No. 16-748

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MATTHEW CHRISTIANSEN,

Plaintiff-Appellant,

v.

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

Defendants-Appellees.

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

BRIEF OF LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC. AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT'S PETITION FOR REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

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

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STATEMENT OF INTEREST[1]

Formed in 1973, Lambda Legal Defense and Education Fund, Inc. is the nation's oldest and largest legal organization committed to achieving full recognition of the civil rights of lesbian, gay, bisexual, and transgender ("LGBT") people and everyone living with HIV through impact litigation, education, and public policy work. Lambda Legal has served as counsel or *amicus* in seminal cases regarding the rights of LGBT people and people living with HIV. *See, e.g.*, *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015); *United States v. Windsor*, 133 S.Ct. 2675 (2013); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Bragdon v. Abbott*, 524 U.S. 624 (1998); *Romer v. Evans*, 517 U.S. 620 (1996).

Of special relevance here, Lambda Legal successfully represented the plaintiff-appellant 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. It has also served as counsel or *amicus curiae* in many other employment discrimination

[1] *Amicus* certifies that no party's counsel authored this brief in whole or in part, and no person other than *Amicus*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Fed. R. App. P. 29(a)(4)(E); L.R. 29.1(b).

Amicus's counsel assisted with the preparation of the petition for rehearing en banc in *Zarda v. Altitude Express*, No. 15-3775 (2d Cir. May 2, 2017); this brief, however, reflects solely the work of *Amicus*'s counsel.

cases involving the rights of LGBT people. *See, e.g.*, *Evans v. Georgia Reg'l Hosp.*, 850 F.3d 1248 (11th Cir. 2017), *pet. for reh'g en banc pending*; *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011); *Rene v. MGM Grand Hotel*, 305 F.3d 1061 (9th Cir. 2002) (en banc); *EEOC v. Scott Med. Health Ctr., P.C.*, No. 16-cv-225, 2016 WL 6569233 (W.D. Pa. Nov. 4, 2016); *Hall v. BNSF Ry. Co.*, No. C13-2160, 2014 WL 4719007 (W.D. Wash. Sept. 22, 2014); *TerVeer v. Billington*, 34 F.Supp.3d 100 (D.D.C. 2014).

Amicus thus brings a unique perspective and unmatched experience regarding the question of Title VII's application to claims of sexual orientation discrimination. Thus, should the Court believe it would be aided by oral argument from an *amicus* experienced with en banc argument on the issue in this case or a related case raising the same issue, Lambda Legal would be willing to present oral argument. *See* Fed. R. App. P. 29(a)(8).

All parties have consented to the filing of this brief. Fed. R. App. P. 29(b)(2).

THE ISSUE MERITING EN BANC CONSIDERATION

In enacting Title VII, 42 U.S.C. § 2000e *et seq.*, Congress established a statutory imperative to extinguish discrimination in employment "because of . . . sex." 42 U.S.C. § 2000e-2(a)(1). While some lower courts have hesitated to give these words their full meaning, the Supreme Court has not. The Supreme Court has broadly and consistently condemned "sex-based" discrimination in the workplace,

recognizing that Title VII was "intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989).

Now, this Court sitting en banc must decide whether Title VII's prohibition against sex discrimination encompasses sexual orientation discrimination claims. The panel in this case, like the panel in *Zarda v. Altitude Express*, No. 15-3775, 2017 WL 1378932, at *2 (2d Cir. Apr. 18, 2017), felt bound by *Simonton v. Runyon*, 232 F.3d 33 (2d Cir. 2000), and *Dawson v. Bumble & Bumble*, 398 F.3d 211 (2d Cir. 2005), and thus ruled that Title VII allows the firing of men, but not women, who are attracted to men, even though neither *Simonton* nor *Dawson*—nor any other opinion of this Court—has addressed the multiple "persuasive" reasons that support a holding that Title VII's bar on sex discrimination encompasses anti-gay discrimination. *See Christiansen v. Omnicom Grp., Inc.*, 852 F.3d 195, 202 (2d Cir. 2017) (Katzmann, C.J., concurring). Only this full Court, convening en banc, can now overrule *Simonton* and *Dawson* and bring this Court's caselaw into compliance with Title VII's statutory mandate to "treat[] each of the enumerated categories exactly the same," *Price Waterhouse*, 490 U.S. at 244 n.9, and the Court's obligation to entertain *all* claims alleging adverse treatment in employment based on "sex-based considerations." *Id.* at 242.

