15-3775-CV

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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

PLAINTIFFS-APPELLANTS,

v.

ALTITUDE EXPRESS, INC., doing business as Skydive Long Island; and RAYMOND MAYNARD,

DEFENDANTS-APPELLEES.

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

EN BANC BRIEF OF CHRISTIAN LEGAL SOCIETY AND NATIONAL ASSOCIATION OF EVANGELICALS AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Amici curiae Christian Legal Society ("CLS") and National Association of Evangelicals ("NAE") have no parent corporations, do not have shareholders, and do not issue stock.

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This brief *amicus curiae* is respectfully submitted in support of Defendants-Appellees, and the sustaining of the judgment of the district court, and the decision of the panel of this Court dated April 18, 2017.

IDENTITY OF THE *AMICI CURIAE*, INTEREST IN THE CASE, AND SOURCE OF AUTHORITY TO FILE[1]

This brief is submitted on behalf of *amici curiae* Christian Legal Society and National Association of Evangelicals.

Christian Legal Society is an association of Christian attorneys, law professors, and law students dedicated to the defense of religious freedom. From its inception, members of CLS have fought to preserve religious organizations' autonomy from the government and to protect the free exercise and free speech rights of all citizens. For example, CLS was instrumental in passage of the federal Equal Access Act of 1984, 20 U.S.C. §§ 4071-74, that protects the right of both religious and LGBT student groups to meet on public secondary school campuses. *See* 128 Cong. Rec. 11784-85 (1982) (Senator Hatfield statement) (recognizing CLS's role in drafting the Act). *See also, e.g.*, *Board of Educ. v. Mergens*, 496 U.S.

[1] A party or a party's counsel did not author this brief in whole or in part and did not contribute money that was intended to fund preparing or submitting this brief. No person—other than the *amici curiae*, their members, or their counsel—contributed money that was intended to fund preparing or submitting this brief. This brief is filed pursuant to the Court's Order of May 25, 2017, "invit[ing] amicus curiae briefs from interested parties."

226 (1990) (Act protects religious student groups' meetings); *Straights and Gays for Equality v. Osseo Area Sch. No. 279*, 540 F.3d 911 (8th Cir. 2008) (Act protects LGBT student groups' meetings).

The National Association of Evangelicals is the largest network of evangelical churches, denominations, colleges, and independent ministries in the United States. It serves 40 member denominations, as well as numerous evangelical associations, missions, nonprofits, colleges, seminaries, and independent churches. NAE serves as the collective voice of evangelical churches, their religious ministries, and separately-organized evangelical ministries. It believes that religious liberty is a God-given right recognized in and protected by the First Amendment and other federal laws and that church-state separation is one of our nation's constitutional restraints on government designed to safeguard the autonomy of religious organizations. NAE believes that civil government has a high duty to not just protect but also to promote the religious freedom of peoples of all faiths.

In recent years, new "nondiscrimination" statutes, as well as new interpretations of existing statutes and regulations, have sometimes been applied in a manner that restricts or threatens the ability of individuals and institutions to live and speak in a manner consistent with the teachings of their religions concerning marriage, sexual relationships, and the sanctity of human life, and to choose with

whom to associate for those purposes. Because of the central importance of free exercise of religion, free speech, and freedom of association to all other liberties, *amici* have a strong interest in the maintenance of these freedoms, when threatened by any state mandates whatsoever, and in avoiding conflicts between state mandates and these individual liberties whenever possible. *Amici* are concerned that while issues of free exercise of religion, free speech, and freedom of association are not facially implicated by the present case, a decision of this Court inconsistent with long-standing precedent will quickly create large numbers of such conflicts.

STATEMENT OF ISSUES

Pursuant to this Court's Order of May 25, 2017, the issue to be considered is: "Does Title VII of the Civil Rights Act of 1964 prohibit discrimination on the basis of sexual orientation through its prohibition of discrimination 'because of . . . sex'?"

