No. 15-14554

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BARBARA BURROWS,
Plaintiff-Appellant,

v.

THE COLLEGE OF CENTRAL FLORIDA,
Defendant-Appellee.

On Appeal from the United States District Court
for the Middle District of Florida
Hon. James S. Moody, Jr., Judge

BRIEF OF THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT AND REVERSAL

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

In addition to the individuals and entities listed on the Appellant's Certificate of Interested Persons and Corporate Disclosure Statement, *Amicus Curiae* the Equal Employment Opportunity Commission submits this list, pursuant to Eleventh Circuit Rules 26.1-1 and 29-2, of the following individuals and entities also having an interest in the outcome of this appeal:

Equal Employment Opportunity Commission (*Amicus Curiae*)

Goldstein, Jennifer S. (EEOC Associate General Counsel)

Horowitz, Jeremy D. (Attorney for EEOC)

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So far as the Commission is aware, no publicly traded company or corporation has an interest in the outcome of the case or appeal.

s/ Jeremy D. Horowitz
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STATEMENT OF INTEREST

The Equal Employment Opportunity Commission ("Commission") is the primary agency charged by Congress with interpreting and enforcing Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* This case addresses whether claims of sexual orientation discrimination are cognizable under Title VII as claims of sex discrimination. The district court held, *inter alia*, that Burrows's claim for gender stereotype discrimination necessarily failed because it constituted a claim for sexual orientation discrimination, and sexual orientation claims are not cognizable under Title VII as a matter of law. This unduly restrictive interpretation of Title VII is contrary to the understanding of an increasing number of courts (as well as the Commission) that sexual orientation discrimination claims necessarily involve illegal sex stereotyping, illegal gender-based associational discrimination, and impermissible consideration of a plaintiff's sex, placing them squarely within Title VII's prohibition against discrimination on the basis of sex. Because the Commission has a strong interest in the proper interpretation of the federal anti-discrimination employment laws, it offers its views to the Court. Fed. R. App. P. 29(a).

STATEMENT OF RELATED CASE

Both this case and *Evans v. Georgia Regional Hospital*, No. 15-15234 (11th Cir. filed Nov. 19, 2015), involve the same issue: whether sexual orientation

discrimination is cognizable under Title VII as a form of sex discrimination. The Commission is filing an amicus brief in that case as well.

STATEMENT OF THE ISSUES[1]

1. Title VII prohibits discrimination against employees "because of . . . sex." 42 U.S.C. § 2000e-2(a)(1). Discrimination based on gender stereotypes violates this prohibition, as the Supreme Court held in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S. Ct. 1775 (1989). Does sexual orientation discrimination, which by definition involves adverse treatment based on a failure to comply with traditional gender norms, constitute illegal gender stereotyping in violation of Title VII?

2. This Court held in *Parr v. Woodmen of the World Life Insurance Co.*, 791 F.2d 888 (11th Cir. 1986), that Title VII forbade an employer from discriminating against an employee based on the race of that employee's spouse. Can an employer nevertheless discriminate against an employee based on the *sex* of that employee's spouse, when the same standards generally apply to both race-based and sex-based claims under Title VII?

3. Given that sexual orientation can only be understood with reference to sex, does sexual orientation discrimination rely upon sex-based considerations, in violation of Title VII's prohibition against sex discrimination?

[1] The Commission takes no position on any other issues in this case.

STATEMENT OF THE CASE

This is an appeal from a final judgment under Federal Rule of Civil Procedure 54(b) granting summary judgment in favor of the College of Central Florida (CCF).

A. Statement of Facts[2]

Plaintiff Barbara Burrows is a lesbian college professor and administrator. CCF hired Burrows as its Vice President for Instructional Affairs in July 2008 under an annual contract renewable at CCF's discretion. Her supervisor, CCF President Charles Dassance, knew she was a lesbian and had a partner.

Burrows received acceptable annual evaluations in her first two years in the position, and CCF renewed her contract each year. Beginning in the fall of 2010, however, Dassance began receiving complaints from faculty and staff about her job performance. In late March 2011, Dassance informed Burrows that he was not going to renew her contract for the 2011-12 school year.

CCF allowed Burrows to transfer to a teaching position in the mathematics department. She was replaced as Vice President for Instructional Affairs by Mark Paugh, another CCF employee who had been the runner-up when Burrows was initially selected for the position. Even with a "bridge-the-gap" addition to ease

[2] This is a summary of the facts of the case that relate specifically to the Commission's position and interest in the litigation. The recitation does not include facts relating only to Burrows's state law claims for marital status discrimination.

her transition and a supplemental duty contract for a special project, Burrows's salary was still more than $40,000 less in the mathematics department than it had been as a Vice President. Burrows filed numerous grievances claiming she was entitled to nearly $25,000 more in annual salary under CCF's salary schedule, but each was denied.

