curiam*) (mothers of preschool-aged children); *Jefferies v. Harris Cty. Cmty. Action Ass’n*, 693 F.2d 589 (5th Cir. 1982) (Black women); *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194 (7th Cir. 1971) (unmarried female flight attendants).

The initial rejection and later recognition of sexual harassment as sex discrimination offers another useful lens into courts’ ever-widening understanding of discrimination “because of sex.” Initially, judges wrote off adverse employment

actions against women who had spurned their supervisors' advances as "controvers[ies] underpinned by the subtleties of an inharmonious personal relationship." *Barnes v. Train*, No. 1828-73, 1974 WL 10628, at *1 (D.D.C. Aug. 9, 1974), *rev'd sub nom Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977); *see, e.g., Corne v. Bausch & Lomb, Inc.*, 390 F. Supp. 161, 163 (D. Ariz. 1975), *rev'd*, 562 F.2d 55 (9th Cir. 1977).

In 1980 the EEOC updated its Guidelines on Discrimination Because of Sex to declare that sexual harassment of a female employee could not be disentangled from her sex. 29 C.F.R. § 1604.11(a) (1980). The 1980 Guidelines recognized that it is not "personal" to disadvantage a female employee because of her supervisor's sexual conduct toward her; it is illegal.

The Supreme Court continued this evolution in 1986, when it ruled that severe or pervasive conduct that creates a sexually hostile work environment violates Title VII by altering the "terms, conditions, or privileges" of employment. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 63-67 (1986). Roughly a decade later, the Court unanimously extended *Vinson* to encompass same-sex sexual harassment, even though "male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII." *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 79 (1998). In so doing, the Court reaffirmed the straightforward test for discrimination: whether the

harassment occurred because of the employee's sex. *Id.* at 80. The same straightforward test applies to discrimination against lesbian, gay, and bisexual employees.

II. *Simonton* should be reconsidered in light of the Supreme Court's expansive interpretation of discrimination "because of sex."

Simonton was wrongly decided because it ignored the meaning of sex discrimination discussed above. Plaintiffs-Appellants' petition for rehearing *en banc* presents an opportunity for this Court to revisit the decision in light of the history of Title VII jurisprudence described above, the Seventh Circuit's recent *en banc* decision, *Hively v. Ivy Tech. Cmty. Coll. of Ind.*, 853 F.3d 339, 342 (7th Cir. 2017) (*en banc*), the EEOC's 2015 ruling in *Baldwin v. Foxx*, EEOC Doc. 0120133080, 2015 WL 4397641 (EEOC July 15, 2015), the decisions of a growing number of district courts, the concurring opinion in another case before this Court, *Christiansen v. Omnicom Group, Inc.*, 852 F.3d 195 (2d Cir. 2017) (Katzmann, C.J., concurring), and the dissenting opinion in *Evans v. Georgia Regional Hosp.*, 850 F.3d 1248, 1261 (11th Cir. 2017) (Rosenbaum, J., dissenting), recognizing that sexual orientation discrimination is necessarily sex discrimination within the meaning of Title VII.

Simonton's holding relied in part on *DeCintio v. Westchester Cty. Med. Ctr.*, 807 F.2d 304 (2d Cir. 1986), a decision that did not involve sexual orientation discrimination. *DeCintio* found that the male plaintiffs, who were denied

promotion in favor of a woman who was involved in a romantic heterosexual relationship with their supervisor, did not have a Title VII claim. *Id.* at 306. This Court observed that “[s]ex, when read in this context, logically could only refer to membership in a class delineated by gender, rather than sexual activity.” *Id.* (internal quotation marks omitted). The *Simonton* Court’s reliance on this language was misplaced, given the “sexual activity” at issue was in the context of a heterosexual relationship. Further, this language was inconsistent with *Price Waterhouse*’s holding that sex means more than the fact of being a man or a woman and encompasses the full range of gender expression in the workplace.

Simonton also relied on the fact that Congress has refused to amend Title VII to prohibit explicitly discrimination because of sexual orientation. The Supreme Court has cautioned repeatedly that acts of subsequent Congresses “deserve little weight in the interpretive process” regarding federal statutes. *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994). Subsequent legislative action (or inaction) has no bearing on what Congress intended (or did not intend) in 1964 when it enacted Title VII. Moreover, the Supreme Court rejected the notion that legislative intent could limit the forms of sex discrimination prohibited by Title VII and made clear that the full scope of Title VII’s protections cannot be determined solely by reference to the kinds of discrimination that were evident to legislators in 1964. *Oncale*, 523 U.S. at 79-80.

For the reasons discussed above, this Court should no longer adhere to precedent and reasoning contravening *Price Waterhouse*, but rather should apply the principles mandated by the Supreme Court to determine that sexual orientation discrimination is a form of sex discrimination prohibited by Title VII.

CONCLUSION

This Court should grant rehearing *en banc* and hold that sexual orientation discrimination is sex discrimination prohibited by Title VII.