SUMMARY OF THE ARGUMENT

The Court should be slow to overturn precedent where what is demanded is clearly an innovation over long-established law, where constitutional rights are not at issue, where ample remedies for the alleged wrong exist under the statutory law of every state in this Circuit, and where the complexities and competing priorities that would be raised by declaration of new statutory

protections are of a nature that should have the benefit of legislative fact-finding, debate, and fine-tuning. (Section I)

If it reverses the panel's decision, this Court risks serious and unnecessary harm to its credibility. Reversing the panel's decision will require direct contradiction of multiple prior decisions of this Court on multiple distinct points. Notably, this Court has previously expressly rejected the "associational" argument for interpreting "sex" within the meaning of Title VII to include "sexual orientation;" has found that the history of Congressional consideration (and rejection) of amendments to add "sexual orientation" to the list of classes protected by Title VII is "strong evidence" that Title VII as it currently stands does not provide such protection; and has cautioned that theories of discrimination based on "sex stereotypes" cannot be "bootstrapped" to reach discrimination based on sexual orientation *per se*. (Section II)

There is no failure of the democratic process that could justify judicial intervention and innovation at the expense of so many precedents, given that state and municipal legislatures have, in fact, been acting to extend anti-discrimination protection to include sexual orientation, while—according to an *amicus* brief submitted by a number of corporations—market forces are rapidly driving major employers to adopt such anti-discrimination policies even where not required by law. (Section III)

Finally, creating a federal remedy under Title VII for discrimination based on sexual orientation will inevitably give rise to a whole new class of conflicts between First Amendment rights and this new statutory right. When extending such rights, legislatures have often sought to minimize such conflicts by means of carefully crafted religious exemptions, and courts have found it necessary to create such exemptions when legislatures have failed to do so. Because the present case does not involve any claims of First Amendment rights, it does not illuminate the conflicts that the creation of new statutory rights will trigger, nor can it equip the Court to mark out the boundaries of the exemptions that may be necessary to protect First Amendment rights. Accordingly, if the Court does declare new rights under Title VII in this case, it should do so with the utmost caution, closely confining its holding to the facts presented, while carefully noting that the free exercise and other First Amendment rights of individuals must be and will be protected when conflicts arise. (Section IV)

ARGUMENT

I. THIS COURT SHOULD BE SLOW TO OVERRULE EXTENSIVE PRECEDENT IN THIS LONG-SETTLED AREA.

To read the briefs of Appellant and supporting *amici*, one would think that this case presents a question of profound constitutional rights and of injustice without remedy. The reality is far less dramatic.

The case presents no question concerning the scope or nature of the constitutional rights of the Appellant; it presents no opportunity to recognize, reject, or define any such rights. Instead, it concerns only statutory construction and the availability of a particular federal civil remedy, under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq*. What this Court said in *Simonton* in 2000 remains true here: "We are called upon here to construe a statute . . . not to make a moral judgment." *Simonton v. Runyon,* 232 F.3d 33, 35 (2nd Cir. 2000), *quoting Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999).

Nor does the case present the equitable tug of a wrong without a remedy; if Appellant was discriminated against on the basis of his sexual orientation, his estate had a remedy under the express terms of New York employment discrimination law. (*Infra* p. 17 n.6.)

This case *does*, however, present a problem of judicial credibility. Reversal *en banc* would require not merely reversing the result below, but flatly contradicting the repeated legal and logical conclusions of multiple panels of this Court spanning three decades, with little more to justify the switch than say-so. In a day of steadily increasing politicization of courts and judicial appointments, and steadily increasing cynicism that judicial decisions are anything more than another mechanism of power politics, such a blatant about-face on so many conclusions

would be institutionally damaging. *Amici* respectfully submit that such a wholesale rejection of precedent should not be countenanced absent grave necessity and urgency—which do not exist here.