On April 12, 2012, Burrows filed a discrimination claim with the Florida Commission on Human Relations (FCHR) alleging that CCF failed to renew her contract as Vice President based on her gender, sexual orientation, marital status, failure to conform to religious beliefs, and failure to conform to gender stereotypes.

In April 2013, CCF informed Burrows that it was renewing her annual faculty contract for a third year and that she was eligible to apply for the community college equivalent of tenure. Upon learning of projected deficits for the Spring 2013 term and 2013-14 academic year, however, CCF eliminated Burrows's position on May 29, 2013, as part of a reduction in force that eliminated eleven full-time positions and closed an additional seventeen vacant positions.

B. Procedural History and the District Court's Decision on Summary Judgment

Burrows initially filed suit against CCF in Florida state court, alleging causes of action for gender discrimination, religious discrimination, and retaliation under Title VII and Florida state law; marital status discrimination under state law;

and gender stereotype discrimination under Title VII. CCF removed the case to federal court, then filed a 12(b)(6) motion to dismiss Burrows's claims for religious discrimination and marital status discrimination. In its 12(b)(6) motion CCF argued that both claims amounted to claims for discrimination based on sexual orientation, which is not covered under either Title VII or Florida state law. The district court granted the motion as to Burrows's religious discrimination claim, agreeing with CCF that it constituted a claim of sexual orientation discrimination, and "courts in this circuit and across the country have consistently held that Title VII does not apply to discrimination claims based on sexual orientation." Order on Motion to Dismiss at 6-7 (citing *Anderson v. Napolitano*, 2010 WL 431898, at *4 (S.D. Fla. Feb. 8, 2010); *Mowery v. Escambia Cnty. Utils. Auth.*, 2006 WL 327965, at *9 (N.D. Fla. Feb. 10, 2006)).

CCF then brought a motion for summary judgment on the remainder of Burrows's claims, which the court granted in its entirety. With respect to Burrows's gender discrimination claim, the court found that CCF produced evidence of legitimate, non-discriminatory reasons for demoting her from the Vice President position: she micromanaged subordinates, lost sight of the "big picture," was not trusted by faculty, and could not successfully adapt to her job. Dist. Ct. Order (Op.) at 10-11. The court found unavailing Burrows's proffered evidence of pretext (based on the award of the job to Paugh, the original runner-up for the

position; CCF's decision not to offer her an Employee Improvement Plan before the demotion; and the fact that she was allowed to continue with some of the duties she performed as Vice President after the decision was made not to renew her contract). *Id.* at 11-16.

Holding that Burrows had not produced evidence to show that Dassance was aware of her marriage or that CCF deviated from its standard policy when it set her salary, the court rejected Burrows's marital status discrimination claim. *Id.* at 16-18. With respect to the retaliation claim, the court held that Burrows had not produced evidence of a sufficient causal connection between her FCHR complaint and her subsequent termination. The court concluded that the year between Burrows's complaint and her termination was too long to establish a causal link, and that CCF's manner of conducting its reduction in force and refusal to give her an adjunct position following the termination of her employment likewise failed to demonstrate any retaliatory intent. *Id.* at 21-25.

The court also rejected Burrows's gender stereotyping claim. The Complaint alleges that CCF discriminated against and harassed Burrows based on her same-sex marriage (which failed to "meet[] the stereotype of who a woman should marry and function within a traditional family"), as well as how she looked and acted. In her opposition to CCF's Motion for Summary Judgment, Burrows focused on the salary she received when she changed from being an administrator

to a mathematics professor, arguing that the amount was lower than what similarly situated individuals in opposite-sex marriages received. The court characterized Burrows's claim as "merely a repackaged claim for discrimination based on sexual orientation, which is not cognizable under Title VII or [Florida state law]." Op. at 19. It then explained that gender stereotype claims applied to characteristics "readily demonstrable in the workplace," and that Burrows's relationship did not qualify under this standard. *Id.* at 20 (citing *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 763 (6th Cir. 2006), and several other out-of-circuit cases rejecting gender stereotyping claims as failed attempts to bootstrap claims for sexual orientation). The court concluded, "Because Plaintiff's gender stereotyping claim is truly a claim for discrimination based on Plaintiff's sexual orientation, Defendant is entitled to summary judgment on this claim." *Id.* at 20. The court further held that even if Burrows could have made out a prima facie claim for gender stereotype discrimination, she had not shown sufficient evidence of pretext in the way CCF set her salary. *Id.*

