NO. 16-2401

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

LORI FRANCHINA,

PLAINTIFF-APPELLEE,

V.

CITY OF PROVIDENCE,

DEFENDENT-APPELLANT,

PROVIDENCE FIRE DEPARTMENT; PROVIDENCE FIREFIGHTERS LOCAL 799,

DEFENDANTS.

On Appeal from the United States District Court
for the District of Rhode Island, Providence
No. 12-cv-00517-M-LDA
The Honorable John J. McConnell, United States District Court Judge

BRIEF OF *AMICI CURIAE* GLBTQ LEGAL ADVOCATES & DEFENDERS, AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF RHODE ISLAND, LAMBDA LEGAL DEFENSE & EDUCATION FUND, INC., AND NATIONAL CENTER FOR LESBIAN RIGHTS IN SUPPORT OF PLAINTIFF-APPELLEE AND AFFIRMANCE

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Pursuant to Rules 26.1 and 29(a)(4)(A) of the Federal Rules of Appellate Procedure, amici curiae state that they do not have a parent corporation and that no publicly held corporation owns 10% or more of their stock.

Pursuant to Federal Rule of Appellate Procedure Rule 29(a)(4)(E), amici curiae certify that no person or entity, other than amici, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief or authored this brief in whole or in part.

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Through strategic litigation, public policy advocacy, and education, **GLBTQ Legal Advocates & Defenders (GLAD)** works in New England and nationally to create a just society free of discrimination based on gender identity and expression, HIV status, and sexual orientation. GLAD has litigated widely in both state and federal courts in all areas of the law in order to protect and advance the rights of lesbians, gay men, bisexuals, transgender individuals, and people living with HIV and AIDS. GLAD has an enduring interest in ensuring that employees receive full and complete redress for violation of their civil rights in the workplace.

The **American Civil Liberties Union (ACLU)** is a nationwide, nonprofit, nonpartisan organization with over one million members dedicated to defending the principles embodied in the Constitution and our nation's civil rights laws. The ACLU has long fought to ensure that lesbian, gay, bisexual, and transgender people are treated equally and fairly under law and has appeared as counsel or amicus in virtually every major case involving the civil rights of LGBT people, including *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (holding that the Constitution guarantees same-sex couples the freedom to marry), *United States v. Windsor*, 133 S. Ct. 2675 (2013) (striking down the Defense of Marriage Act),

and *Cook v. Gates*, 528 F.3d 42 (1st Cir. 2008) (rejecting challenge to exclusion of lesbian and gay people from military service).

The **ACLU of Rhode Island**, the Rhode Island affiliate of the American Civil Liberties Union, is a nonprofit, nonpartisan organization with approximately 6,000 members founded in 1959 to protect and advance civil rights in Rhode Island. For over 40 years, the ACLU of Rhode Island has served as counsel or amicus in litigation to ensure that lesbian, gay, bisexual, and transgender Rhode Islanders are treated equally and fairly under state and federal law. *See, e.g.*, *Toward a Gayer Bicentennial Committee v. RI Bicentennial Commission*, 417 F. Supp. 632 (D.R.I. 1976) (challenge on behalf of a group denied official endorsement of a gay pride parade as a bicentennial event); *Chambers v. Ormiston*, 916 A.2d 758, 935 A.2d 956 (R.I. 2007) (amicus brief supporting Family Court jurisdiction to consider a divorce petition filed by a same-sex couple validly married in Massachusetts).

Founded in 1973, **Lambda Legal** is the nation's oldest and largest legal organization committed to safeguarding and achieving the full recognition of the civil rights of lesbian, gay, bisexual, and transgender (LGBT) people and everyone living with HIV through impact litigation, education, and policy advocacy. Lambda Legal has extensive expertise with respect to the central issue addressed in this brief—the application of laws barring discrimination because of

"sex" to lesbians, bisexuals, and gay men. This experience is reflected in numerous *amicus curiae* briefs and most notably as counsel of record in *Hively v. Ivy Tech Community College*, 853 F.3d 339 (7th Cir. 2017), in which the Seventh Circuit recently held en banc "that discrimination on the basis of sexual orientation is a form of sex discrimination." *Id.* at 339. On the same issue, Lambda Legal also represents the plaintiff-appellant in *Evans v. Georgia Regional Hospital*, 850 F.3d 1248 (11th Cir. 2017), which reached a contrary result, prompting an imminent petition for certiorari. Previously, Lambda Legal successfully represented plaintiff-appellant in *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011), in which the Eleventh Circuit held that employment discrimination on basis of gender identity is a form of sex discrimination.

