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UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 16-748-cv

Caption [use short title]

Christiansen v. Omnicom Group, Incorporated

Motion for: Members of Congress as Amici Curiae for leave to file a brief in support of plaintiff-appellant's petition for rehearing en banc

Set forth below precise, complete statement of relief sought:

Amici curiae seek leave to file a brief in support of the petition for rehearing en banc

MOVING PARTY: Amici Members of Congress

☐ Plaintiff ☐ Defendant

☐ Appellant/Petitioner ☐ Appellee/Respondent

OPPOSING PARTY:

MOVING ATTORNEY: Peter T. Barbur

OPPOSING ATTORNEY:

[name of attorney, with firm, address, phone number and e-mail]

Cravath, Swaine & Moore LLP
825 Eighth Avenue
New York, NY 10019

(212) 474-1000
pbarbur@cravath.com

Court-Judge/Agency appealed from:

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
☑ Yes ☐ No (explain):

Opposing counsel's position on motion:
☑ Unopposed ☐ Opposed ☐ Don't Know

Does opposing counsel intend to file a response:
☐ Yes ☑ No ☐ Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has request for relief been made below? ☐ Yes ☐ No

Has this relief been previously sought in this Court? ☐ Yes ☐ No

Requested return date and explanation of emergency:

Is oral argument on motion requested? ☐ Yes ☑ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☐ Yes ☑ No If yes, enter date:

Signature of Moving Attorney:
/s/ Peter T. Barbur **Date:** 05/05/2017

Service by: ☑ CM/ECF ☐ Other [Attach proof of service]

Form T-1080 (rev. 12-13)

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16-748-cv

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

MATTHEW CHRISTIANSEN,
Plaintiff-Appellant,

v.

OMNICOM GROUP, INC., DDB WORLDWIDE COMMUNICATIONS GROUP INC., JOE CIANCIOTTO, PETER HEMPEL AND CHRIS BROWN,
Defendants-Appellees.

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

MOTION OF FOUR MEMBERS OF CONGRESS AS *AMICI CURIAE* FOR LEAVE TO FILE A 12-PAGE BRIEF IN SUPPORT OF PLAINTIFF-APPELLANT'S PETITION FOR REHEARING *EN BANC*

Peter T. Barbur
CRAVATH, SWAINE & MOORE LLP
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019
(212) 474-1000

Attorney for Amici Curiae *Members of Congress*

May 5, 2017

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Pursuant to Federal Rules of Appellate Procedure 27 and 29(b), and 2d Cir. R. 27.1 and 29.1, four Members of Congress (Senator Jeffrey A. Merkley, Senator Tammy Baldwin, Senator Cory A. Booker and Representative David N. Cicilline; the "Members") move this Court for leave to file the attached brief as *amici curiae* in support of Plaintiff-Appellant Matthew Christiansen's petition for rehearing *en banc*. In support, the Members state:

1. The Members wish to file an *amici curiae* brief in support of the Plaintiff-Appellant's petition for rehearing *en banc*.

2. Plaintiff-Appellant's petition for rehearing *en banc* was filed on April 28, 2017. Therefore, *amicus curiae* briefs in support of this petition are due on May 5, 2017. Fed. R. App. P. 29(b)(5).

3. Members of Congress, as officers of the United States, typically may file *amici curiae* briefs without the parties' consent or leave of the Court. Fed. R. App. P. 29(a). However, since this is an *amici curiae* brief in support of a petition for rehearing, rather than in support of a party's principal brief, the Members seek leave from this Court to file as required by Fed. R. App. P. 29(b)(2).

4. Fed. R. App. P. 29(b)(4) specifies that an *amicus curiae* brief during consideration of whether to grant a rehearing must not exceed 2,600 words.

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The Members therefore respectfully ask this Court for leave to file a 2,600-word brief as *amici curiae* in support of Plaintiff-Appellant's petition for rehearing *en banc*.

Signed this 5th day of May, 2017.