SUMMARY OF ARGUMENT

The district court dismissed Burrows's religious discrimination claim and summarily rejected her gender stereotyping claim on the grounds that each "amounted to a claim of sexual orientation discrimination," which the court concluded was not cognizable under Title VII. Under longstanding interpretation

of Title VII's prohibition against sex discrimination, however, the district court's conclusion is erroneous for three reasons. First, sexual orientation discrimination necessarily involves sex stereotyping, as it results in the adverse treatment of individuals because their orientation does not conform to heterosexually defined gender norms. Such discrimination based on gender stereotypes violates Title VII, as explained in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S. Ct. 1775 (1989), and *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011). Second, sexual orientation discrimination constitutes gender-based associational discrimination. Courts, including this Court, have routinely held that associational discrimination is actionable under analogous circumstances implicating race. Third, Title VII generally prohibits sex-based considerations in the employment context, and discrimination based on sexual orientation necessarily requires such impermissible consideration of a plaintiff's sex.[3]

ARGUMENT

Sexual orientation discrimination is cognizable as sex discrimination under Title VII.

Title VII prohibits employers from discriminating against individuals in employment matters "because of such individual's . . . sex." 42 U.S.C. § 2000e-

[3] In coming to this conclusion, the Commission acknowledges that its understanding of Title VII's application to claims of sexual orientation discrimination – like society's understanding of homosexuality more generally – has evolved over time. *See Baldwin v. Foxx*, EEOC Appeal No. 0120133080, 2015 WL 4397641, at *9 n.13 (EEOC July 15, 2015).

2(a)(1). To date, the Eleventh Circuit has not determined whether this prohibition against discrimination because of sex applies to sexual orientation discrimination. *See Evans v. Ga. Reg'l Hosp.*, 2015 WL 5316694, at *2 (S.D. Ga. Sept. 10, 2015) ("[T]he Eleventh Circuit has not addressed this issue . . . ."); *Isaacs v. Felder Servs., LLC*, 2015 WL 6560655, at *3 (M.D. Ala. Oct. 29, 2015) ("In the Eleventh Circuit, the question is an open one."). Thus, this Court writes in the area on a clean slate.

When it enacted the Civil Rights Act of 1964, Congress may not have considered whether Title VII's prohibition on discrimination because of sex included discrimination based on an individual's sexual orientation. But in the years since its enactment, the Supreme Court has repeatedly cautioned that analysis of the statute does not end with consideration of Congress's initial intent. Instead, the Court explained, "[S]tatutory prohibitions often go beyond the principal evil [they were passed to combat] to cover reasonably comparable evils." *Oncale v. Sundowner Offshore Oil Servs., Inc.*, 523 U.S. 75, 79-80, 118 S. Ct. 998, 1002 (1998); *see also Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 381, 97 S. Ct. 1843, 1878 (1977) (explaining that "[t]he evils against which [Title VII] is to be aimed are defined broadly"); *EEOC v. Boh Bros. Constr. Co.,* 731 F.3d 444, 454 (5th Cir. 2013) (en banc) (citing *Oncale*). Thus, the Court has recognized, for example, that the statute's prohibition against discrimination in the

terms and conditions of employment encompasses sexual harassment of an employee, *see Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 66, 106 S. Ct. 2399, 2405 (1986), and that the term "because of . . . sex" can include same-sex harassment, *see Oncale*, 523 U.S. at 79-80, 118 S. Ct. at 1002, though Congress likely considered neither issue when it initially passed the law. As the Court summarized its holding in *Oncale*, "[I]t is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Id.* at 79, 118 S. Ct. at 1002.

Although it is true that Congress has not amended Title VII or passed new legislation to protect against sexual orientation discrimination explicitly, the Supreme Court has made clear that the outcome of legislative efforts to amend Title VII over the years says nothing about what the existing statute prohibits. As the Court explained, "[S]ubsequent legislative history 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," because "several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change." *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650, 110 S. Ct. 2668, 2678 (1990).

The Court's guidance in interpreting Title VII is particularly apropos to the central issue in this case – whether an employer that discriminates because of an

employee's sexual orientation has discriminated because of that employee's sex. Three ways of analyzing sexual orientation discrimination, discussed below, all point inescapably to the conclusion that sexual orientation discrimination *is* sex discrimination, and such sex discrimination violates Title VII.