The **National Center for Lesbian Rights (NCLR)** is a national non-profit legal organization dedicated to protecting and advancing the civil rights of lesbian, gay, bisexual, and transgender people and their families through litigation, public policy advocacy, and public education. Since its founding in 1977, NCLR has played a leading role in securing fair and equal treatment for LGBT people and their families in cases across the country involving constitutional and civil rights. NCLR has a particular interest in promoting equal opportunity for LGBT people in the workplace through legislation, policy, and litigation, and represents LGBT people in employment and other cases in courts throughout the country.

INTRODUCTION

Title VII's prohibition against discrimination "because of . . . sex" prohibits employers from taking into account any sex-based considerations when making adverse employment decisions. Recently, the en banc Seventh Circuit Court of Appeals, as well as members of the Second and Eleventh Circuit Courts of Appeals, recognized that sexual orientation discrimination is a form of sex discrimination barred by Title VII. The Second Circuit is considering the same question en banc in *Zarda v. Altitude Express*, 2017 U.S. App. LEXIS 13127 (2d Cir. May 25, 2017) (granting rehearing). The straightforward reason for this reconsideration of existing precedent is that, but for the plaintiff's sex, discrimination based on sexual orientation would not occur. For example, if a man is treated adversely because he is attracted to men, then he has been discriminated against because of his sex—if he were instead a woman who was attracted to men, he would not have been treated that way.

Although the question of whether sexual orientation discrimination is sex discrimination under Title VII was raised earlier in this litigation, that issue is not necessarily presented on appeal.[1] To the extent that issue may have some impact

[1] Plaintiff-Appellee did not appeal the District Court's order dismissing Plaintiff's Title VII sexual orientation harassment claim to this Court. (*See generally* Def.-Appellant's App.)

on this Court's analysis, we are submitting this *amici curiae* brief to demonstrate why application of Title VII in accordance with its text and established doctrine requires treating sexual orientation claims as a type of sex discrimination.

This brief proceeds in three parts. First, we provide an overview of Supreme Court precedent consistently interpreting Title VII's sex discrimination provision to strike at the entire spectrum of sex discrimination. Second, we show how sexual orientation claims are cognizable under Title VII in accord with settled law. Finally, we address this Court's decision in *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252 (1st Cir. 1999), which held that Title VII permits claims based on sex stereotyping, but found that the plaintiff in that case, a gay man, had failed to allege such a claim below. Some courts have interpreted *Higgins* to mean that Title VII does not allow sex stereotyping claims based on a plaintiff's sexual orientation. As numerous judges have observed, that standard is simply impossible to apply with any degree of consistency or fairness.[2]

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[2] The en banc Seventh Circuit recently discussed the "confused hodge-podge of cases" that have attempted to extricate gender nonconformity claims from sexual orientation claims. *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 342 (7th Cir. 2017) (en banc); *see also, e.g., Philpott v. New York*, 2017 U.S. Dist. LEXIS 67591, at *6-7 (S.D.N.Y. May 3, 2017) (commenting on the "'illogical' artificial distinction between gender-stereotyping discrimination and sexual-orientation discrimination"); *Boutillier v. Hartford Pub. Sch.*, 221 F. Supp. 3d 255, 270 (D. Conn. 2016) ("[R]econciliation of *Simonton* and *Price Waterhouse* produces untenable results."); *Christiansen v. Omnicom Group, Inc.*, 167 F. Supp. 3d 598, 620 (S.D.N.Y. 2016) ("The lesson imparted by the body of Title VII litigation concerning sexual orientation discrimination and sexual stereotyping

DISCUSSION

I. The United States Supreme Court Has Consistently Interpreted Title VII's Prohibition of Sex Discrimination to Strike at the Entire Spectrum of Sex Discrimination.

Title VII of the Civil Rights Act of 1964 creates workplace norms based on capability and merit and without exclusions based on irrelevant personal characteristics. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 239 (1989) ("In passing Title VII, Congress made the simple but momentous announcement that sex, race, religion, and national origin are not relevant to the selection, evaluation, or compensation of employees."). In addition to race, color, national origin, and religion, Title VII made it unlawful to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual's . . . sex[.]" 42 U.S.C. § 2000e-2(a)(1).