Respectfully submitted,

CRAVATH, SWAINE & MOORE LLP,

By /s/ Peter T. Barbur
Peter T. Barbur

Worldwide Plaza
825 Eighth Avenue
New York, NY 10019
(212) 474-1000

Attorney for Amici Curiae *Members of Congress*

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16-748-cv

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

MATTHEW CHRISTIANSEN,
Plaintiff-Appellant,

v.

OMNICOM GROUP, INC., DDB WORLDWIDE COMMUNICATIONS GROUP INC., JOE CIANCIOTTO, PETER HEMPEL AND CHRIS BROWN,
Defendants-Appellees.

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

BRIEF *AMICUS CURIAE* OF FOUR MEMBERS OF CONGRESS IN SUPPORT OF PLAINTIFF-APPELLANT'S PETITION FOR REHEARING *EN BANC*

Peter T. Barbur
CRAVATH, SWAINE & MOORE LLP
Worldwide Plaza
825 Eighth Avenue
New York, NY 10019
(212) 474-1000

Attorney for Amici Curiae *Members of Congress*

May 5, 2017

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I. STATEMENT OF INTERESTS OF *AMICI CURIAE*[1]

Amici are United States Senators Jeffrey A. Merkley, Tammy Baldwin and Cory A. Booker and member of the United States House of Representatives David N. Cicilline. All cosponsor the Equality Act,[2] which clarifies and expands current civil rights laws to better protect people of color, women and lesbian, gay, bisexual and transgender ("LGBT") Americans from discrimination. The Equality Act represents the latest bipartisan legislative effort to update our nation's laws with respect to LGBT Americans. It uses a "belt-and-suspenders" approach to reflect what the Act's cosponsors and various federal regulatory and judicial bodies recognize: LGBT Americans are *already* protected against discrimination on the basis of sexual orientation and gender identity under Title VII of the Civil Rights Act of 1964, because sexual orientation and gender identity are inherently aspects of a person's "sex".

As members of Congress, we are uniquely able to advise the Court on draft and pending legislation. We also have an inherent interest in the proper interpretation of enacted laws and pending legislation—particularly when differing

[1] No counsel for any party in this case authored this brief in whole or in part, and no party, party's counsel or any other person, contributed money that was intended to fund preparing or submitting this brief.

[2] This brief cites to the Senate version of the Equality Act, but the House and Senate versions, H.R. 2282 and S. 1006 respectively, are identical in substance.

interpretations alternately vindicate or eliminate the rights of the constituents we represent. Varying interpretations of Title VII have led to uncertainty in the workplace and left LGBT Americans inconsistently protected from workplace harassment and discrimination, despite applicable federal law. We firmly believe that Title VII already prohibits discrimination based on an individual's sexual orientation and gender identity. We urge the Court to grant Plaintiff-Appellant Christiansen's petition for rehearing *en banc* and overrule erroneous Second Circuit precedent to the contrary.[3]

II. SUMMARY OF ARGUMENT

> "Numerous provisions of Federal law expressly prohibit discrimination on the basis of sex, and Federal agencies and courts have correctly interpreted these prohibitions on sex discrimination to include discrimination based on sexual orientation, gender identity and sex stereotypes . . . . The absence of explicit prohibitions of discrimination on the basis of sexual orientation and gender identity under Federal statutory law, as well as the existence of legislative proposals that would have provided such explicit prohibitions, has led some courts to conclude incorrectly that current Federal laws prohibiting sex discrimination do not prohibit discrimination on the basis of sexual orientation and gender identity. It has also created uncertainty for employers and other entities covered by Federal nondiscrimination laws . . . ." Equality Act of 2017, S. 1006, 115th Cong. § 2(9)-(10) (2017).

[3] *Amici* also urge *en banc* review for the same reasons of two similar cases pending in this Circuit, *Cargian v. Brietling*, 16-3592-cv, and *Zarda v. Altitude Express, Inc.*, 15-3775-cv.

This is why *Amici* re-introduced the Equality Act of 2017 and drafted it both to codify the status of current law and to provide clarity and stability for the American people. The Equality Act will expressly add "sexual orientation" and "gender identity" to Title VII of the Civil Rights Act, S. 1006 § 7, and it *also* defines "sex" to *include* "sexual orientation and gender identity", S. 1006 § 9(2). *Amici* drafters did this intentionally because we recognize that, under current law, "sex" already includes and is inseparable from sexual orientation and gender identity.