No one seriously contends that, when enacting Title VII, Congress *intended* Title VII to provide a federal remedy for discrimination based on sexual orientation. Instead, the position of Appellant and his *amici* is a rather frank request that this Court make new law. When the Seventh Circuit took just this step in the *Hively* case earlier this year, Judge Posner was doing no more than stating the simple truth—a truth apparent on the face of the majority opinion—when he wrote in his concurrence that "we, who are judges rather than members of Congress, are imposing on a half-century-old statute a meaning of 'sex discrimination' that the Congress that enacted it would not have accepted." *Hively v. Ivy Tech Cmty. Coll. of Indiana*, 853 F.3d 339, 357 (7th Cir. 2017) (*en banc*) (Posner, J., concurring).

It would be fruitless for *amici* to wade into philosophical debates concerning the merits of textualism, originalism, or a "living constitution" (or in this case "living statutes") or concerning the boundaries of legitimate judicial power and innovation. For better or worse, too few minds remain open to persuasion on those questions. But regardless of where one comes down on those large questions of judicial philosophy, it cannot be healthy for the judiciary to

permit itself to be reduced to—and seen as—a mere tell-tale for the prevailing cultural winds, at the expense of the rule of law.

Judicial innovation should be approached with all the more caution in a complex area that cries out for the benefit of the legislative process, which includes fact-gathering, weighing of innumerable competing considerations, input from diverse perspectives, and an ability to compromise and fine-tune to an extent which the case-specific judicial process cannot approach. For example, given the unique medical issues associated with pregnancy, Congress acted only after more than a decade of experience under Title VII to add an express prohibition on discrimination based on pregnancy, subject to a "bona fide occupational qualification" exception.[2] This deliberate legislative care was appropriate when deciding how the law should interact with one of the most foundational facts of gender—the fact that only women become pregnant.

Because of the biological differences between the sexes, the term "sex" appears in many places in federal law and, in particular, within Title IX of the Education Amendments of 1972, 20 U.S.C. §§1681-1688, and implementing regulations. This includes express provisions permitting sex-segregated living

[2] *See* the Pregnancy Discrimination Act of 1978, 42 U.S.C. §2000e(k), amending Title VII of the Civil Rights Act of 1964, and §703(e)(1) of the Civil Rights Act of 1964, defining the "bona fide occupational qualification" defense.

facilities (20 U.S.C. §1686) and locker rooms and restrooms at educational institutions (34 C.F.R. §106.33) to provide privacy and accommodate modesty, as well as provisions intended to encourage women's sports teams (34 C.F.R. §106.41(a)) and expressly permitting sex-segregated teams (34 C.F.R. §106.41(b)) to serve social goals, such as developing leadership and competitiveness among young women that might be disrupted by forcing admission of biological males to women's teams, whatever their own perceived gender identity might be. In short, attempting to divorce the word "sex" from "physiological sex" in the Civil Rights Act of 1964 will instantly create a wide range of practical and interpretive problems and, in fact, a definition stretched to include "sexual orientation" or "gender identity" almost certainly cannot be followed consistently within this body of law. This is a logical "tell" that the interpretation of "sex" that Appellant urges cannot be correct within the statutory framework, regardless of how social mores and perceptions of sexuality may have changed since 1964. Again, the conclusion is that this is an area that requires legislative deliberation, not a quick judicial "fix."

Finally, the one circuit that has extended Title VII to reach sexual orientation has rapidly extended it further to reach "gender identity," *see Whitaker v. Kenosha Unified Sch. Dist.*, 858 F.3d 1034 (7th Cir. 2017), and we would caution that gender identity brings new complexities to the table because (for some

individuals at least) it is mutable over time and perhaps even by choice, unlike race, national origin, and biological sex (in the most basic sense of the presence or absence of a Y chromosome in each cell of an individual's body). How the existing body of law under Title VII can and should interact with a mutable characteristic is a novel question, and again one that deserves all the fact-finding, debate, and perhaps compromise of the legislative process.

II. REVERSAL WILL REQUIRE EXTENSIVE VIOLENCE TO PRECEDENT.

To rule for the Appellant here is not merely a matter of reversing the panel decision. Instead, reversal would require rather remarkable and visible violence to 30 years of repeated and consistent precedent from this Court itself. It would be all too clear that as a matter of policy choice, this Court now prefers a different result, and is willing to run roughshod over Congress to get there.