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seems to be that no coherent line can be drawn between these two sorts of claims"), *aff'd* in part, *rev'd* in part, 852 F.3d 195 (2d Cir. 2017) (per curiam); *Videckis v. Pepperdine Univ.*, 150 F. Supp. 3d 1151, 1159-1160 (C.D. Cal. 2015) ("Simply put, the line between sex discrimination and sexual orientation discrimination is 'difficult to draw' because that line does not exist, save as a lingering and faulty judicial construct. . . . It is impossible to categorically separate 'sexual orientation discrimination' from discrimination on the basis of sex or from gender stereotypes[.]"); *Baldwin v. Foxx*, EEOC. Doc. 0120133080, 2015 EEOPUB LEXIS 1905 (EEOC July 16, 2015) ("We do not view the borders between sex discrimination and sexual orientation as 'imprecise.' As we note above, discrimination on the basis of sexual orientation necessarily involves discrimination on the basis of sex.")

No legislative history supports limitations on the broad scope of conduct that may be unlawful sex discrimination, *Meritor Sav. Bank, FSB v. Vinson,* 477 U.S. 57, 64 (1986), and the Supreme Court has been emphatic that courts must entertain *all* claims that meet the statutory requisites of discrimination because of a person's sex. *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 80 (1998).[3] Accordingly, over the past five-plus decades, the Supreme Court's interpretation of Title VII's proscription against discrimination "because of . . . sex" has worked to "strike at

[3] Although the inclusion of "sex" may well have been meant to protect white women, *see* Brief for American Civil Liberties Union et al. as Amici Curiae Supporting Plaintiffs-Appellants, at 5 n.3, *Zarda v. Altitude Express, Inc.*, No. 15-3775-cv, 2017 U.S. App. LEXIS 13127 (2d Cir. June 26, 2017), including "sex" in Title VII advanced protections for both white and Black women. *See generally* Serena Mayeri, *Panel I: Historical Perspectives: Intersectionality and Title VII: A Brief (Pre-) History*, 95 B.U. L. Rev. 713 (2015); Cary Franklin, *Inventing the "Traditional Concept" of Sex Discrimination*, 125 Harv. L. Rev. 1307 (2012); Robert C. Bird, *More Than a Congressional Joke: A Fresh Look at the Legislative History of Sex Discrimination of the 1964 Civil Rights Act*, 3 Wm. & Mary J. Women & L. 137 (1997). As Mayeri describes, an influential memorandum by African American attorney Pauli Murray, circulated to the Senate and the Johnson administration in April 1964, warned that both Black and white women "will share a common fate of discrimination" if "sex" is not included in Title VII. Mayeri, *supra* at 718-19. As Murray explained in her memo, it is "exceedingly difficult for a [Black] woman to determine whether or not she is being discriminated against because of race or sex." *Id*. at 719. Murray's line of reasoning pertaining to the intersection of race and sex still rings true to this day, especially for LGBT people of color who experience "high rates of discrimination both because they are LGBT and because of their race and ethnicity." Center for American Progress and Movement Advancement Project, *Paying An Unfair Price The Financial Penalty for LGBT People of Color in America*, 9 (2015), *available at* http://lgbtmap.org/file/paying-an-unfair-price-lgbt-people-of-color.pdf (last visited August 24, 2017).

the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." *City of L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978). The Supreme Court has consistently applied the text and its developing jurisprudence to address the many manifestations of sex discrimination.

It is unlawful sex discrimination to discriminate against men, and not only women, because "Congress had always intended to protect *all* individuals from sex discrimination in employment[.]" *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 681 (1983) (emphasis in original) (holding that providing pregnancy related benefits to married female employees but not to married male employees violated Title VII by providing men with less inclusive benefits). Accordingly, it also violates Title VII to discriminate against any sex-based *subsets* of employees. For example, in *Phillips v. Martin Marietta Corp.*, the employer hired female employees, but violated Title VII by not hiring women with young children. 400 U.S. 542, 544 (1971). This type of sex discrimination is sometimes referred to as "sex-plus" discrimination because it does not occur categorically against all members of one sex, but only those members possessing a certain trait (such as having young children). *Chadwick v. WellPoint, Inc.*, 561 F.3d 38, 43 (1st Cir. 2009).