Rehearing *en banc* is necessary in this case in light of the exceptional need to correct the interpretation of federal civil rights law within this Circuit and to correct faulty application of prior Supreme Court decisions. *See* Fed. R. App. P. 35(a). While a panel of this Court correctly applied Supreme Court precedent in recognizing that "adverse employment action rooted in 'sex stereotyping' . . . was actionable sex discrimination" , *Christiansen v. Omnicom*, 852 F.3d 195, 200 (2d Cir. 2017), the panel declined to find that sexual orientation discrimination is sex discrimination under Title VII, because of Circuit precedent like *Simonton* and *Dawson*, *id.* at 199. However, *Simonton* and *Dawson*'s insistence on a narrow interpretation of sex under Title VII conflicts with Supreme Court precedent, *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), and ignores the plain text of Title VII as well as the doctrine of associational discrimination. *Christiansen*'s

holding, which declines to correct *Simonton* or *Dawson*, is contrary to law and common sense, as the Seventh Circuit sitting *en banc* recognized just a month ago. *See Hively v. Ivy Tech Cmty. Coll., S. Bend*, No. 15-1720, 2017 WL 1230393, at *9 (7th Cir. Apr. 4, 2017) ("[I]t is actually impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex . . . .").

The obvious paradox of Title VII jurisprudence in the Second Circuit is undoubtedly the judiciary's concern. *See Christiansen*, 852 F.3d at 207 (Katzmann, J., concurring) ("[I]n the context of an appropriate case our Court should consider reexamining the holding that sexual orientation discrimination claims are not cognizable under Title VII"). While Congress attempts to codify, update and expand civil rights protections for all LGBT Americans, courts play a vital role by applying the law in individual cases. Landmark Supreme Court cases like *Windsor* and *Obergefell* demonstrated the important role of the judiciary as a coequal branch with a duty to protect civil rights and "afford[] greater legal protection to gay, lesbian, and bisexual individuals". *Id.* at 206. The solution to the uncertainty and confusion created by *Simonton* and its progeny is straightforward, logical, just and supported by *Amici*. This Court should grant Christiansen's petition for rehearing *en banc* and recognize that Title VII encompasses sexual orientation discrimination because it is (1) sex discrimination by its very definition, (2) impermissible gender stereotyping under *Price*

Waterhouse and (3) impermissible sex-based associational discrimination. Any case law in this Circuit to the contrary should be overturned.

III. THE *CHRISTIANSEN* DECISION SHOULD BE RECONSIDERED BECAUSE IT RELIED ON INCORRECTLY DECIDED LAW TO JUSTIFY AN INCOHERENT INTERPRETATION OF "SEX" UNDER TITLE VII.

The holding in *Simonton v. Runyon*, 232 F.3d 33 (2d Cir. 2000), and its progeny—now including *Christiansen*—that a claim for discrimination based on sexual orientation is not cognizable under Title VII, *see, e.g.*, *Dawson v. Bumble & Bumble*, 398 F.3d 211, 217-18 (2d Cir. 2005), is inconsistent with logic and the law. The Equality Act aims to counter such erroneous judicial interpretations by clarifying Title VII's existing protections, and to avoid any implication that the judiciary is powerless to interpret Title VII correctly without Congressional intervention.

A. Sex Discrimination Includes Sexual Orientation Discrimination by Its Plain Meaning.

Sexual orientation discrimination cannot be understood without reference to an individual's sex. *See Baldwin v. Foxx*, E.E.O.C. Decision No. 0120133080, 2015 WL 4397641, at *5 (July 16, 2015). If sex discrimination entails being "exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed", *see Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998), then a gay man subject to a hostile

work environment because he dates men, where his straight female colleagues who date men do not face such abuse, faces discrimination "because of . . . sex".

