No. 15-3775

In the United States Court of Appeals
for the Second Circuit

MELISSA ZARDA AND WILLIAM ALLEN MOORE, JR. AS CO-INDEPENDENT EXECUTORS OF THE ESTATE OF DONALD ZARDA,
Plaintiffs-Appellants,

v.

ALTITUDE EXPRESS, D/B/A SKYDIVE LONG ISLAND AND RAYMOND MAYNARD,
Defendants-Appellees.

On Appeal from the
U.S. District Court
for the Eastern District of New York

Brief *Amicus Curiae* of
Conservative Legal Defense and Education Fund,
Public Advocate of the United States, and
United States Justice Foundation
in Support of Appellees and Affirmance

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DISCLOSURE STATEMENT

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/s/ William J. Olson
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TABLE OF CONTENTS

Page

DISCLOSURE STATEMENT

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

STATEMENT 2

ARGUMENT

I. ZARDA WAS FIRED FOR HIS INAPPROPRIATE BEHAVIOR, NOT HIS SEXUAL ORIENTATION 2

II. SEXUAL ORIENTATION IS NOT SEX 5

III. LAMBDA'S CASE THAT SEX COMPREHENDS SEXUAL ORIENTATION IS LEGAL SOPHISTRY 7

A. Lambda's "Sex-Plus" Theory Is Based on a Fallacious Comparison 7

B. Lambda's Analogy That Sex Is Like Race Is Fallacious 10

C. Lambda's Claim that Sexual Orientation Is like Sexual Stereotyping in Price Waterhouse v. Hopkins Is Fallacious 12

IV. THE LAMBDA BRIEF IS BASED UPON A FALLACIOUS EVOLUTIONARY JURISPRUDENCE 17

CONCLUSION 23

TABLE OF AUTHORITIES

Page

HOLY BIBLE

Hosea 8:4 22

FEDERAL STATUTES

42 U.S.C. § 2000e-2 10
Civil Rights Act of 1964, Title VII . . . . 2, *passim*

CASES

Anonymous v. Omnicom Group, Inc., 852 F.3d 195 (2nd Cir. 2017) 11, 18
Hively v. Ivy Tech Cmty College of Ind., 853 F.3d 339 (7th Cir. 2017) 7, 21
Obergefell v. Hodges, 135 S.Ct. 2584 (2015) 8
Perry v. MSPB, 198 L.Ed.2d 527 (2017) 19
Price Waterhouse v. Hopkins, 490 U.S. 8 (1989) . . . . 12, *passim*
Simonton v. Runyon, 232 F.3d 33 (2nd Cir. 2000) 2

MISCELLANEOUS

W. Blackstone, Commentaries of the Laws of England (Univ. Chi. Facsimile ed.: 1765) 20
P. Boghossian & J. Lindsay, "The Conceptual Penis as a Social Construct: A Sokal-Style Hoax on Gender Studies" 15
Fred V. Cahill, Jr., Judicial Legislation (Ronald Press Co.: 1952) 19
R.L. Clinton, God & Man in the Law (U. Press Kan.: 1997) 22
J. Kent, Commentaries on American Law (1826-30) 9
R. Pound, Introduction To The Philosophy of Law (Yale: 1922) 20
Herbert Schlossberg, Idols for Destruction (Crossway Books: 1990) 21, 22

INTEREST OF *AMICI CURIAE*[1]

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- G.G. v. Gloucester County School Board (4th Cir. No. 15-2056), Brief *Amicus Curiae* of Public Advocate of the United States, *et al*., in Support Petition for Rehearing *En Banc* (May 10, 2016) (involving application to Civil Rights Act Title IX to transgender access to bathrooms and locker rooms of the opposite sex);

- Gloucester County School Board v. G.G. (Supreme Court No. 16-273), Brief *Amicus Curiae* of Public Advocate of the United States, *et al*., in Support of Petitioner (Jan. 10, 2017);

- G.G. v. Gloucester County School Board (4th Cir. No. 15-2056), Brief *Amicus Curiae* of Public Advocate of the United States, *et al*., in Support of Defendant-Appellee and Affirmance (May 15, 2017) (on remand); and

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[1] No party's counsel authored this brief in whole or in part. No person, including a party or a party's counsel, other than *amici curiae*, their members, or their counsel, contributed money that was intended to fund preparation or submission of this brief.