The Court has long condemned employer decision-making that relies on "stereotyped characterizations of the sexes." *Phillips*, 400 U.S. at 545 (Marshall,

J., concurring). Its *Price Waterhouse* ruling confirmed that an employer cannot insist that an employee match "the stereotype associated with their group" and still remain within the legal confines of Title VII. *Price Waterhouse,* 490 U.S. at 251. This principle applies even if the "stereotype-based" treatment seems benign or is based on generalizations that may have some statistical basis. *See Manhart,* 435 U.S. at 707 (holding that an employer's pension plan requiring women employees to make larger plan contributions to their plans because of the stereotype that women on average lived longer than men violated Title VII); *Int'l Union v. Johnson Controls,* 499 U.S. 187, 197, 211 (1991) (holding employer's fetal protection policy violated Title VII because the policy only applied to pregnant and fertile women and could not be justified by the employer's view of the proper role of childbearing women in the protection of future children).

In rooting out every type of discrimination "because of sex," in 1986, the Supreme Court held in *Meritor Sav. Bank, FSB* that the creation of a hostile work environment predicated upon the sex of the employee constitutes sex discrimination under Title VII. 477 U.S. at 64. Reasoning that employees should not be required to suffer sexual abuse "in return for the privilege of being allowed to work and make a living[,]" the Court viewed a hostile work environment as a barrier to sexual equality in the workplace. *Id*. at 67. Neither the sex of the harasser nor of the person harassed is relevant to a sexual harassment claim since

harassment "of any kind" is covered if it meets the statutory requirements. *Oncale,* 523 U.S. at 80 (holding that same-sex sexual harassment is within the purview of Title VII).

Finally, a Title VII sex discrimination violation can be based on the relationship of an employee to another person. *See Newport News,* 462 U.S. at 676 (plan did not cover costs of male employee's wife's hospitalization for pregnancy; plan is unlawful "because the protection it affords to married male employees is less comprehensive that the protection it affords to married female employees").

As the Supreme Court's precedent demonstrates, the statutory requirement that discrimination be "because of . . . sex" is met where sex is a motivating factor in the alleged discrimination. 42 U.S.C. §2000e-2(m). Thus, the "because of . . . sex" provision of Title VII encompasses the sex-based classifications involved in discrimination against lesbian, gay, and bisexual employees for the reasons set forth in Section II, below.

II. Recognizing That Sexual Orientation Discrimination Is a Form of Sex Discrimination Is Compelled by Title VII's Text and Doctrine.

For at least three reasons, "discrimination on the basis of sexual orientation is a form of sex discrimination." *Hively,* 853 F.3d at 341. First, such discrimination necessarily involves sex-based considerations because the discrimination directed, for example, at a man because he is attracted to men is not

directed at a woman who is attracted to men. For this simple reason, it is "impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex[.]" *Id.* at 351.[4] Second, just as discrimination against an employee who is romantically attracted to or involved with someone of a different race consistently has been recognized as race discrimination barred by Title VII, discrimination against an employee who is attracted to or in a relationship with someone of the same sex must be recognized as unlawful sex discrimination. Finally, sexual orientation discrimination constitutes prohibited sex discrimination because it is based on an employee's nonconformity with the sex-based stereotype that men should be attracted only to women, and that women should be attracted only to men.

A. When Employers Discriminate Based on Sexual Orientation, They Necessarily Consider an Employee's Sex.

First, "sexual orientation discrimination is sex discrimination for the simple reason that such discrimination treats otherwise similarly-situated people differently solely because of their sex." *Anonymous v. Omnicom Group, Inc.*, 852 F.3d 195, 202 (2d Cir. 2017) (Katzmann, C.J., concurring). This traditional

[4] In *Higgins*, this Court declined to consider whether discrimination on the basis of same-sex attractions or relationships constitutes a form of sex-plus discrimination because the issue had not been properly presented to the district court. *Higgins*, 194 F.3d at 259-60. That issue therefore remains open for this Court's consideration.

method for assessing sex discrimination under Title VII requires the Court to engage in a straightforward inquiry: "holding all other things constant and changing only [the employee's] sex, would [the employee] have been treated the same way?" *Hively*, 853 F.3d at 345. *See also Manhart*, 435 U.S. at 711 (holding that test under Title VII is "whether the evidence shows 'treatment of a person in a manner which but for that person's sex would be different.'").[5] If the employee would have been treated differently had they been of the other sex, the employer has discriminated "because of sex."