In *Price Waterhouse v. Hopkins*, a plurality of the Supreme Court noted the "simple" declaration of Title VII, plain "on the face of the statute," that "gender must be irrelevant to employment decisions." *Price Waterhouse*, 490 U.S. 228, 239-40 (1989) (plurality op.). In *Oncale v. Sundowner Offshore Servs., Inc.*, nine years later, Justice Scalia, writing for the majority, quoted Justice Ginsburg to emphasize that Title VII is concerned, as its "text indicates, [with] whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." *Oncale*, 523

U.S. 75, 80 (1998), *quoting Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring). Three years after *Oncale*, and just 17 years ago, this Court held that "[t]he law is well-settled in this Circuit and in all others to have reached the question that Simonton has no cause of action under Title VII because Title VII does not prohibit harassment or discrimination because of sexual orientation." *Simonton*, 232 F.3d at 35. Respondents and *amici* now ask this Court to stretch far beyond the "simple" "face of the statute" to reach the diametrically opposite conclusion.

Courts have repeatedly, over almost 30 years, catalogued the many prior decisions of this Court and other circuit and district courts around the nation that have concluded that the text of Title VII cannot be read to reach discrimination based on sexual orientation.[3] *Amici* will not duplicate that catalog. Instead, we wish to call the Court's attention to the more specific fact that multiple distinct arguments for including "sexual orientation" as a subheading of "sex" have been *specifically* considered and rejected by this Court in its prior decisions. For this

[3] *See Dawson v. Bumble & Bumble*, 398 F.3d 211, 219 (2nd Cir. 2005) (cataloging decisions of district courts in the Second Circuit holding that Title VII does not provide a remedy for discrimination based on sexual orientation); *Hively*, 853 F.3d at 341-42 (collecting cases from multiple Circuits that reach this conclusion); *Evans v. Georgia Reg. Hosp.*, 850 F.3d 1248, 1256-57 (11th Cir. 2017) (cataloging nine such decisions spanning the years from 1989 through 2006).

Court now to reverse all these reasoned decisions by all these panels of Second Circuit jurists would require a striking lack of respect for even the recent past and would suggest that in this Circuit the law, like the clothing on Fifth Avenue, changes with the latest fashion.

A. This Court has previously rejected the "associational" argument for extending liability under Title VII to discrimination based on sexual orientation.

Appellant and several *amici* seek to analogize to *Loving v. Virginia*, 388 U.S. 1 (1967), and to *Holcomb v. Iona Coll.*, 521 F.3d 130 (2nd Cir. 2008), to argue that discrimination based on sexual orientation should fall within the reach of Title VII under a theory of "associational discrimination." But the theory does not fit the conclusion that is urged; an individual's sexual orientation may or may not be reflected in any actual relationship ("association") at any relevant time—or ever. *Loving*, as well as the cited cases under Title VII, involved discrimination based on *actual* relationships with an individual of a particular race. It would be a large stretch from these precedents to a new rule barring discrimination based on merely hypothetical relationships, and it would be highly undesirable to create a situation under which a court would have to enquire whether the plaintiff actually was in—and the defendant actually knew about—a relationship with an individual of the same sex. As this Court observed in *DeCintio*, "Appellees' proffered interpretation . . . would involve the EEOC and federal courts in the policing of

intimate relationships." *DeCintio v. Westchester County Med. Ctr.*, 807 F.2d 304, 308 (2d Cir. 1986). Indeed, the "associational" argument seeks to apply Title VII based on the plaintiff's *conduct* (association), rather than his or her status—a change of focus that fits poorly with the nature of the other categories protected by Title VII. *See id.* at 306 ("the other categories . . . refer to a person's status as a member of a particular race, color, religion or nationality.")

To the immediate point, the attempt to extend Title VII to reach sexual orientation by means of an "associational" argument is an approach that this Court directly rejected in *DeCintio*, where it wrote:

> The meaning of "sex," for Title VII purposes, thereby would be expanded to include "sexual liaisons" and "sexual attractions." Such an overbroad definition is wholly unwarranted. . . . "Sex," when read in this context, logically could only refer to membership in a class delineated by gender, rather than sexual activity regardless of gender. . . . The proscribed differentiation under Title VII, therefore, must be a distinction based on a person's sex, not on his or her sexual affiliations.