Title VII plainly prohibits similarly situated people from being treated differently solely "because of . . . sex". In the situation described above, "but for" the employee's sex, he is treated differently from similarly situated female colleagues. Title VII's prohibition against sex discrimination "must extend" to this situation because it "meets the statutory requirements" of Title VII. *Id.* Likewise, to treat Christiansen differently from female colleagues who share the *same preferences* is quintessential sex discrimination under Title VII. To hold otherwise would defy common sense.

B. Sexual Orientation Discrimination Constitutes Impermissible Associational Discrimination.

Sexual orientation discrimination is also discrimination "because of . . . sex" because it treats people differently based on their chosen associates. Associational discrimination is a well established Title VII violation. *See Holcomb v. Iona College*, 521 F.3d 130, 138 (2d Cir. 2008) ("[A]n employer may violate Title VII if it takes action against an employee because of the employee's association with a person of another race").

While associational discrimination has played a role in cases that recognize that disparate treatment because of an employee's interracial

associations necessarily takes into account the employee's own race, the same standard applies "with equal force" to Title VII's sex discrimination prohibition. *Price Waterhouse*, 490 U.S. at 243 n.9; *see also Whidbee v. Garzarello Food Specialties, Inc.*, 223 F.3d 62, 69 n.6 (2d Cir. 2000) ("[T]he same standards apply to both race-based and sex-based hostile environment claims").[4] Under a correct and consistent application of Title VII, disparate treatment based on an employee's same-sex associations is discrimination based on sex, just as disparate treatment based on an employee's interracial associations is discrimination based on race.

C. Sexual Orientation Discrimination Is Impermissible Gender Stereotyping.

Finally, it is well established that discrimination "because of . . . sex" includes discrimination on the basis of sex stereotypes. Sexual orientation discrimination *is* discrimination on the basis of sex stereotypes.

In 2000, the Second Circuit concluded that a male employee subjected to an abusive work environment because of his sexual orientation had no sex discrimination claim under Title VII. *Simonton*, 232 F.3d at 34-35. Recognizing the dearth of Title VII legislative history the court ignored Supreme Court precedent like *Price Waterhouse* and erroneously looked to "Congress's rejection

[4] The only distinction between standards for assessing race- and sex-based discrimination is the statutory exception for sex-based bona fide occupational qualifications, 42 U.S.C. § 2000e-2(e)(1), which would not extend to a heterosexuality requirement.

on numerous occasions of bills that would have extended Title VII's protection to people based on their sexual preferences". *Id.* at 35.

In 2005, the Second Circuit again concluded that though "[w]hen utilized by an avowedly homosexual plaintiff . . . gender stereotyping claims can easily present problems for an adjudicator" because "stereotypical notions about how men and women should behave will often necessarily blur into ideas about heterosexuality and homosexuality", *Dawson*, 398 F.3d at 217-18 (internal quotation marks omitted), the definition of "sex" under Title VII should not be "bootstrapped" into protecting against sexual orientation discrimination. *Id.*

Dawson identifies precisely why prohibiting discrimination based on sex stereotypes must encompass sexual orientation discrimination: "it is logically untenable for us to insist" that the "particular gender stereotype" that "real men should date women, and not other men" would somehow be "outside of the gender stereotype discrimination prohibition articulated in *Price Waterhouse*". *Christiansen*, 852 F.3d at 205 (Katzmann, J., concurring). In *Price Waterhouse*, the Supreme Court reaffirmed that "[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes". 490 U.S. at 251 (quoting *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 707, n.13 (1978)). And in *Oncale v. Sundowner Offshore*

Servs., Inc., Justice Scalia confirmed that "statutory prohibitions often go beyond" "the principal evil Congress was concerned with when it enacted" the statute. 523 U.S. 75, 79 (1998). Indeed, given the clear conflict between *Simonton*'s and *Price Waterhouse*'s interpretations of "sex", courts now agree "with near-total uniformity that the narrow approach" adopted in cases like *Simonton* "has been eviscerated". *Glenn v. Brumby*, 663 F.3d 1312, 1318 n.5 (11th Cir. 2011) (quoting *Smith v. City of Salem*, 378 F.3d 566, 573 (6th Cir. 2004)).