Application of the "but-for" method shows that sexual orientation discrimination is discrimination because of sex. When an employer fires a female employee because the employee is married to (or lives with, dates, or is attracted to) a woman but would not fire a male employee for identical conduct with (or attraction to) a woman, the employer has engaged in "paradigmatic sex discrimination." *Hively*, 853 F.3d at 345. That is true because "sexual orientation is inseparable from and inescapably linked to sex[.]" *Baldwin*, 2015 EEOPUB LEXIS at *14.[6] Sexual orientation is a relational characteristic, defined by being

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[5] While a plaintiff satisfying this "but-for" test necessarily satisfies Title VII's causation requirement, Title VII plaintiffs alleging sex discrimination are not required to prove such causation and may alternatively prevail under the "motivating-factor" test. *See, e.g., Velazquez-Perez v. Developers Diversified Realty Corp.*, 753 F.3d 265, 278 (1st Cir. 2014); *see also* 42 U.S.C. § 2000e–2(m).

[6] This is not to say that "sex" and "sexual orientation" are interchangeable concepts or terms; the salient point is, rather, that an individual's sexual orientation

(or desiring to be) romantically involved with a person of a particular sex. An employer's decision to take adverse action only against men who are attracted to men, but not against women with the same attractions, necessarily involves sex-based considerations and therefore violates Title VII.

Although this Court for procedural reasons declined to consider a similar argument in *Higgins*, 194 F.3d at 259-60, a growing number of courts have recognized the compelling logic of this position. *See, e.g.*, *Hively*, 853 F.3d at 350-51; *id.* at 358 (Flaum, J., concurring); *Isaacs v. Felder Servs., LLC*, 143 F. Supp. 3d 1190, 1194 (M.D. Ala. 2015); *Hall v. BNSF Ry. Co.*, 2014 U.S. Dist. LEXIS 132878, at *8-9 (W.D. Wash. Sept. 22, 2014); *Koren v. Ohio Bell Tel. Co.*, 894 F. Supp. 2d 1032, 1038 (N.D. Ohio 2012); *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212, 1223 (D. Or. 2002); *see also Videckis*, 150 F. Supp. 3d at 1161*); Baldwin*, 2015 EEOPUB LEXIS, at *14. This Court should not foreclose its ability to do the same in a future case where this issue is squarely presented.

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is defined in relation to sex, and that anti-gay discrimination necessarily takes account of an individual's sex.

B. Discrimination Based on Same-Sex Relationships Is Analogous to Discrimination Based On Interracial Relationships and, Therefore, Equally Violates Title VII.

Second, sexual orientation discrimination is sex discrimination because it treats otherwise similarly-situated people differently because of their sex, viewed in relation to the sex of the individuals with whom they associate (or to whom they are attracted). *Omnicom*, 852 F.3d at 204 (Katzmann, C.J., concurring); *see also Hively*, 853 F.3d at 347-48; *id.* at 359 (Flaum, J., concurring). Numerous courts have adopted this reasoning in the context of race discrimination, holding that "an employer may violate Title VII if it takes action against an employee because of the employee's association with a person of another race." *Holcomb v. Iona Coll.*, 521 F.3d 130, 132 (2d Cir. 2008); *see also Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 156 F.3d 581, 589 (5th Cir. 1998), vacated in part on other grounds, *Williams v. Wal-Mart Stores, Inc.*, 182 F.3d 333 (5th Cir. 1999); *Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick & GMC Trucks, Inc.*, 173 F.3d 988, 994-95 (6th Cir. 1999); *Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 892 (11th Cir. 1986). The same analysis should apply to claims of sex discrimination based on same-sex relationships or associations. *See Hively*, 853 F.3d at 349 (citing *Price Waterhouse*, 490 U.S. at 244 n.9). Judge Flaum's concurrence in *Hively* explains why this is so:

> Interracial relationships are comprised of (A) an individual of one race, and (B) another individual of a *different race*. Without

> considering the first individual's race, the word 'different' is meaningless. Consequently, employment discrimination based on an employee's interracial relationship is, in part, tied to an enumerated trait: the employee's race … The same principle applies here. Ivy Tech allegedly refused to promote Professor Hively because she was homosexual—or (A) a woman who is (B) sexually attracted to women.

Id. at 359 (Flaum, J., concurring) (emphasis in original).