Dated: May 9, 2017

Respectfully submitted,

s/ Fatima Goss Graves
FATIMA GOSS GRAVES
National Women's Law Center
11 Dupont Circle, N.W., Suite 800
Washington, D.C. 20036
(202) 588-5180
fgraves@nwlc.org

Attorney for Amici Curiae

CERTIFICATE OF COMPLIANCE

I hereby certify in accordance with Fed. R. App. P. 32(g)(1) that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 35(b)(2)(A) and Local Rule 29.1(c) because according to the word processing program Microsoft Word 2010 with which it was prepared, it contains 1930 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using the word processing program Microsoft Word 2010 in 14-point Times New Roman type style.

Dated: May 9, 2017

s/ Fatima Goss Graves
FATIMA GOSS GRAVES
National Women's Law Center
11 Dupont Circle, N.W., Suite 800
Washington, D.C. 20036
(202) 588-5180
fgraves@nwlc.org

Attorney for Amici Curiae

APPENDIX: INTERESTS OF AMICI CURIAE

The **National Women's Law Center** is a nonprofit legal advocacy organization dedicated to the advancement and protection of women's legal rights and opportunities since its founding in 1972. The Center focuses on issues of key importance to women and their families, including economic security, employment, education, health, and reproductive rights, with special attention to the needs of low-income women and women of color, and has participated as counsel or *amicus curiae* in a range of cases before the Supreme Court and the federal Courts of Appeals to secure the equal treatment of women under the law, including numerous cases addressing the scope of Title VII's protection. The Center has long sought to ensure that rights and opportunities are not restricted for women or men on the basis of gender stereotypes and that all individuals enjoy the protection against such discrimination promised by federal law.

9to5, National Association of Working Women is a 44 year-old national membership organization of women in low-wage jobs dedicated to achieving economic justice and ending all forms of discrimination. Our membership includes individuals who identify as lesbian, gay, bisexual, transgender and gender nonconforming. 9to5 has a long history of supporting corporate, local, state and national measures to combat discrimination. The outcome of this case will directly

affect our members' and constituents' rights and economic well-being, and that of their families.

A Better Balance is a national legal advocacy organization dedicated to promoting fairness in the workplace and helping employees meet the conflicting demands of work and family. Through its legal clinic, A Better Balance provides direct services to low-income workers on a range of issues, including employment discrimination based on pregnancy and/or caregiver status. A Better Balance is also working to combat LGBTQ employment nondiscrimination through its national LGBT Work-Family project. The workers we serve, who are often struggling to care for their families while holding down a job, are particularly vulnerable to retaliation that discourages them from complaining about illegal discrimination.

California Women's Law Center (CWLC) is a statewide, nonprofit law and policy center dedicated to advancing the civil rights of women and girls through impact litigation, advocacy and education. CWLC's issue priorities include gender discrimination, reproductive justice, violence against women, and women's health. Since its inception in 1989, CWLC has placed an emphasis on eliminating all forms of gender discrimination, including discrimination based on sexual orientation. CWLC remains committed to supporting equal rights for lesbians and gay men, and to eradicating invidious discrimination in all forms,

including eliminating laws and policies that reinforce traditional gender roles. CWLC views sexual orientation discrimination in the workplace as a form of illegal gender discrimination that is harmful to our state and country, and needs to be eradicated.

Equal Rights Advocates (ERA) is a national non-profit legal organization dedicated to protecting and expanding economic and educational access and opportunities for women and girls. Since its founding in 1974, ERA has sought to end gender discrimination in employment and education and advance equal opportunity for all by litigating historically significant cases in both state and federal courts, including two of the first U.S. Supreme Court cases addressing Title VII's prohibition of discrimination "because of sex" and its application to pregnant workers, *Geduldig v. Aiello*, 417 U.S. 484 (1974) and *Richmond Unified Sch. Dist. v. Berg*, 434 U.S. 158 (1977). ERA has participated as *amicus curiae* in scores of cases involving the interpretation of Title VII and other anti-discrimination laws, including *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986); *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993); *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006); and *Ledbetter v. Goodyear*, 550 U.S. 618 (2007). Because ERA recognizes that sex discrimination often is justified by or based on stereotypes and biased assumptions about the roles that women and men can or should play in the public and private sphere, we have supported the recognition and

application of these laws and the constitutional principles of equal protection and due process to gay, lesbian, bisexual, and transgender persons in amicus briefs filed in numerous cases, including *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), and *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

Gender Justice is a nonprofit advocacy organization based in the Midwest that works to eliminate gender barriers based on sex, sexual orientation, gender identity, or gender expression. Gender Justice targets the root causes of gender discrimination, such as cognitive bias and stereotyping. We believe that courts should take an expansive, and inclusive, interpretation of what constitutes discrimination “because of sex.” Consistent with that view, we represent the transgender plaintiff in *Rumble v. Fairview Health Services*, No. 0:14-cv-02037-SRN-FLN (D. Minn.), whose right to sue under the Affordable Care Act, Section 1557, was recognized by the court in 2015.