The panel's adherence to *Simonton* perpetuated a "longstanding tension in Title VII caselaw," *Zarda*, 2017 WL 1378932, at *2, and conflicts with multiple decisions of the Supreme Court, *e.g.*, *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75 (1998); *Price Waterhouse*, 490 U.S. 228; *City of Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702 (1978), and of this Court, *e.g.*, *Holcomb v. Iona Coll.*, 521 F.3d 130 (2d Cir. 2008); *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107 (2d Cir. 2004).

Furthermore, whether Title VII's prohibition on sex discrimination protects employees from sexual orientation discrimination is a question of exceptional importance. The en banc Seventh Circuit, the Equal Employment Opportunity Commission, and this Court's Chief Judge all agree that sexual orientation discrimination is a form sex discrimination. *See Hively*, 853 F.3d at 345-59; *Christiansen*, 852 F.3d at 207 (Katzmann, C.J., concurring); *Baldwin v. Foxx*, Appeal No. 0120133080, 2015 WL 4397641 (EEOC July 16, 2015). And a majority of the panel that decided *Simonton* nearly two decades ago believes the issue warrants reconsideration. *See Christiansen*, 852 F.3d at 207 (Katzmann, C.J., concurring); Oral Arg. at 11:06, *Zarda*, 2017 WL 1378932 (Sacks, J.), *available at* http://files.eqcf.org/cases/15-3775-oral-argument-audio/.

ARGUMENT

I. WHETHER TITLE VII FORBIDS SEXUAL ORIENTATION DISCRIMINATION IS A QUESTION OF EXCEPTIONAL IMPORTANCE.

The Court's disposition of this matter will affect not only the rights of Mr. Christiansen and the plaintiffs in two other pending petitions regarding the same issue,[2] but also the rights of countless others who may face sex discrimination in the form of sexual orientation discrimination but who may not, under *Simonton* and *Dawson*, access Title VII's broad redress—including remedies unavailable even under state laws *expressly* prohibiting "sexual orientation" discrimination. *See, e.g.*, *Tomick v. United Parcel Serv., Inc.*, 153 A.3d 615, 625 (Conn. 2016); *Thoreson v. Penthouse Intern., Ltd.*, 606 N.E.2d 1369, 1373 (N.Y. 1992); *see also Lightfoot v. Union Carbide Corp.*, 110 F.3d 898, 914 (2d Cir. 1997).[3] Moreover, many LGB persons may well not be subject to such discrimination if this Court sends a clear message that Title VII prohibits it.

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[2] *See* Pet. for Reh'g En Banc, *Zarda*, No. 15-3775; Pet. for Hearing En Banc, *Cargian v. Breitling USA, Inc.*, No. 16-3592 (2d Cir. Apr. 19, 2017).

[3] Not only does "[T]itle VII affords greater financial relief than the [New York State] Human Rights Law," *Margerum v. City of Buffalo*, 28 N.E.3d 515, 523 (N.Y. 2015) (Rivera, J., concurring in part, dissenting in part), it also "provides the sole remedy for federal employees alleging employment discrimination," *Rivera v. Heyman*, 157 F.3d 101, 105 (2d Cir. 1995).

This Court's caselaw carving out LGB people from Title VII's full protections from sex-based discrimination is out-of-step with other federal courts' increasing recognition that sexual orientation discrimination "is a form of sex discrimination." *Hively*, 853 F.3d at 341. *See*, *e.g.*, *Philpott v. New York*, No. 16-cv-6778, 2017 U.S. Dist. LEXIS 67591 (S.D.N.Y. May 3, 2017); *Winstead v. Lafayette Cty. Bd. of Cty. Comm'rs*, 197 F.Supp.3d 1334 (N.D. Fla. 2016); *Scott Med. Health Ctr.*, 2016 WL 6569233; *Isaacs v. Felder Servs., LLC*, 143 F.Supp.3d 1190 (M.D. Ala. 2015); *Videckis v. Pepperdine Univ.*, 150 F.Supp.3d 1151 (C.D. Cal. 2015); *Terveer*, 34 F.Supp.3d 100; *Boutillier v. Hartford Pub. Sch.*, No. 13-cv-1303, 2014 WL 4794527 (D. Conn. Sept. 25, 2014).