Simonton's holding that sexual orientation is not protected under Title VII contradicts Supreme Court precedent like *Price Waterhouse* and *Oncale*. *Christiansen*'s reliance on *Simonton* is therefore an error which this Court can and should correct *en banc*.

D. *Amici* Introduced the Equality Act To Codify Existing Law and Provide Explicit Protections for LGBT Americans Using a "Belt-and-Suspenders" Approach.

The Equality Act was drafted to codify current law and administrative rulings, to expand those civil rights laws that do not currently prohibit sex discrimination and to put the public on clear notice that LGBT status is an explicitly protected characteristic under federal law. *Amici* also wish to avoid further confusion in the courts as to whether legislative proposals designed to protect employees from discrimination based on their sexual orientation or gender identity were an indication that such protections do not exist under current law.

241 members of Congress cosponsored the Act to prohibit discrimination against people of color, women and LGBT Americans across many different aspects of public life. But the Equality Act explicitly acknowledges that Title VII *already* protects against sexual orientation and gender identity discrimination. S. 1006 § 2(9). *Amici* sought to affirm, not supersede, case law and administrative holdings that discrimination based on sexual orientation and gender identity are sex discrimination. *Amici* undertook a "belt-and-suspenders" approach when drafting the Equality Act's substantive provisions.

First, the Equality Act would amend Title VII to explicitly include "sexual orientation" and "gender identity" as protected characteristics. S. 1006 § 7. We believe this will help clarify the statute for the average American who would look at its text without the benefit of legal experience or a repository of case law.

Second, in keeping with the proper interpretation of Title VII, the Act also *defined* "sex" as including "a sex stereotype[,] . . . sexual orientation or gender identity". S. 1006 § 9(2). This would codify both existing case law and EEOC rulings. This definitional structure is the "suspenders" of our approach, and was drafted with circumstances such as the present case in mind. We further included a "no negative inference" provision, to ensure nothing in the amended Civil Rights Act "shall be construed to support any inference that any Federal law prohibiting a

practice on the basis of sex does not prohibit discrimination on the basis of . . . sexual orientation, gender identity, or a sex stereotype". S. 1006 § 9(3).

Finally, with respect to prior iterations of the Act, the Supreme Court has warned against giving too much significance to failed amendments to current law:

> "[S]ubsequent legislative history is a hazardous basis for inferring the intent of an earlier Congress. It is a particularly dangerous ground on which to rest an interpretation of a prior statute when it concerns . . . a proposal that does not become law. Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change." *Pension Ben. Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) (internal citations and quotation marks omitted).

Indeed, Judge Katzmann's *Christiansen* concurrence recognized "there are idiosyncratic reasons that many bills do not become law" including reasons "wholly unrelated to the particular provision . . . a court is assessing". *Christiansen*, 852 F. 3d at 206 (Katzmann, J., concurring). For the reasons set forth above, sex discrimination under Title VII includes sexual orientation discrimination and because "it is ultimately the provisions of our laws . . . by which we are governed", this Court cannot rely on congressional inaction to read out sexual orientation discrimination from Title VII's plain text. *Oncale*, 532 U.S. at 79.

Therefore, not only should this Court review *Christiansen en banc* in light of a proper understanding of Title VII, but also if this Court considers proposed legislation to inform its Title VII interpretation, the Equality Act of 2017 is the correct benchmark for such an inquiry.

IV. CONCLUSION

For the foregoing reasons, we respectfully request that this Court grant Plaintiff-Appellant's petition for rehearing *en banc*.

May 5, 2017.

Respectfully submitted,

CRAVATH, SWAINE & MOORE LLP,

by /s/ Peter T. Barbur
Peter T. Barbur

Worldwide Plaza
825 Eighth Avenue
New York, NY 10019
(212) 474-1000

Attorney for Amici Curiae *Members of Congress*

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation set forth in Fed. R. App. P. 29(b)(4) because it contains 2,600 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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)(5)-(6). It was prepared using a 14-point, proportionally spaced typeface with serifs and set in a roman style, except as otherwise permitted.

Signed this 5th day of May, 2017.

/s/ Peter T. Barbur
Peter T. Barbur