Despite the many differences, historically and socially, among the kinds of discrimination prohibited under Title VII, the Supreme Court has made clear that courts should treat discrimination under the enumerated traits the same, because the statue "on its face treats each of the enumerated categories exactly the same."[7] *Price Waterhouse*, 490 U.S. at 243 n.9; *see also Faragher v. City of Boca Raton*, 524 U.S. 775, 787 n.1 (1998); *Meritor*, 477 U.S. at 66; *Manhart*, 435 U.S. at 709; *cf. Oncale*, 523 U.S. at 78 (rejecting attempt to exclude all same-sex harassment from Title VII's scope). Accordingly, this Court should not foreclose its ability to apply this well-established and widely accepted reasoning to claims under Title VII's sex discrimination provision in a future case.

C. Discrimination Based on Sexual Orientation Constitutes Discrimination Based on Sex Stereotypes.

Third, sexual orientation discrimination is sex discrimination "because such discrimination is inherently rooted in gender stereotypes." *Omnicom*, 852 F.3d at

[7] The statute delineates limited, narrow exceptions to this rule that are not relevant here. *See* 42 U.S.C. § 2000e-2(e).

205 (Katzmann, C.J., concurring). It is firmly established that discrimination based on such stereotypes violates Title VII. *See Price Waterhouse*, 490 U.S. at 251; *Chadwick*, 561 F.3d at 44.

Sexual orientation discrimination is a paradigmatic instance of gender stereotyping. An individual's same-sex attraction represents a "failure to conform to [a sex] stereotype (at least as understood in a place such as modern America, which views heterosexuality as the norm and other forms of sexuality as exceptional)[.]" *Hively*, 853 F.3d at 346; *see also Omnicom*, 852 F.3d at 205 (Katzmann, C.J., concurring); *Centola v. Potter*, 183 F. Supp. 2d 403, 410 (D. Mass. 2002) ("Sexual orientation harassment is often, if not always, motivated by a desire to enforce heterosexually defined gender norms."). As the Seventh Circuit aptly put it, making a "job decision based on the fact that the complainant—woman or man—dresses differently, speaks differently, or dates or marries a same-sex partner, is a reaction purely and simply based on sex." *Hively*, 853 F.3d at 347. Title VII prohibits employers from basing decisions on such considerations. This Court should not foreclose its ability to recognize in a future case that discrimination because an individual departs from the gendered expectation that a man should only be attracted to women and that a woman should only be attracted to men constitutes prohibited sex discrimination.

III. *Higgins* Has Sown Confusion and Inconsistency in Title VII Cases Brought by Lesbian, Gay and Bisexual Employees in This Circuit.

Almost twenty years ago, this Court determined in *Higgins* that although the plaintiff-appellant "toiled in a wretchedly hostile [work] environment" because of his sexual orientation, the plaintiff nonetheless failed to establish a claim under Title VII because "Title VII does not proscribe harassment simply because of sexual orientation." 194 F.3d at 258-59. At the same time, this Court also recognized that "a man can ground a claim [of impermissible gender-based stereotyping] on evidence that other men discriminated against him because he did not meet stereotyped expectations of masculinity." *Id*. at 261 n.4.

Mr. Higgins was foreclosed from arguing sex stereotyping because he did not raise the argument with the District Court. He was also held to have waived the argument that he had been discriminated against on a sex-plus theory. *Id.* at 259-60; *see supra* n.4. Accordingly, *Higgins* did not squarely address the contention that discrimination on the basis of sexual orientation inherently involves sex stereotyping, and therefore is no obstacle to this Court's consideration of that argument in a future case in which the issue is properly presented. Moreover, even if *Higgins* could be considered to have implicitly rejected that argument, "an opinion that contains no discussion of a powerful ground later advanced against it is more vulnerable to being overruled than an opinion which demonstrates that the

court considered the ground now urged as a basis for overruling." *United States v. Hill*, 48 F.3d 228, 232 (7th Cir. 1995).

This implied dichotomy between permissible sexual stereotyping and claims about sexual orientation discrimination – a dichotomy that fails to grapple with the victim's deviation from sex stereotypes in being a man drawn to relationships with other men, or a woman drawn to relationships with other women – has bedeviled the lower courts and is inconsistent with Title VII.