A. Sexual orientation discrimination necessarily involves sex stereotyping, in violation of Title VII.

Sexual orientation discrimination necessarily involves sex stereotyping, as it results in the adverse treatment of individuals because their orientation does not conform to heterosexually defined gender norms. Because such discrimination is at heart based on gender stereotypes, it violates Title VII's prohibition against discrimination against employees "because of . . . sex." *Price Waterhouse*, 490 U.S. at 240, 109 S. Ct. at 1785 (citing 42 U.S.C. § 2000e-2(a)(1)). Thus, the district court erred in peremptorily concluding that any claim relating to sexual orientation must fall outside the protection of Title VII.

Price Waterhouse involved a woman perceived by her employer to be insufficiently feminine. Six justices agreed that comments the defendant's representatives made about the plaintiff – that she was "macho" and "overcompensat[ing] for being a woman," and would have better chances of partnership at the firm if she would "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry" –

indicated discrimination based on sex stereotypes that is illegal under Title VII.[4] *Price Waterhouse*, 490 U.S. at 235, 251, 109 S. Ct. 1782, 1791. As the Court held, "[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group." *Id.* at 251, 1791. This conclusion followed from the Court's earlier recognition that Congress passed Title VII "to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." *Id.* (quoting *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13, 98 S. Ct. 1370, 1375 n. 13 (1978)).

Applying *Price Waterhouse*, this Circuit held in *Glenn v. Brumby*[5] that discrimination based on gender non-conformity constitutes actionable sex discrimination. This Court concluded that "discrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it's described as being on the basis of sex or gender. . . . [D]iscrimination against plaintiffs because they fail to act according to socially prescribed gender roles constitute[s] discrimination under Title VII according to the rationale of *Price*

[4] The four justices in the plurality, as well as Justice White and Justice O'Connor, who both concurred separately, all agreed with this conclusion. *See Glenn*, 663 F.3d at 1316.

[5] Although *Glenn* was brought as an Equal Protection Clause challenge under 42 U.S.C. § 1983, the opinion's extensive reliance on *Price Waterhouse* and other cases brought under Title VII shows that its conclusions are equally applicable to Title VII actions.

Waterhouse." 663 F.3d at 1317. Importantly, the Court did not restrict its conclusion to transgender employees: "All persons, whether transgender or not, are protected from discrimination on the basis of gender stereotype. . . . An individual cannot be punished because of his or her perceived gender-nonconformity." *Id.* at 1318-19.

Many other circuits have similarly held that employers violate Title VII's prohibition against sex discrimination when they discriminate against employees for failing to conform to gender-based stereotypes by acting in an effeminate or masculine manner or by wearing gender-nonconforming clothing. *See id.* at 1317 (summarizing cases and concluding that "instances of discrimination against plaintiffs because they fail to act according to socially prescribed gender roles constitute discrimination under Title VII according to the rationale of *Price Waterhouse*"); *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 874 (9th Cir. 2001) ("[T]he holding in *Price Waterhouse* applies with equal force to a man who is discriminated against for acting too feminine. . . . At its essence, the systematic abuse directed at [the plaintiff] reflected a belief that [he] did not act as a man should act."); *Boh Bros. Constr. Co.*, 731 F.3d at 459-60 (holding that liability was warranted under Title VII if a jury concluded harassment occurred because the victim "fell outside of [the harasser's] manly-man stereotype"); *Smith v. City of Salem*, 378 F.3d 566, 574 (6th Cir. 2004) ("After *Price Waterhouse,* an employer

who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination because the discrimination would not occur but for the victim's sex. It follows that employers who discriminate against men because they *do* wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination, because the discrimination would not occur but for the victim's sex."); *Doe v. City of Belleville*, 119 F.3d 563, 580 (7th Cir. 1997) ("Title VII does not permit an employee to be treated adversely because his or her appearance or conduct does not conform to stereotypical gender roles."), *vacated and remanded on other grounds*, 523 U.S. 1001, 118 S. Ct. 1183 (1998).

Along these same lines, an employer who discriminates because of an employee's homosexuality necessarily discriminates because of that employee's failure to conform to a gender-based stereotype: the stereotype of opposite-sex attraction. *See, e.g.*, *Terveer v. Billington*, 34 F. Supp. 3d 100, 116 (D.D.C. 2014) (finding that a homosexual plaintiff's allegations that he was denied promotions and subjected to a hostile work environment because his sexual orientation "did not conform to the Defendant's gender stereotypes associated with men" stated a sufficient claim to survive a motion to dismiss). Intentional discrimination on the basis of the gender of an individual's preferred partners – whether that individual is lesbian, gay, bisexual or straight – *necessarily* implicates stereotypes relating to "proper" sex-specific roles in romantic and/or sexual relationships. Even if the