- E.E.O.C. v. Harris Funeral Home (6th Cir. 16-2424), Brief *Amicus Curiae* of Public Advocate of the United States, *et al.*, in Support of Appellee and Affirmance (May 24, 2017) (involving application of Title VII to a transgender employee).

STATEMENT

On April 18, 2017, a panel of this Court decided that it was bound by Second Circuit precedent[2] that Title VII of the Civil Rights Act of 1964 does not prohibit discrimination based on sexual orientation. Zarda v. Altitude Express, 855 F.3d 76 (2017). On May 25, 2017, this Court granted rehearing *en banc*, and invited *amicus curiae* briefs, to decide the following question:

> 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"?

ARGUMENT

I. ZARDA WAS FIRED FOR HIS INAPPROPRIATE BEHAVIOR, NOT HIS SEXUAL ORIENTATION.

Even before this Court considers the legal question it posed in its Order of May 25, 2017, it must ensure this case is an appropriate vehicle to decide whether discrimination based on "sexual orientation" is actionable. It is not. The Appellant urges this Court to assume that the discrimination alleged in this case was about "sexual orientation." It was not. Rather, as Zarda's own brief makes

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[2] *See* Simonton v. Runyon, 232 F.3d 33 (2nd Cir. 2000).

clear, the reason he was fired was not for his sexual orientation, but for his overt sexual behavior.

Zarda made no secret about his sexuality with his boss and coworkers. In fact, for many years prior to Zarda's firing, "Maynard [knew] plaintiff was gay" and "never told Zarda to cover his sexuality." Aplt. Br. at 15. In fact, among coworkers at the office, "Zarda's orientation was subject of humor." *Id.* Based on the oversharing that is rampant in Zarda's brief, it is clear that everyone at his office (including Maynard) knew of and accepted his sexuality, even if he was the subject of "testosterone-crammed" jokes. *Id*.

Rather, it was only when Zarda chose to act in an unprofessional manner and openly discuss his sexuality with customers (rather than his coworkers), that Maynard was forced to take action. In fact, as the Zarda brief further notes, he had a bad habit of unprofessionally sharing details about his sexuality with anyone who would listen (including some customers who did not make objections), and still Maynard did not fire him. *Id*. at 12. However, it seems clear that when a customer finally complained about Zarda's unprofessional behavior, Maynard was forced to take action.

Zarda's brief essentially claims that his homosexuality permitted him to engage in unprofessional behavior with customers, and that to require a certain

minimum level of professionalism from employees is actionable. As the Zarda brief alleges, the main reason he chose to reveal his homosexuality to this particular customer was because he was strapped to her. *Id*. at 9. Although the panel opinion notes that "Zarda alleged that another skydiving instructor had disclosed that he was heterosexual but was not punished," Zarda at 80 n.3, it would seem a matter of common sense that this disclosure was not made to a woman to whom the instructor was strapped. It also seems clear that an employer has the right to dismiss straight male skydivers who took the opportunity to tell every woman customer to whom they were strapped to how straight they were, and the employer should have the same authority over homosexual employees.

In fact, Zarda's brief actually admits that he was not fired because of his sexual orientation, but rather because of his indiscriminate chit chat — "Zarda lost his job because he told Orellana that he was a gay man." Aplt. Br. at 8.

The record is clear, then, that Zarda was not fired for being homosexual, but for his apparent need to openly profess his gayness to everyone with whom he came into contact — so they would celebrate it along with him. For such manifestly unprofessional behavior, Title VII provides no protection.