Id. at 306-307.

B. This Court has previously held that the repeated Congressional rejections of proposals to extend liability under Title VII to reach discrimination based on sexual orientation is "strong evidence" that Title VII does not currently create such liability.

Congress has spent a great deal of time over almost 40 years considering and debating—but has never yet adopted—proposed amendments to Title VII that would have added "sexual orientation" to the list of grounds of

discrimination prohibited by that law.[4] The Seventh Circuit recently dismissed this history as irrelevant, declaring that "we have no idea what inference to draw from congressional inaction or later enactments." *Hively*, 853 F.3d at 344. The arguments made by the *Hively en banc* panel to reach this conclusion would categorically exclude consideration of subsequent Congressional actions from the process of statutory interpretation. That represents a remarkably facile break with long-standing interpretative practice. In any case, this Court has declared a precisely opposite conclusion on this very point with respect to this exact statute, noting, in *Simonton*, "Congress's rejection, on numerous occasions, of bills that would have extended Title VII's protection to people based on their sexual preferences" and concluding that this history is not merely evidence, but "**strong evidence**" of Congressional intent (thus far) *not* to include sexual orientation within the categories of discrimination actionable under Title VII. *Simonton*, 232 F.3d at 35 (emphasis added).

[4] *See Simonton*, 232 F.3d at 35, and *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1085-86 (7th Cir. 1984), citing numerous such instances from 1975 through 1996. Congressional consideration of the so-called "Employment Non-Discrimination Act" ("ENDA"), which would add sexual orientation to the categories protected by Title VII, has continued thereafter, with ENDA being passed by the Senate in 2013, but not by the House. S. 815, 113th Cong. (2013).

C. This Court has previously held that a theory of non-conformance with sex stereotypes cannot be used to "bootstrap" Title VII liability for discrimination based on sexual orientation.

Appellant argues that *Price Waterhouse* opened the door for his claim because the plurality opinion in that case—which did not consider issues of sexual orientation—stated that discrimination based on "sex" may include discrimination based on failure to conform to sex stereotypes.[5] Appellant and several *amici* assert that it is a "stereotype" that individuals are attracted to members of the opposite sex. (App. Br. 34; *see also* Brief of Amicus ACLU et al. at 18 ff.)

This Court has repeatedly considered and rejected exactly this line of argument, stating in 2000 that, even if Title VII liability can be found based on failure to conform to gender stereotypes, "this theory would not bootstrap protection for sexual orientation into Title VII because not all homosexual men are

[5] The plurality opinion in *Price Waterhouse* made a step from Title VII precedent that condemned discrimination "resulting from gender stereotypes" concerning women's "inability to perform certain kinds of work," *Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702, 707 (1978), to bring within Title VII's reach an employer's decisions influenced by an employee's failure to conform in a manner evident in the workplace to gender stereotypes (*e.g.*, dress, aggressiveness, use of profane language). *See Price Waterhouse*, 490 U.S. at 251-252. The plaintiff in *Price Waterhouse* did not claim to be a lesbian. It would be a different and longer step to stretch this precedent to reach allegations of discrimination based on sexual orientation *per se*, which, as this Court has previously noted, does not necessarily correlate to any non-conformity with gender stereotypes visible in the workplace. *See Simonton*, 232 F.3d at 38 ("not all homosexual men are stereotypically feminine, and not all heterosexual men are stereotypically masculine").

stereotypically feminine, and not all heterosexual men are stereotypically masculine." *Simonton*, 232 F.3d at 38. In 2005, this Court concluded once again that "[l]ike other courts, we have . . . recognized that a gender stereotyping claim should not be used to 'bootstrap protection for sexual orientation into Title VII.'" *Dawson*, 398 F.3d at 218. Just this year, a panel of this Court once again reaffirmed the teaching of *Simonton* and *Dawson* that "being gay, lesbian, or bisexual, alone, does not constitute nonconformity with a gender stereotype that can give rise to a cognizable gender stereotyping claim." *Christiansen v. Omnicom Group, Inc.*, 852 F.3d 195, 201 (2nd Cir. 2017).