employee exhibits no other gender-nonconformity, when his or her sexual orientation gives rise to discrimination, that discrimination violates Title VII. *See Centola v. Potter*, 183 F. Supp. 2d 403, 410 (D. Mass. 2002) ("Conceivably, a plaintiff who is perceived by his harassers as stereotypically masculine in every way except for his actual or perceived sexual orientation could maintain a Title VII cause of action alleging sexual harassment because of his sex due to his failure to conform with sexual stereotypes about what 'real' men do or don't do."); *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212, 1222-24 (D. Or. 2002) ("[A] jury could find that Cagle repeatedly harassed (and ultimately discharged) Heller because Heller did not conform to Cagle's stereotype of how a woman ought to behave. Heller is attracted to and dates other women, whereas Cagle believes that a woman should be attracted to and date only men. . . . That Cagle perceived Heller as being a lesbian does not compel a different outcome."); *Terveer*, 34 F. Supp. 3d at 116 (holding that a complaint alleging the plaintiff's "sexual orientation is not consistent with the Defendant's perception of acceptable gender roles" stated a valid claim of sex discrimination); *Videckis v. Pepperdine Univ.*, --- F. Supp. 3d ---, 2015 WL 8916764, at *6-7 (C.D. Cal. Dec. 14, 2015) ("In sexual orientation discrimination cases, focusing on the actions or appearance of the alleged victim of discrimination rather than the bias of the alleged perpetrator asks the wrong question and compounds the harm."); *see generally*

Latta v. Otter, 771 F.3d 456, 486 (9th Cir. 2014) (Berzon, J., concurring) ("The notion underlying the Supreme Court's anti-stereotyping doctrine in both Fourteenth Amendment and Title VII cases is simple, but compelling: '[n]obody should be forced into a predetermined role on account of sex,' or punished for failing to conform to prescriptive expectations of what behavior is appropriate for one's gender.").

As noted above, this Court held in *Glenn* that "discrimination against plaintiffs because they fail to act according to socially prescribed gender roles constitute[s] discrimination under Title VII." 663 F.3d at 1317. Discrimination based on sexual orientation *necessarily* constitutes discrimination for failure to comply with such socially prescribed gender roles. *Glenn* thus compels a finding that sexual orientation discrimination is forbidden under Title VII.

In coming to its erroneous contrary conclusion, the district court relied on *Vickers*, 453 F.3d at 763, for the proposition that gender stereotyping claims "[g]enerally [involve] characteristics readily demonstrable in the workplace, such as behaviors, mannerisms, and appearances." Op. at 19-20. But this distinction between behaviors observed inside and outside the workplace is irrational and has never been recognized by this Circuit. If an employer is motivated by discriminatory animus and takes an adverse action against an employee, it makes no difference whether that animus arose from knowledge gained inside or outside

the workplace. It is the employer's discriminatory motive – and not the source of the information giving rise to that motive – that is the *sine qua non* of a disparate treatment case under Title VII. *See EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2033 (2015) ("[T]he intentional discrimination provision prohibits certain motives, regardless of the state of the actor's knowledge"); *see also id.* (holding that an employer may violate Title VII "even if he has no more than [an] unsubstantiated suspicion"); *Videckis*, --- F. Supp. 3d at ---, 2015 WL 8916764, at *6 ("[I]t is the biased mind of the alleged discriminator that is the focus of the analysis."). For example, an employer who discriminates against a white employee based on that employee's interracial marriage is just as culpable whether he learns of the relationship from a picture on the employee's desk or from seeing him and his family at a restaurant on the weekend.

The district court rejected Burrows's sex stereotyping claim on the grounds that it was simply a means of "bootstrapping" a claim for sexual orientation discrimination onto an already accepted legal theory. Op. at 19-20. But even if this Court did not wish to extend legal protection to sexual orientation *per se*, such a concern cannot immunize otherwise impermissible discrimination solely because of the plaintiff's sexual orientation. A concern about extending protections does not logically justify restricting otherwise available protections simply because of a claimant's sexual orientation: "Nothing in Title VII suggests that Congress

intended to confine the benefits of that statute to heterosexual employees alone. Rather, Congress intended that all Americans should have an opportunity to participate in the economic life of the nation." *Heller*, 195 F. Supp. 2d at 1222; *see also Smith*, 378 F.3d at 574-75 ("Sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior.").

Sexual orientation discrimination is based on the same impermissible gender stereotyping the Supreme Court held illegal in *Price Waterhouse* and this Court held illegal in *Glenn*. This Court should therefore reverse the district court's ruling that discrimination based on sexual orientation is not unlawful sex discrimination under Title VII.