II. SEXUAL ORIENTATION IS NOT SEX.

What appears to be appellant's principal *amicus curiae*, Lambda Legal Defense and Education Fund ("Lambda"), filed an *amicus* brief which claims that discrimination based on sexual orientation "**is**" and "must be recognized **as**" discrimination based on sex. Lambda Brief at 3, 4, 6, 8 (emphasis added). However, when the time came to cite authority to back up that bald assertion, Lambda quickly backed off, opting instead to obscure by laying out a laundry list of terms such as:

- "involves sex-based considerations"
- "'inseparable from'" sex
- "'inescapably linked to sex'"
- "in relation to sex"
- "takes account of an individual's sex" and
- "'inherently rooted in gender[3] stereotypes.'" *Id*. at 4, 5 & n.3, 8.

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[3] It is quite interesting that Lambda here uses "sex" and "gender" interchangeably. *Id*. at 8, 11, 23. However, "sex" is biological and fixed by nature, "sexual orientation" is psychological, variable by how a person feels about others, while "gender" is existential in relation to how a person feels about himself at any moment of time. There are two sexes — male and female. However, there are several "sexual orientations" — heterosexual, homosexual, bisexual, asexual, and perhaps more. As for "gender," the list of types is endless, subject only to human imagination, and for some includes things like "pedophilia" and "zoophilia." The idea of "gender" is evolving to the point where it can encompass anything the mind can conceive. In February of 2014, Facebook added 58 gender options to its users' profiles. By June of that year, UK Facebook users could select from 71 options. By February of 2015, Facebook no longer defines gender at all, allowing each person to choose one's own gender instead of being "pigeon-holed" by only 71 options. In a blank space provided, a Facebook user

Upon more careful examination, Lambda is not arguing that sexual orientation discrimination "must be recognized as" sex discrimination, but only that "'there is no reason why' discrimination because of an individual's sex 'cannot include' sexual orientation discrimination." *Id.* at 15. As Lambda is finally forced to admit, "sexual orientation" is **not actually** the same thing as "sex." *Id*. at 5 n.3 ("This is not to say that 'sex' and 'sexual orientation' are interchangeable concepts or terms...."). However, Lambda discards this flaw in its argument as "irrelevant," hoping to deflect this Court into believing that "it is wholly unnecessary for Plaintiffs-Appellants to demonstrate that 'sexual orientation' and 'sex' are synonyms or that they are interchangeable...." *Id.* at 12. Lambda should not be allowed to bootleg "sexual orientation" into the list of categories protected by Title VII from discrimination, especially when it admits the two are not at all the same.

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can become any "gender" that one wishes, subject only to the limits of expression on the ASCII keyboard. Perhaps one of the most interesting genders offered is the Native American "two-spirit" gender, which includes both male and female elements. Nevertheless, although it is easy to be diverted into gender studies, the task at hand is to discover the meaning of "sex" as used in a federal statute, not as used in an academic discussion.

III. LAMBDA'S CASE THAT SEX COMPREHENDS SEXUAL ORIENTATION IS LEGAL SOPHISTRY.

Citing the Seventh Circuit's recent decision in Hively v. Ivy Tech Cmty College of Ind., 853 F.3d 339, 341 (7th Cir. 2017), the Lambda brief claims that "'discrimination on the basis of sexual orientation is a form of sex discrimination.'" Lambda Br. at 3. In support, the Lambda brief offers three reasons, all of which seem superficially plausible, but actually are completely fallacious.

A. Lambda's "Sex-Plus" Theory Is Based on a Fallacious Comparison.

The Lambda brief rests, first of all, on its "'sex-plus'" proposition that sexual orientation:

> necessarily involves sex-based considerations because the discrimination endured by a man based on his attraction to men is not suffered by any woman with an **identical attraction** to men. [*Id.* at 3-4 (emphasis added).]