As one District Court described it, "the line between discrimination because of sexual orientation and discrimination because of sex is hardly clear." *Centola*, 183 F. Supp. 2d at 408. In that case, the plaintiff had not disclosed his sexual orientation at work, and alleged a seven-year period when co-workers "continuously tormented him by making comments and leaving photographs which may be characterized as mocking his masculinity, portraying him as effeminate, and implying that he was a homosexual." *Id.* at 406. The court found his sex discrimination claim viable because a jury could conclude that he "did not conform with [his co-worker's] ideas about what 'real' men should look or act like[,]" and that his "co-workers punished him because they perceived him to be impermissibly feminine for a man." *Id.* at 410.

Several other District Courts have relied on *Centola*'s recognition that a person who is or is perceived as lesbian, gay or bisexual is, as a result, also seen by

others as transgressing gender stereotypes. *See Rosado v. Am. Airlines,* 743 F. Supp. 2d 40, 57-58 (D. P.R. 2010) (agreeing with *Centola* that the line between sexual orientation and sex is unclear and that the plaintiff, a gay man, had alleged a sex discrimination case based on a failure to conform with sexual stereotypes of what "real" men do and don't do); *Tinory v. Autozoners, LLC,* 2016 U.S. Dist. LEXIS 8760, at *16 (D. Mass. Jan. 26, 2016) (finding *Centola*'s holding that when an "employer acts upon stereotypes about sexual roles in making employment decisions" to be "an appropriate state of the law in this Circuit with regard to claims under Title VII based harassment or discrimination alleged to stem from sex stereotyping."). At the same time, even in cases involving similar facts, other courts rejected Title VII claims by gay plaintiffs. For example, in *Ayala-Sepulveda v. Municipality of San German*, 661 F. Supp. 2d 130, 134-135 (D. P.R. 2009), a gay man brought a Title VII gender stereotyping claim based on allegations that he was mocked, harassed, demoted and ultimately fired due to his sexual orientation and a relationship with a male co-worker. In contrast to *Centola*, however, the court held that while "the line between sexual orientation discrimination and discrimination 'because of sex' can be difficult to draw," "the plaintiff's allegations in this case do fall clearly on one side of the line." *Id*. at 137 (internal citations omitted).

As these and other examples illustrate, the impossibility of drawing a principled line between discrimination based on sex and discrimination based on sexual orientation leaves lower courts with no clear guidance and results in unpredictable and inconsistent rulings. For example, in *Rosado*, the court held that it was conceivable that "because [the plaintiff] dated men, not women[,]" a jury could conclude that plaintiff was discriminated against because of his sex. 743 F. Supp. 2d at 58. In contrast, the court in *Ayala-Sepulveda* rejected the very same claim, finding no possible Title VII liability where the only "claim of sexual stereotyping is the very fact that he is attracted to other men and had an affair with a member of the same sex." 661 F. Supp. 2d at 136-137.

Similarly, in several cases, courts held that harassment based on a person's sexual orientation are sex-based and can establish a sex discrimination claim. *See, e.g.*, *Snelling v. Fall Mt. Reg'l Sch. Dist.*, 2001 U.S. Dist. LEXIS 3591 at *3-6, *11-12 (D. N.H. Mar. 21, 2001) (relying on Title VII case law and holding that student-plaintiffs stated a viable Title IX claim based, in part, on homophobic taunts); *Ramos-Perez v. Nat'l Life Ins. Co.,* 2012 U.S. Dist. LEXIS 122993, at *2-3 (D. P.R. Aug. 27, 2012) (refusing to grant summary judgment against a Title VII plaintiff who alleged sexual harassment based, in part, on the plaintiff's perceived sexual orientation). In others, courts have rejected such claims out of hand, holding that epithets or harassment based on a person's sexual orientation fall

outside of Title VII's scope. For example, in *Ianetta v. Putnam Invs., Inc.*, the court held that Title VII did not protect an employee who had been called "faggot" by his supervisor, rejecting the employee's claims that the "faggot" is a "stereotypical term [that] necessarily imports the male gender." 183 F. Supp. 2d 415, 421-423 (D. Mass. 2002). The court held that *Price Waterhouse* does not encompass "perceived homosexuality" as a gender stereotype actionable under Title VII.