B. Sexual orientation discrimination constitutes associational discrimination that violates Title VII.

Sexual orientation discrimination also violates Title VII's prohibition against sex discrimination because it treats individuals differently based on the sex of those with whom they associate. Such discrimination necessarily, and illegally, takes into account the employee's sex, in violation of Title VII. *See Price Waterhouse*, 490 U.S. at 243.

This Court held nearly thirty years ago that analogous associational discrimination violates Title VII's prohibition against race discrimination. In *Parr v. Woodmen of the World Life Insurance Co.*, 791 F.2d 888 (11th Cir. 1986), a

white man alleged the defendant did not hire him because he was married to a black woman. This Court held that the plaintiff had stated a valid claim for discrimination in violation of Title VII because, "[w]here a plaintiff claims discrimination based upon an interracial marriage or association, he alleges, by definition, that he has been discriminated against because of *his* race." *Id.* at 892. In support of its decision, the court noted that courts "are obliged to give Title VII a liberal construction," and that "[t]he EEOC's interpretation of Title VII [under which discrimination based on interracial association violates the statute] is to be accorded 'great deference.'" *Id.* (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 434 (1971)); *see also Isaacs*, 2015 WL 6560655, at *3 (finding the EEOC's opinion that sexual orientation discrimination claims are cognizable under Title VII "persuasive[]," particularly in light of its "compelling" reliance on *Parr*).

A panoply of cases from other circuits, involving a range of interracial associational relationships, have likewise concluded that such claims for association-based discrimination are cognizable under Title VII. *See, e.g.*, *Holcomb v. Iona Coll.*, 521 F.3d 130, 139 (2d Cir. 2008) (interracial marriage); *Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick, & GMC Trucks, Inc.*, 173 F.3d 988, 994-95 (6th Cir. 1999) (having a biracial child); *Deffenbaugh-Williams v. Wal-Mart Stores*, 156 F.3d 581, 589 (5th Cir. 1998) (interracial dating), *vacated in part on other grounds in Deffenbaugh Williams v. Wal-Mart Stores, Inc.*, 182

F.3d 333 (5th Cir. 1999) (en banc); *Floyd v. Amite Cty. Sch. Dist.*, 581 F.3d 244, 249 (5th Cir. 2009) (interracial teacher-student friendship); *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1118 (9th Cir. 2004) (interracial friendships or associations among coworkers).

As courts routinely recognize, the same analysis that applies to race-based discrimination under Title VII also applies to claims of sex discrimination. *See Whidbee v. Garzarelli Food Specialties, Inc.*, 223 F.3d 62, 69 n.2 (2d Cir. 2000) ("[T]he same standards apply to both race-based and sex-based hostile environment claims." (internal citation omitted)); *Williams v. Owens-Illinois, Inc.*, 665 F.2d 918, 929 (9th Cir. 1982) ("Under [Title VII] the standard for proving sex discrimination and race discrimination is the same."); *Horace v. City of Pontiac*, 624 F.2d 765, 768 (6th Cir. 1980) (holding that standards and orders of proof used in race discrimination cases "are generally applicable to cases of sex discrimination"). The Supreme Court has observed that Title VII "on its face treats each of the enumerated categories" – race, color, religion, sex and national origin – "exactly the same." *Price Waterhouse*, 490 U.S. at 243 n.9, 109 S. Ct. at 1787 n.9; *see id.* (noting that even though the case involved sex discrimination, its analysis "appl[ied] with equal force to discrimination based on race, religion, or national origin"). Other than the statutory exception for bona fide occupational

qualifications,[6] 42 U.S.C. § 2000e-2(e)(1), there is no basis in the legislative history or elsewhere for applying different criteria when analyzing claims of discrimination based on race and those based on sex. Thus, the analysis of race-based associational discrimination described above should apply with equal force to claims of sex-based associational discrimination. If a plaintiff is in a relationship with someone of the same sex, and an adverse employment consequence results from that relationship, discrimination has occurred "because of [the plaintiff's] . . . sex," in violation of Title VII. 42 U.S.C. § 2000e-2(a). Because Title VII forbids associational discrimination based on sex, sexual orientation discrimination clearly falls within the statute's ambit.

C. Sexual orientation discrimination is, by definition, discrimination "because of . . . sex," in violation of Title VII.