This statement presupposes that the sexual relationship of a man and another man is identical to the sexual relationship of a woman and a man. They are not now, and never have been, identical. Therefore, the proper comparison would be to pair the man, or the woman, each to a person of the opposite sex so that each is similarly situated. By making that comparison, there would be no sex

discrimination because the man and the woman would be treated exactly the same. The simple fact is that a man who is in a sexual relationship with another man is not "similarly situated" with a woman who is in a sexual relationship with a man. Rather, they are dis-similarly situated.

That is why it is commonly stated that a man married to another man is in a same-sex marriage, but a man who is married to a woman is in a marriage. In Obergefell v. Hodges, 135 S.Ct. 2584 (2015), for example, the Supreme Court was careful not to declare that a same-sex marriage was identical to an opposite-sex union, but only that whatever benefits the government confers upon a heterosexual union must also be conferred on a homosexual union.

So it is the Lambda Brief, and the court opinions upon which it relies, that are illogical, not the other way around. Again, this is so because of Lambda's fallacious comparison. Consider this illustration from the Lambda brief: "'If a business fires Ricky because of his **sexual activities** with Fred, while this action would not have been taken against Lucy if she did **exactly the same things** with Fred, then Ricky is being discriminated against because of his sex.'" *Id.* at 6. No, Ricky is not being discriminated against because of his sex (prohibited by Title VII), but because of his sexual orientation (not prohibited by Title VII). By the very nature of the biological differences between males and females, because two

men cannot do "exactly the same things" with each other as would one man and one woman.[4] Biologically, then, Ricky is not — indeed cannot — be similarly situated vis-a-vis his sexual relationship with Lucy as he would be with Fred. So the firing of Ricky is not discrimination because of his "sex," but because of his "sexual orientation" — a distinction that even the Lambda Brief acknowledges when it admits these are not "interchangeable concepts or terms." *Id.* at 5 n.3. Therefore, "sex" does not — indeed, cannot — include "sexual orientation," the two being very different terms or concepts.

Indeed, under the Lambda Brief's creative "sex-plus" theory, the action taken against a person on the basis of his "sexual orientation" is necessarily discrimination based on the "plus" add-on — not the "sex" part of the theory. And Title VII only bans discrimination based on sex. Lambda's "sex-plus" theory, by

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[4] Since time immemorial, the existence of a marriage is not based only on consent of the parties, or a civil or religious ceremony, but on the "consummation" of that marriage by sexual intercourse. As Chancellor James Kent explained:

> **If** the contract be made *per verba de praesenti*, or if made *per verba de futuro*, **and be followed by consummation**, it amounts to a **valid marriage**, and which the parties (being competent as to age and consent) cannot dissolve, and it is equally binding as if made *in facie ecclesiae*. [J. Kent, Commentaries on American Law (1826-30), Claitor's Publishing Div. Lecture 26, section 6 (emphasis added.)]

Although it appears a concerted effort has been made to politicize and broaden the dictionary definition of "sexual intercourse" to include acts of sodomy, from time immemorial, sexual intercourse has required penile-vaginal sexual penetration. Clearly, basic anatomy makes the comparisons made by Lambda inapt.

its very definition, proves that "sexual orientation" discrimination is not "sex" discrimination. Rather, it asserts "'sex-plus' is the term for discrimination occurring **not categorically** against all members of one sex, but only those members sharing a certain **trait**" that is unrelated to their sex. *Id*. at 4 n.2 (emphasis added). Indeed, Zarda's homosexuality is not "inseparable from and inescapably linked to sex," *id*. at 4, but rather had nothing to do with his sexual orientation — as Lambda is so quick to point out, both men and women may be attracted to men. *Id*. at 4. Rather, it was Zarda's homosexuality — a trait not shared by most men — which is the **alleged** basis for the **alleged** discrimination.