D. *Oncale* did not open an interpretive pathway to extend Title VII to reach sexual orientation.

Appellant and several *amici* argue that *Oncale* declared interpretive principles that open a door to read sexual orientation as a protected category under Title VII. Once again, however, this Court has previously considered and directly rejected this argument: "We . . . do not see how *Oncale* changes our well-settled precedent that 'sex' refers to membership in a class delineated by gender. The critical issue, as stated in *Oncale*, 'is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.'" *Simonton*, 232 F.3d at 36, *quoting Oncale*, 523 U.S. at 80. Indeed, it is ironic that Appellant should invoke *Oncale's* emphasis on the primacy of the statutory text, while simultaneously attempting to persuade this Court to

treat that text as a mere vehicle for judicial will by assigning indisputably new meaning to the words of that text.

III. THERE IS NO DRIVING NEED TO ENGAGE IN THE SWEEPING OVERTURNING OF PRECEDENT THAT REVERSAL WOULD REQUIRE.

Courts and academics have often argued that judicial innovation may be justified where the democratic mechanisms of government seem stuck, unable to make progress to protect minority rights; however, it is implausible to argue that such a situation exists here. For those who believe that sexual orientation should define a protected class on a par with race or biological sex, there is every sign that rapid progress is being made through both democratic and market mechanisms—and perhaps a synergy between the two.

A. The democratic process is resulting in statutes that extend nondiscrimination protection to sexual orientation.

All states in this Circuit provide civil remedies for discrimination based on sexual orientation, through statutes duly enacted through the democratic process.[6] Moreover, various city and county ordinances prohibit employment

[6] New York State Human Rights Law, N.Y. Exec. Law § 290 et seq. ("[C]laims of sexual orientation discrimination are actionable under the NYSHRL." *Dawson*, 398 F.3d at 224); Conn. Gen Stat. §46a-81c; Vt. Stat. Ann. tit. 21, §495. *See* Movement Advancement Project, http://www.lgbtmap.org/equality-maps/non_discrimination_ordinances/policies (last visited July 24, 2017) (click on "City and County Listing," then scroll down to "Connecticut," "New York," or "Vermont." All three entries show "100% of

discrimination by private employers on the basis of sexual orientation and gender identity. In this Circuit, there is no such discrimination without a remedy.

Further, these statutes are explicit, a situation far healthier than "discovering" such remedies in a 50-year-old statute by means of interpretive legerdemain. Against this record of state and municipal legislative action, for federal courts now to impose on Title VII "a meaning of 'sex discrimination' that the Congress that enacted it would not have accepted," *Hively*, 853 F.3d at 357 (Posner, J., concurring), would be an unjustified exercise in federal "me-too-ism," driven by an apparent sense—at odds with our federal structure—that the federal government must provide a legal remedy for every wrong.

B. Market forces are resulting in policies that extend nondiscrimination protection to sexual orientation.

The En Banc Brief of 50 Employers and Organizations, filed June 26, 2017 (the "Corporations Brief"), while purporting to support reversal, is in fact a compendium of evidence and argument that market forces are punishing any existing discrimination based on sexual orientation, rapidly driving it from the

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population protected" for "sexual orientation" and for "gender identity."). The modest difference in evidentiary standard discerned by the panel below (Slip Op. at 6-7)—a difference not discerned by this Court in *Dawson*, 398 F.3d at 224 ("the question of whether such claims can survive summary judgment is determined by the same analysis as for Title VII claims")—scarcely rises to the level of a basic denial of a remedy.