More generally, sexual orientation discrimination is also inherently sex-based discrimination because sexual orientation cannot be understood without reference to an individual's sex (in conjunction with the sex of those to whom the individual is physically and/or emotionally attracted). *See Videckis*, --- F. Supp. 3d at ---, 2015 WL 8916764, at *5 ("[T]he distinction [between sex discrimination and sexual orientation discrimination] is illusory and artificial, and . . . sexual orientation discrimination is not a category distinct from sex or gender

[6] CCF did not argue that the bona fide occupational qualification exception is relevant to this case and, indeed, it is difficult to imagine heterosexuality being a legitimate bona fide occupational qualification for any particular job.

discrimination."); *Baldwin v. Foxx*, EEOC Appeal No. 0120133080, 2015 WL 4397641, at *5 (EEOC July 15, 2015) ("[S]exual orientation is inseparable from and inescapably linked to sex and, therefore, . . . allegations of sexual orientation discrimination involve sex-based considerations."). Discrimination based on sexual orientation requires an employer to consider "sex-based preferences, assumptions, expectations, stereotypes, or norms" in determining how to treat its employees. *Id.*; *see also Centola*, 183 F. Supp. 2d at 410 ("[S]tereotypes about homosexuality are directly related to our stereotypes about the proper roles of men and women."). An employer therefore cannot discriminate against an employee based on that employee's sexual orientation without taking the employee's sex into account. *Isaacs*, --- F. Supp. 3d at ---, 2015 WL 6560655, at *3; *Baldwin*, 2015 WL 4397641, at *5.

The district court's treatment of sexual orientation discrimination as distinct from sex discrimination is untenable and based on a fundamentally flawed premise. As the court recently explained in *Videckis*, "It is impossible to categorically separate 'sexual orientation discrimination' from discrimination on the basis of sex or from gender stereotypes; to do so would result in a false choice. Simply put, to allege discrimination on the basis of sexuality is to state a . . . claim on the basis of sex or gender." --- F. Supp. 3d at ---, 2015 WL 8916764, at *7.[7]

[7] *Videckis* is a Title IX case, but the court stressed that the same analysis applies to

If an employer treats an employee less favorably than it would treat a comparable employee who, aside from his or her sex, is identical in all respects (including, for example, the sex of that employee's spouse), the employer discriminates against the employee "because of sex." *See Manhart*, 435 U.S. at 711, 98 S. Ct. at 1377 (employing "the simple test of whether the evidence shows treatment of a person in a manner which but for that person's sex would be different" to determine whether a sex-based violation of Title VII occurred (internal citation and quotation marks omitted)); *see also Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 682-83, 103 S. Ct. 2622, 2630-31 (1983) (applying *Manhart*'s "simple test of Title VII discrimination").

Several courts have already taken this approach to sexual orientation discrimination cases, eschewing the distinction between discrimination based on sexual orientation and sex discrimination more generally. In *Hall v. BNSF Railway Co.*, the court held that a plaintiff, a man married to another man, successfully alleged sex discrimination under Title VII when he was denied a spousal health benefit available to similarly situated women married to men. 2014 WL 4719007, at *3 (W.D. Wash. Sept. 22, 2014). The court in *Heller v. Columbia Edgewater Country Club* explained that a woman claiming sexual harassment

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claims under Title IX and Title VII. *Videckis*, --- F. Supp. 3d at ---, 2015 WL 8916764, at *5.

could prove her claim if she could show that her manager would have treated her differently if she were a man dating a woman instead of a woman dating a woman. 105 F. Supp. 2d 1212, 1223 (D. Or. 2002). In *Videckis*, the court explained, "If Plaintiffs had been males dating females, instead of females dating females, they would not have been subjected to the alleged different treatment," and therefore concluded that they "have stated a straightforward claim of sex discrimination." *Videckis*, --- F. Supp. 3d at ---, 2015 WL 8916764, at *8.

In sum, sexual orientation discrimination necessarily requires impermissible consideration of sex. It should therefore be held illegal under Title VII.

D. The contrary cases on which the district court relied are not persuasive authority.

In determining that Title VII does not apply to sexual orientation claims, the district court relied solely on two unpublished district court cases, *Anderson v. Napolitano*, 2010 WL 431898 (S.D. Fla. Feb. 8, 2010), and *Mowery v. Escambia County Utilities Authority*, 2006 WL 327965 (N.D. Fla. Feb. 10, 2006). Neither case is persuasive – let alone binding – authority for the district court's blanket conclusion.