B. Lambda's Analogy That Sex Is Like Race Is Fallacious.

Lambda claims that sex is like race because Title VII "'on its face treats [race and sex] **exactly the same**.'" Lambda Br. at 7 (emphasis added). It does not. While discrimination because of race is not subject to any exceptions, sex decidedly is. *See* 42 U.S.C. § 2000e-2(e). Even the Lambda Brief concedes this point in a footnote, but insists that these "limited, narrow exceptions" "are **not relevant here**." Lambda Br. at 7 n.5 (emphasis added). But the Lambda Brief never explains why the existence of these exceptions is not relevant — it just asserts it.

Instead of establishing its point that sex and race are "exactly the same," the Lambda Brief enlists the "associational discrimination" theory articulated by this Court with respect to racial discrimination, in which it ruled that if Title VII is violated by an employer by action taken against the employee for being in a sexual relationship with a person of **another race**, then it is considered to be a violation of the employee's own race. Anonymous v. Omnicom Group, Inc., 852 F.3d 195, 204 (2nd Cir. 2017) (emphasis added). Similarly, Lambda argues, if an employer takes action against an employee on the basis of a sexual relationship that the employee has with a person of the **same** sex, then the employee is discriminated against on the basis of "sex" and so the same rule should apply — the employee is being discriminated against because of his own sex. The problem with this argument is that it rests upon a dissimilar premise, not an analogous one. In the race case, the associational theory applies only to an employee who is associated with a person of another or different race, whereas in the sex case, the associational theory is applied only when the person is in a relationship with a person of the same sex. If the employee and the associate are of the same race, then there could be no violation of Title VII. Thus, the two cases are not analogous. Further, as discussed above, a relationship between a man and a man cannot possibly be considered the same as one between a man and a woman,

because they are not capable of "doing the same things" with one another. An interracial relationship, however, is capable of doing the same thing. A white man and a black woman, however, are similarly situated to two white people or two black people. To equate interracial relationships to homosexual activity is fallacious.

C. Lambda's Claim that Sexual Orientation Is Like Sexual Stereotyping in Price Waterhouse v. Hopkins Is Fallacious.

Neither Zarda's brief nor Lambda's brief presents thoughtful analysis as to why Price Waterhouse v. Hopkins, 490 U.S. 8 (1989), supports the view that Title VII prevents sex discrimination. In fact, Zarda's brief gives almost no attention to Price Waterhouse v. Hopkins except to hold it up as an illustration of the admirable creativity of the federal courts in applying Title VII beyond the text and authorial intent of that law: "Congress adopted Title VII without suggestion that sex stereotypes were illegal, *see Price Waterhouse*..." Aplt Br. at 44. Zarda makes only one reference to Price Waterhouse in a way that relates at all to the question posed by the Court on *en banc* reconsideration:

> But because the decision [in Simonton] based its holding on only a pleading, it left open the question for another day as to whether a plaintiff may allege subjugation to sex stereotypes, as recognized by *Price Waterhouse* ... as a basis to proceed under Title VII. *Simonton*, 232 F.3d at 37-38. [Aplt. Br. at 20.]

Zarda leaves it there. There is no argument in support of why Price Waterhouse would decide this issue — a complete failure of advocacy.

The Lambda brief tries to fill this void with these few sentences:

> discrimination based on [gender] stereotypes indisputably violates Title VII. *See Price Waterhouse*, 490 U.S. at 251 ("As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they match [] the stereotype associated with their group.....").
>
> An individual's same-sex attraction "represents the ultimate case of failure to conform to [a sex] stereotype.... It is thus untenable to suggest that Title VII does not cover discrimination based on this attraction. [Lambda Br. at 8-9 (citations omitted).]

The Lambda brief takes great liberties with the Price Waterhouse decision, asserting that it somehow was meant to decide that discrimination based on sexual orientation was banned by Title VII. To the contrary, Justice Brennan's theory of sex discrimination based on sex stereotypes was quite narrow:

> In saying that **gender** played a motivating part in an employment decision, we mean that, if we asked the employer at the moment of the decision what its reasons were and if we received a truthful response, one of those reasons would be that the applicant or employee was a **woman**. In the specific context of **sex stereotyping**, an employer who acts on the basis of a belief that a **woman** cannot be aggressive, or that she must not be, has acted on the basis of **gender**.... "'Congress intended to strike at the entire spectrum of **disparate treatment of men and women** resulting from **sex stereotypes**.'" [Price Waterhouse at 250-51 (emphasis added).]