Across the country, federal circuit judges have increasingly recognized that whether Title VII forbids sexual orientation discrimination as a form of sex discrimination is a question of exceptional importance that merits consideration by their full courts. For one, in his concurrence here, Chief Judge Katzmann contends that the full Court should "revisit the central legal issue confronted in *Simonton* and *Dawson*, especially in light of the changing legal landscape that has taken shape in the nearly two decades since *Simonton* issued." *Christiansen*, 852 F.3d at 202. And Judge Sack has declared that "there is no question that th[e] question is ripe for visitation." Oral Arg. at 11:06, *Zarda*, 2017 WL 1378932 (Sack, J.). Notably, Chief

Judge Katzmann and Judge Sack comprise a majority of the panel that decided *Simonton*.

Similarly, a majority of the Seventh Circuit voted to grant en banc review of a panel decision that was compelled by existing precedent in holding Title VII inapplicable to sexual orientation discrimination based on the importance of the issue. *See Hively*, 853 F.3d at 343 (noting the court "voted to rehear th[e] case en banc" "[i]n light of the importance of the issue"); *id.* at 359 (Sykes, J., dissenting) (describing case as "momentous"). An Eleventh Circuit judge has also urged her court to consider the issue en banc, and a petition for en banc rehearing is now pending there. *See Evans*, 850 F.3d at 1271 (Rosenbaum, J., dissenting).

Thus, the question of whether Title VII forbids sexual orientation discrimination is one of exceptional importance that merits en banc consideration.

II. EN BANC REVIEW IS WARRANTED BECAUSE SEXUAL ORIENTATION DISCRIMINATION IS A FORM OF SEX DISCRIMINATION.

The panel in this case reached a legally flawed result that conflicts with Supreme Court precedent, *see Christiansen*, 852 F.3d at 201, even though a majority of the panel recognized that sexual orientation discrimination is a form of sex discrimination. *Id*. at 202-206. The panel concluded that it "lack[ed] the power to reconsider *Simonton* and *Dawson*." *Id.* at 199. This Court sitting en banc needs to right this wrong.

In his concurrence, Chief Judge Katzmann (joined by District Judge Brodie) agreed that sexual orientation discrimination is a form of sex discrimination, because such discrimination treats otherwise similarly-situated people differently because of their sex, viewed in relation to the sex of the individuals with whom they associate and because such discrimination is inherently rooted in gender stereotypes. *Id.* at 202-206. He urged this full Court to "consider reexamining the holding that sexual orientation discrimination claims are not cognizable under Title VII," as "[n]either *Simonton* nor *Dawson* had occasion to consider the[] worthy approaches," endorsed by other courts. *Id.* at 207. He did so because the "three arguments" "reflect the evolving legal landscape since [this] Court's decisions in *Simonton* . . . and *Dawson*" and because a faithful application of *Oncale* dictates that "there is 'no justification in the statutory language . . . for a categorical rule excluding'" sexual orientation discrimination from Title VII's coverage. *Id.* at 202, 207.

Similarly, in its decision in *Hively*, the Seventh Circuit not only endorsed each of the same three arguments for coverage, *see* 853 F.3d at 345-49; it also noted the flaw in contrary decisions that have emphasized what words are not in the statute, rather than "the scope of the language that already is in the statute," *id.* at 344. That is because focusing on non-statutory considerations contravenes *Oncale*, where Justice Scalia, writing for a unanimous court, emphasized that "it is ultimately the

provisions of our laws rather than the principal concerns of our legislators by which we are governed." 523 U.S. at 79.

Chief Judge Katzmann and *Hively* found persuasive the following three arguments:

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." *Christiansen*, 852 F.3d at 202 (Katzmann, C.J., concurring). Thus, where 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.

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). *Christiansen*, 852 F.3d at 204 (Katzmann, C.J., concurring). *See also Hively*, 853 F.3d at 347-48; *id*. at 359 (Flaum, J., concurring).