marketplace. According to this submission, "[r]ecent studies confirm that companies with LGBT-inclusive workplaces have better financial outcomes" (Corp. Br. at 6), while "[o]ne study . . . concluded that businesses in one state 'risk[ed] losing $8,800 on average for *each* LGBT employee that leaves the state or changes jobs because of the negative environment.'" (Corp. Br. at 13). If these assertions are even directionally true, then Darwinian selection will strongly pressure companies to avoid discrimination based on sexual orientation. And indeed, the Corporations Brief—both by its list of 50 signatories and by a study it cites and submits—confirms that a wide sweep of corporate America has adopted such policies. According to an advocacy paper from 2011 relied on by the Corporations Brief, already by that date "[a]ll but two of the top 50 Fortune 500 companies include sexual orientation in their non-discrimination policies," while "81% [42] of the top 50 federal contractors include sexual orientation in their non-discrimination policies."[7] There is little doubt that the percentages would be higher today, six years later.

[7] *See* Brad Sears & Christy Mallory, *Economic Motives for Adopting LGBT-Related Workplace Policies*, The Williams Institute, 2 (Oct. 2011), available at http://tinyurl.com/yd5g6sha (last visited July 25, 2017).

C. "Uniformity" is not itself an appropriate goal within our federal system.

Perhaps recognizing that the widespread adoption of laws against discrimination based on sexual orientation weakens their plea for federal judicial intervention, the Corporations complain that a diverse "patchwork" of state legislation in this area is inefficient, creating an "artificial barrier that restricts the free flow of resources, ideas, and capital." (Corp. Br. at 15-16.)

This argument, however, would apply with equal force to the interaction between individual values or preferences and *any* important policy differences among states, including policies relating to tax rates, education, gun control, investment in parks and infrastructure, and much more. But this type of diversity is inherent in a federal system and, indeed, legal diversity is essential to the function of the states as "laboratories for devising solutions to difficult legal problems." *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2673 (2015); *and see* cases cited therein. An assertion that some citizens may prefer to live under the policies of one state more than another cannot justify disregarding our federal legal structure, nor shutting down the flexible diversity of those "legal laboratories."

IV. THIS CASE DOES NOT PRESENT, AND THE COURT SHOULD BE CAREFUL NOT TO ADDRESS, QUESTIONS CONCERNING THE BOUNDARIES BETWEEN STATUTORY RIGHTS OF HOMOSEXUAL INDIVIDUALS AND CONSTITUTIONAL RIGHTS OF FREE EXERCISE, FREEDOM OF EXPRESSION, AND FREEDOM OF ASSOCIATION OF RELIGIOUS INDIVIDUALS AND ORGANIZATIONS.

It is no news that progressive sexual mores have given rise to complex clashes with the beliefs and goals of those who wish to teach—consistent with all traditional Western religions and their texts—that the only moral context for sexual relations is the male-female union in marriage for purposes of procreation and the raising of their biological children. And there is no doubt that individuals and at least certain types of institutions have the right to hold, teach, and live according to such views, and to associate together for the purpose of doing those things.[8] But it is equally certain that ascertaining the boundary lines of these rights of free expression, free exercise of religion, and freedom of association is a challenging task.

[8] "Finally, it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015).

In order to respect and protect those rights, legislators have had to give careful consideration and, in some cases, craft exceptions to otherwise generally applicable laws—or courts have had to intervene to require such exceptions. As is well known, Title VII itself contains two separate exemptions for religious organizations.[9] Similarly, the version of the Employment Non-Discrimination Act passed by the Democratic Senate in 2013 included a robust religious exemption that not only reiterated the existing Title VII exemption of "religious employers", but also declared that:

> A religious employer's exemption under this section shall not result in any action by a Federal agency, or any State or local agency that receives Federal funding or financial assistance, to penalize or withhold licenses, permits, certifications, accreditation, contracts, grants, guarantees, tax-exempt status, or any benefits or exemptions from that employer, or to prohibit the employer's participation in programs or activities sponsored by that Federal, State, or local agency.