One can see that Justice Brennan employs the word "gender" as a synonym to the statutory term "sex," and in explaining "gender" to mean "sex" (*i.e.*, male or female), the narrow scope of Price Waterhouse is made clear. Based on the text of the statute and a fair reading of Justice Brennan's opinion, the rule of that case must be that unlawful discrimination under Title VII must be based only on either (i) sex or (ii) "sex stereotyping," where that later term is understood to reveal an underlying bias against a woman (or man) because of her (or his) nature and characteristics.

In sum, the Price Waterhouse decision simply clarified that Title VII barred not only discrimination against women as such, but also discrimination against women for how they may act as women — a thinly veiled version of opposition because a person is a woman. However, in no way does this doctrine establish a free-floating cause of action based on a right to be free of any sort of sex-stereotyping that does not reveal categorical discrimination against a real biological man or woman.

To understand the psychological (not therefore legal) term "sex-stereotyping," it is necessary to examine the derivation of that term in Price

Waterhouse. There, the term was attributed to Dr. Susan Fiske, a psychologist[5] who testified at trial for plaintiff Hopkins regarding statements made about the plaintiff by others at Price Waterhouse. Importantly, her testimony was designed to establish unlawful discrimination and was not limited to "the overtly sex-based comments of partners but also on gender-neutral remarks...." Price Waterhouse at 235. Justice Brennan summarized her testimony as follows:

> According to Fiske, Hopkins' **uniqueness** (as the only woman in the pool of candidates) and the **subjectivity** of the evaluations made it **likely** that sharply critical remarks ... were the product of **sex stereotyping**. [*Id*. at 235-36 (emphasis added).]

Justice Brennan on behalf of a minority of four justices lamely attempted to demonstrate the reliability of Dr. Fiske's imputation of discriminatory motives to

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[5] Courts must be very wary of grounding legal decisions on the social sciences, especially when it relates to sex. Recently, two social scientists demonstrated the openness of psychologists and other social scientists to the most irrational and foolish notions that fit their personal sexual and political views. *See* P. Boghossian & J. Lindsay, "The Conceptual Penis as a Social Construct: A Sokal-Style Hoax on Gender Studies," http://www.skeptic.com/reading_room/conceptual-penis-social-contruct-sokal-style-hoax-on-gender-studies/. The two authors created a "paper" entitled "The Conceptual Penis as a Social Construct," consisting of 3,000 words of utter nonsense posing as academic scholarship. Then a peer-reviewed academic journal in the social sciences accepted and published it. The two scholars who perpetuated this hoax asserted "that the *conceptual penis* is better understood not as an anatomical organ but as a gender-performative, highly fluid social construct." The authors stated, "[w]e assumed that if we were merely clear in our moral implications that maleness is intrinsically bad and that the penis is somehow at the root of it, we could get the paper published in a respectable journal." *Id*.

Price Waterhouse personnel — despite the fact that she never "met any of the people involved in the decisionmaking process," by pointing out that "it was commonly accepted practice for social psychologists to reach this kind of conclusion" without any personal contact with the persons allegedly being demeaned. Price Waterhouse at 236. Justice Brennan thereby implicitly adopted for the Court an unreliable standard of proof just because Dr. Fiske said it was "commonly" used in the world of social psychology.