Third, sexual orientation discrimination is sex "because such discrimination is inherently rooted in gender stereotypes." *Christiansen*, 852 F.3d at 205 (Katzmann, C.J., concurring). Indeed, an individual's same-sex attraction

"represents the ultimate case of 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 Christiansen*, 852 F.3d at 205 (Katzmann, C.J., concurring).

III. CONSIDERATION EN BANC IS IN KEEPING WITH THE COURT'S INTERESTS AND WOULD FACILITATE OPTIMAL DECISIONMAKING.

Given the extraordinary importance of the issue, en banc review should be granted because this petition, as well as those in *Cargian* and *Zarda*, fits squarely within the institutional concerns underlying this Court's practice and standards regarding such review.

There are no institutional interests served where *no* panel of the Court has *ever* had—nor ever *will* have, in the absence of en banc review—an opportunity to fully consider the arguments, presented here and in the petition, regarding the scope of a central provision of one of the nation's most significant civil rights statutes. *See Christiansen*, 852 F.3d at 202 (Katzmann, C.J., concurring). And en banc review here is in keeping with the desire to foster collegiality among the Court's judges and to establish respect for the role of panels in establishing circuit precedent, where, as here, a majority of the judges that decided *Simonton* have declared that the issue merits revisiting.

The Court should not rely on the possibility of Supreme Court review,[4] when certiorari review is so rarely granted and it is this Court's cases that have helped shaped the caselaw on this issue. *See, e.g.*, *Medina v. Income Support Div.*, 413 F.3d 1131, 1135 (10th Cir. 2005) (citing *Simonton*); *Bibby v. Phila. Coca-Cola Bottling Co.*, 260 F.3d 257, 265 (3d Cir. 2001) (same); *see also Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 763-64 (6th Cir. 2006) (citing *Dawson*). Rather than delay the possibility of justice any further, this Court should follow the path charted by the Seventh Circuit in *Hively* and resolve the issue itself.[5]

CONCLUSION

Therefore, *Amicus* Lambda Legal respectfully urges the Court to grant en banc review and hold that sexual orientation discrimination is a form of sex discrimination prohibited by Title VII.

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[4] Any denial based on speculation regarding certiorari prospects should reserve the right to revisit the issue. *See Muntaqim v. Coombe*, 385 F.3d 793, 795 (2d Cir. 2004) (Straub, Pooler, Sack, Katzmann, JJ., concurring in the denial of rehearing en banc) (noting denial of rehearing en banc was "specifically without prejudice to renewal by a judge or party after the Supreme Court acts on the certiorari petitions now pending"), *cert. denied*, 543 U.S. 978, *amended and superseded by*, 396 F.3d 95 (2d Cir. 2004) (granting rehearing en banc).

[5] Both in *Christiansen* and *Hively*, the panels felt bound by prior precedent, despite appellants' requests for them to resort to mini en banc procedures, making en banc review necessary. *Compare Christiansen*, 852 F.3d at 199; *and* Appellant's Br., *Christiansen*, No. 16-748 (2d Cir. June 21, 2016), at 27 n.14; *with Hively*, 830 F.3d 698, 718 (7th Cir. 2016), *as amended* (Aug. 3, 2016), *reh'g en banc granted, opinion vacated by*, 2016 WL 6768628 (7th Cir. Oct. 11, 2016); *and* Appellant's Br., *Hively*, No. 15-1720 (7th Cir. May 12, 2015), at 4 n.1.

Dated this 5th day of May, 2017.

Respectfully submitted,

/s/ Omar Gonzalez-Pagan

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), the undersigned hereby certifies that:

1. This petition complies with the type-volume limitation, as provided in Fed. R. App. P. 29(b)(4), because, exclusive of the exempted portions of the petition, the petition contains 2,600 words.

2. This brief complies with the type-face requirements, as provided in Fed. R. App. P. 32(a)(5), and the type-style requirements, as provided in Fed. R. App. P. 32(a)(6), because the brief has been prepared in proportionally spaced typeface using Microsoft Word 2010 in 14 point Times New Roman font.

3. As permitted by Fed. R. App. P. 32(g)(1), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

Dated this 5th day of May, 2017.

/s/ Omar Gonzalez-Pagan

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CERTIFICATE OF SERVICE

I hereby certify that I filed the foregoing brief with the Clerk of the United States Court of Appeals for the Second Circuit via the CM/ECF system this 5th day of May, 2017. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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