S. 815, §6(b), 113th Cong. (2013).

And, of course, in addition to the Title VII religious exemptions, the courts have repeatedly intervened to protect the First Amendment rights of religious schools to hire (and fire) teachers free of the restraints of, and

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[9] *See* Title VII §§ 702(a) and 703(e)(2), *codified at* 42 U.S.C. § 2000e-1 and § 2000e-2. For a review of the text and history of the religious exemptions of Title VII, *see* Carl Esbeck, *Federal Contractors, Title VII, and LGBT Employment Discrimination: Can Religious Organizations Continue to Staff on a Religious Basis?*, 4 Oxford J. of Law & Religion 368, 375-80 (2015).

government intermeddling under cover of, Title VII or other federal nondiscrimination laws, *see Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171 (2012) (the First Amendment precludes schoolteacher's disability claim against religious school under the federal Americans with Disabilities Act); *Fratello v. Archdiocese of New York et al*., 2017 WL 2989706 (2nd Cir., July 14, 2017) (First Amendment precludes assertion of sex discrimination claim under Title VII by headmaster of Catholic school), and the right of a corporation not to participate—even indirectly—in the funding of abortion-inducing drugs when its owners hold a religious conviction that abortion is a form of infanticide, *see Burwell v. Hobby Lobby Stores, Inc.*, 135 S. Ct. 2751 (2014). In June of this year, the Supreme Court granted certiorari in the case of *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 370 P.3d 272 (Colo. App. 2015), *cert. denied*, 2016 WL 1645027 (Colo. 2016), *cert. granted*, 2017 WL 2722428 (U.S. June 26, 2017) (No. 16-111), which raises further and fraught issues at the intersection of anti-discrimination law and freedom of speech and free exercise.

The present point is that these intersections of claims of rights are complicated and difficult and, while the extension of Title VII to include sexual orientation (with gender identity likely to follow) would certainly create new such conflicts, these issues are neither raised nor illuminated by the facts of the present

case, in which no party asserts any claim of faith conviction concerning homosexual conduct, nor any desire to advocate, exemplify, or live according to any set of conscientious beliefs inconsistent with homosexual conduct.

Precisely because such issues and potential rights and conflicts are *not* brought into focus by the present facts, if this Court does decide to upend 50 years of evolved precedent to declare new law and expand the reach of Title VII in this case, the Court is at particular risk of declaring those new rights under the statute in terms which later may prove inconsistent with the free exercise and free speech rights of other individuals and organizations.

Accordingly, if this *en banc* panel does declare new law in this area for this Circuit, *amici* respectfully urge that judicial prudence dictates that it should do so cautiously, in terms closely tied to the facts presented, leaving wider implications for future development informed by other specific facts. Further, it should make very explicit that its holding in this case can and does say nothing about the constitutional rights of religious individuals and organizations when broadened statutory rights under Title VII are asserted in apparent conflict with those constitutional rights.

In *Hively*, the Seventh Circuit made a brief nod in this direction, but we are obliged to note that in the process the Seventh Circuit summarized the religious exemption of Title VII in a way that has been obsolete for 45 years,

stating that "Ivy Tech did not contend . . . that it was a religious institution and the positions it denied to Hively *related to a religious mission*." *Hively*, 853 F.3d at 351 (emphasis added). This articulation matches the §702(a) exemption to Title VII as it stood from 1964 until it was amended in 1972, but not since. Instead, for the last 45 years, §702(a) has exempted religious institutions with respect to the employment of individuals "to perform work connected with the carrying on . . . of *its activities*," omitting the limitation of the exemption to "religious" activities.

CONCLUSION

For the foregoing reasons, *amici curiae* Christian Legal Society and National Association of Evangelicals request that this Court sustain the holding of the panel decision that Title VII does not provide a remedy for allegations of discrimination based on sexual orientation standing alone.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitations of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B), and L.R. 29.1(c) and 32.1(a)(4), because it contains 5,903 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)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

/s/ Kimberlee Wood Colby

Kimberlee Wood Colby

Date: July 26, 2017

CERTIFICATE OF SERVICE

The undersigned certifies that on July 26, 2017, she electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the Court's CM/ECF system. The undersigned certifies that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Kimberlee Wood Colby

Kimberlee Wood Colby

Date: July 26, 2017