Many of the decisions *Anderson* and *Mowery* rely on are arguably no longer good law. *Mowery* cites a number of cases in support of its conclusion that "Title VII provides no protection for discrimination based on sexual orientation," 2006 WL 327965, at *9, but many of these either cite *Ulane v. Eastern Airlines, Inc.*,

742 F.2d 1081 (7th Cir. 1984), as their sole precedent or unquestioningly restate its core holding.[8] *Ulane*, which held that Title VII forbids discrimination only "against women because they are women and against men because they are men," *id.* at 1085, predated the Supreme Court's landmark holding in *Price Waterhouse* that discrimination based on gender stereotypes, in addition to that based solely on biological sex, is categorically impermissible. 490 U.S. at 251, 109 S. Ct. at 1791. As this Circuit held in *Glenn*, *Ulane*'s "approach . . . has been eviscerated" by *Price Waterhouse*. 663 F.3d 1312, 1318 n.5 (11th Cir. 2011) (internal quotation marks omitted). The Seventh Circuit itself recently amended an opinion to omit a reference to *Ulane*'s holding, as incorporated in *Hamner*, indicating that it may be questioning *Ulane*'s continuing validity. *See Muhammad v. Caterpillar Inc.*, 767 F.3d 694 (7th Cir. 2014) (*as amended on denial of reh'g*) (original opinion at Docket Entry No. 41, Appeal No. 12-1723). This entire line of cases is therefore suspect and should not be considered persuasive authority.

Similarly, to support its conclusion that "Title VII does not prohibit discrimination based on sexual orientation," 2010 WL 431898, at *4, *Anderson*

[8] The cases cited in *Mowery* that rely on *Ulane* directly or indirectly include *Hamner v. St. Vincent Hospital & Health Care Center, Inc.*, 224 F.3d 701 (7th Cir. 2000) (citing *Ulane*); *Hamm v. Weyauwega Milk Products, Inc.*, 332 F.3d 1058 (7th Cir. 2003) (relying on *Hamner*); *Spearman v. Ford Motor Co.*, 231 F.3d 1080 (7th Cir. 2000) (relying on *Ulane* and *Hamner*); and *King v. Super Service, Inc.*, 68 F. App'x 659 (6th Cir. 2003) (relying on *Spearman*).

cites only *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000). *Simonton*, in turn, relies on a number of cases that were implicitly overruled by *Price Waterhouse* and *Oncale*, and that conflict with *Glenn*. In addition to *Ulane*, *Simonton* cites *DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327, 329-32 (9th Cir. 1979); *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989); and *Wrightson v. Pizza Hut of America, Inc.*, 99 F.3d 138, 143 (4th Cir. 1996). *DeSantis*, which held that Title VII does not protect against discrimination based on sex stereotypes, 608 F.2d at 331-32, was abrogated by *Price Waterhouse* and is no longer good law. *See Nichols*, 256 F.3d at 875 (recognizing abrogation). *Williamson*, a four-paragraph decision that predated *Price Waterhouse* and *Oncale*, relies entirely on *DeSantis* without additional analysis to conclude that Title VII does not protect "transsexuals," a holding directly contrary to *Glenn*. Thus, *Williamson* and the cases relying on it have no persuasive force within this Circuit. *Wrightson*, a pre-*Oncale* decision, cites only *Williamson* and *DeSantis* for its conclusion that Title VII does not protect against sexual orientation discrimination, which was dicta in any event.

In short, nothing in the cases on which the district court relied compels – or even strongly supports – the conclusion that Title VII forecloses sexual orientation discrimination claims. As explained above, the clear weight of authority supports a contrary holding, that discrimination because of sexual orientation is

discrimination because of sex.

Conclusion

An employer that discriminates against an employee based on sexual orientation necessarily discriminates based on sex, in violation of Title VII. The district court's perfunctory rejection of Burrows's gender stereotyping claim as "merely a repackaged claim for discrimination based on sexual orientation, which is not cognizable under Title VII," was therefore simply wrong. The Commission therefore urges this Court to hold that claims of sexual orientation discrimination are cognizable under Title VII.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume requirements set forth in Federal Rules of Appellate Procedure Rule 32(a)(7)(B). This brief contains 6,249 words, from the Statement of Interest through the Conclusion, as determined by the Microsoft Word 2010 word processing program, with 14-point proportionally spaced type for text and footnotes.

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CERTIFICATE OF SERVICE

I, Jeremy D. Horowitz, hereby certify that I filed seven paper copies of the foregoing amicus brief with the Court by first-class mail, postage pre-paid, on this 6th day of January, 2016. I also certify that I submitted the amicus brief electronically in PDF format through the Electronic Case File (ECF) system.

I further certify that I served two paper copies of the foregoing amicus brief this 6th day of January, 2016, by first-class mail, postage pre-paid, to the following counsel of record:

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