As the *Ianetta* decision also makes clear, the lower courts have struggled, without success, to find some way to differentiate between gender stereotypes based on sexual orientation per se and those based on beliefs about the supposed effeminacy of gay men or the masculinity of lesbian women. In *Ianetta*, the court adopted the approach taken by *Simonton v. Runyon*, 232 F.3d 33 (2d Cir. 2000), which held that gender stereotyping claims based on sexual orientation are not permitted under Title VII because "not all homosexual men are stereotypically feminine, and not all heterosexual men are stereotypically masculine." *Ianetta*, 183 F. Supp 2d. at 422 (quoting *Simonton*, 232 F. 3d at 38). But as *Centola* and other recent cases have explained, that myopic focus fails to acknowledge the equally stereotypical view that "'real' men should date women, and not other men," whether effeminate or not. 183 F. Supp. 2d at 41. Rather than merely "singl[ing] out an effeminate man for scorn," that pervasive stereotype views all

lesbian, gay, and bisexual persons as deviating from one of our culture's most deeply rooted gender-based norms: the expectation that a man will only be attracted to women, and that a woman will only be attracted to men. *Id.* Short of an artificial limitation that simply excludes such claims by fiat, there is no principled way to distinguish them from other gender stereotyping claims.

This artificial limitation on gender stereotyping claims gives rise to another unprincipled inconsistency, leading courts to arbitrarily favor claims brought by otherwise gender non-conforming lesbian, gay, and bisexual plaintiffs while disfavoring essentially identical claims brought by those who are not otherwise gender non-conforming. For example, in *Rivera v. HFS Corp.,* 2012 U.S. Dist. LEXIS 82347 (D. P.R. June 12, 2012), the plaintiff alleged a hostile work environment "because her behavior did not conform to the stereotype of a female" and her supervisor called her a "dirty dyke" and subjected her to discriminatory working conditions. *Id*. at *3, *10. The court held that because there was "no showing that the alleged animus was premised on actual behavior" defying gender stereotypes, the Title VII claim failed. *Id*. at *11-13 (holding that the claim was "exclusively premised on a comment relating to sexual orientation"). In contrast, if the plaintiff had been "masculine" in her appearance or behavior, the very same facts likely would have stated a Title VII claim. Similarly, in *Soto-Martinez v. Colegio San Jose, Inc.*, 2009 U.S. Dist. LEXIS 82510, *2, *9-11 (D. P.R. Sept. 9,

2009), the court found no Title VII liability where plaintiff suffered constant verbal harassment referring to him as gay where he was not otherwise seen as failing to conform to gender stereotypes of masculinity. In contrast, if the plaintiff had been "feminine" in his appearance or behavior, the very same facts likely would have stated a Title VII claim.

A final example of the straitjacket imposed by *Higgins*' exclusion of sexual orientation discrimination without considering its inherent reliance on sex stereotyping is *Partners Healthcare Sys. v. Sullivan*, 497 F. Supp. 2d 42 (D. Mass. 2007). *Partners* struggled "to resolve the tension created between . . . *Price Waterhouse*" and *Higgins* that "stems from the fact that *Price Waterhouse* bans discrimination on the basis of sexual stereotypes." *Id*. at 44 n.3. In order to follow *Higgins*, "there must be some limit to the protection for stereotyping discrimination afforded in *Price Waterhouse*." *Id*. In an effort to find such a limit, the court held that the gender stereotypes prohibited by *Price Waterhouse* must refer to "characteristics . . . readily demonstrable in the workplace," which the court held excluded sexual orientation because it is based on private sexual intimacy. *Id*. (quoting *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 763 (6th Cir. 2006)). But that purported limitation has no footing in the Supreme Court's precedents, which hold that impermissible sex discrimination includes unequal treatment based on other factors that are not "readily demonstrable in the

workplace," such as stereotypes about the lifespans of male and female workers, about married flight attendants, or women who have children. *See Manhart*, 435 U.S. at 708 and n.13; *Phillips*, 400 U.S. at 545 (Marshall, J., concurring); and *Sprogis v. United Airlines*, 444 F.2d 1194 (7th Cir. 1971).

In sum, this Court's attempt to exclude sexual orientation claims from the scope of Title VII in *Higgins* has caused confusion among the lower courts and placed lesbian, gay and bisexual employees facing discrimination in an unfair bind.

CONCLUSION

Although the question of whether sexual orientation discrimination is sex discrimination under Title VII was not properly presented in this case, should the Court address that issue in this or a future case, amici respectfully request that the Court answer that question in the affirmative for the foregoing reasons.

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Brief of Amici Curiae, on counsel for all parties, electronically through the ECF System, on this 25th day of August, 2017.

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