Legal Momentum, the Women’s Legal Defense and Education Fund, is a leading national non-profit civil rights organization that for nearly fifty years has used the power of the law to define and defend the rights of girls and women. Legal Momentum has worked for decades to ensure that all employees are treated fairly in the workplace, regardless of their gender or sexual orientation. Legal Momentum has litigated cutting-edge gender-based employment discrimination cases, including *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and has participated as

amicus curiae on leading cases in this area, including *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), and *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993). Legal Momentum has also worked to secure the rights of women under state constitutions, including the right of lesbians to marry.

Legal Voice is a nonprofit public interest organization in the Pacific Northwest that works to advance the legal rights of women and girls through litigation, legislation, and public education on legal rights. Since its founding in 1978, Legal Voice has been at the forefront of efforts to combat sex discrimination in the workplace, in schools, and in public accommodations. We have served as counsel and as *amicus curiae* in numerous cases involving workplace gender discrimination throughout the Northwest and the country. Legal Voice serves as a regional expert advocating for legislation and for robust interpretation and enforcement of anti-discrimination laws to protect women and LGBTQ people. Legal Voice has a strong interest in ensuring that Title VII is interpreted to cover sexual orientation.

The **National Association of Women Lawyers** (NAWL) is the oldest women's bar association in the United States and the leading national voluntary organization devoted to the interests of women lawyers and women's rights. Founded in 1899, NAWL has a long history of serving as an educational forum and

an active voice for the concerns of women. As part of its mission, NAWL promotes the interests of women and families by participation as *amicus curiae* in cases of interest. NAWL supports women's constitutional rights to liberty and equality under the Due Process and Equal Protection Clauses and seeks for those rights to be protected. NAWL recognizes that discrimination in any form impedes the advancement of women and other vulnerable populations. For those reasons, NAWL has an interest in ensuring that individuals of all sexual identities be protected. We support the position that discrimination against anyone based on sexual orientation is discrimination within the intent, meaning, and spirit of Title VII.

The **National Organization for Women Foundation** is a 501 (c)(3) entity affiliated with the National Organization for Women, the largest grassroots feminist activist organization in the United States with chapters in every state and the District of Columbia. NOW Foundation is committed to advancing equal opportunity, among other objectives, and works to assure that women and LGBTQIA persons are treated fairly and equally under the law. As an education and litigation organization dedicated to eradicating sex-based discrimination, we believe that the Civil Rights Act of 1964, Title VII provision prohibiting sex discrimination extends to sexual orientation.

The **National Partnership for Women & Families** (formerly the Women's Legal Defense Fund) is a national advocacy organization that develops and promotes policies to help achieve fairness in the workplace, reproductive health and rights, quality health care for all, and policies that help women and men meet the dual demands of work and family. Since its founding in 1971, the National Partnership has worked to advance women's equal employment opportunities and health through several means, including by challenging discriminatory employment practices in the courts. The National Partnership has fought for decades to combat sex discrimination, including on the basis of sex stereotypes, and to ensure that all people are afforded protections against discrimination under federal law.

The **Southwest Women's Law Center** is a non-profit policy and advocacy Law Center that was founded in 2005 with a focus on advancing opportunities for women and girls in the state of New Mexico. We work to ensure that women have equal access to quality, affordable healthcare, access to equal pay and that girls in middle and high school have equal access to sports' programs. Our work strongly supports protections for individuals, without regard to sexual orientation as we advocate to eliminate the full range of stereotypes and biases that women and LGBT individuals often face. Accordingly, the Law Center is uniquely qualified to comment on the decision in *Zarda v. Altitude Express, Inc.*

Women Employed's mission is to improve the economic status of women and remove barriers to economic equity. Since 1973, the organization has assisted thousands of working women with problems of discrimination and harassment, monitored the performance of equal opportunity enforcement agencies, and developed specific, detailed proposals for improving enforcement efforts, particularly on the systemic level. Women Employed believes that barring discrimination "because of sex" encompasses discrimination against an employee because of his/her sexual orientation because women's rights and LGB rights are inextricable.

The **Women's Law Center of Maryland, Inc.** is a non-profit, membership organization established in 1971 with a mission of improving and protecting the legal rights of women, particularly regarding gender discrimination, employment law, family law and reproductive rights. Through its direct services and advocacy, the Women's Law Center seeks to protect women's legal rights and ensure equal access to resources and remedies under the law. The Women's Law Center is participating as an *amicus* in this case because it agrees with the proposition that sex, gender, and sexual orientation are intrinsically intertwined, particularly in the realm of discrimination. The concerns and struggles of the LGBTQ community impact all women, regardless of sexual orientation.

The **Women's Law Project (WLP)** is a non-profit women's legal advocacy organization with offices in Philadelphia and Pittsburgh, Pennsylvania. Founded in 1974, WLP's mission is to create a more just and equitable society by advancing the rights and status of all women throughout their lives. To this end, we engage in high impact litigation, policy advocacy, and public education. For over forty years, WLP has challenged discrimination rooted in gender stereotyping and based on sex.