In dissent, Justice Kennedy, Chief Justice Rehnquist, and Justice Scalia exposed that Dr. Fiske's testimony was grounded in sand:

> The plaintiff who engages the services of Dr. Susan Fiske should have no trouble showing that sex discrimination played a part in any decision. Price Waterhouse chose not to object to Fiske's testimony, and at this late stage we are constrained to accept it, but I think the plurality's enthusiasm for Fiske's conclusions unwarranted. Fiske purported to discern stereotyping in comments that were gender neutral — *e.g.*, "overbearing and abrasive" — without any knowledge of the comments' basis in reality and without having met the speaker or subject. "To an expert of Dr. Fiske's qualifications, it seems plain that no woman could *be* overbearing, arrogant, or abrasive: any observations to that effect would necessarily be discounted as the product of stereotyping. If analysis like this is to prevail in federal courts, no employer can base any adverse action as to a woman on such attributes." [*Id*. at 293 n.5 (citations omitted).]

IV. THE LAMBDA BRIEF IS BASED UPON A FALLACIOUS EVOLUTIONARY JURISPRUDENCE.

Audaciously, Lambda contends that it is "irrelevant" and "wholly unnecessary for [Zarda] to demonstrate that 'sexual orientation' and 'sex' are synonyms or that they are interchangeable concepts or terms." *Id.* at 12. Thus, the Lambda Brief rejects any and all efforts by courts to discern the "'original public meaning'" of the phrase and word. *Id.* at 13 n.10. Indeed, the Brief argues that Title VII was "not enacted in the same legal era" as subsequent attempts to enact legislation that proscribes "sexual orientation" in addition to or separate from existing statutes aimed at discrimination on account of "sex." *Id.* at 13-14. Therefore, Lambda insists that it is "anachronistic to rely on recent legislation specifically enumerating 'sexual orientation' to justify a narrow interpretation ... 'because of ... sex.'" *Id.* at 14.

Instead, Lambda urges this Court to ignore the "flaw[ed] ... arguments that emphasize what words are *not* in the statute, rather than 'the scope of the language that already is in the statute.'" *Id.* at 9. With this argument settled, Lambda uncovers the common denominator of all its arguments (sex-plus, comparisons to race, sex stereotypes) — an "evolving legal landscape." When legal evolution is glorified, every principle known to man can be jettisoned such as here, where "the

changed 'backdrop of the Supreme Court's decisions'" opens the door to a "'broader [view of] discrimination on the basis of sexual orientation.'" *Id.* at 10. Lambda simply proclaims that "sex" now encompasses "sexual orientation" because "the right of same-sex couples to marry is now recognized as fundamental" and "intimate relations between same-sex couples" can no longer be criminalized. *Id.* It is, Lambda asserts, a "post-*Lawrence*, post-*Obergefell* world" and past "perspectives must be reconsidered." *Id.*

In harmony with Lambda, as Chief Judge Katzmann of this Circuit had already forecasted, this Circuit's rulings and comparable rulings of sister circuits — "that discrimination ... did not encompass discrimination on the basis of sexual orientation" — were not erroneous when made, just out-of-date today. Omnicom Grp. at 206 (Katzmann, C.J., concurring). Now that the Supreme Court has "afford[ed] greater legal protection to gay, lesbian, and bisexual individuals," the Chief Judge asserts, the lower federal courts need not wait for the Supreme Court to act, as the "societal understanding of same-sex relationships has **evolved** considerably." *Id*. at 206 (emphasis added).

In his search for a rationale to justify ignoring the repeated failed efforts to persuade Congress to add sexual orientation to Title VII, the Chief Judge has wittingly or unwittingly adopted the view of Oliver Wendell Holmes, Jr., as

documented by Yale political science professor Fred V. Cahill, Jr. in his book, Judicial Legislation (Ronald Press Co.: 1952):

> [L]aw is a growing thing and ... its growth is determined, not by logic, but by the 'felt necessities of the time.' In this growth, the judge is bound to play an active part. The law moves, according to Holmes, in a climate of opinion made up of **moral and political beliefs**, judgments of **policy** and even **prejudices** — all of which affect the **judge**. [Cahill at 39 (emphasis added).]

In sum, as Cahill concluded, Holmes asserted that "[j]udges really make law ... because they are motivated by the same considerations as is the legislator." *Id.* There is one overriding glitch in that philosophy. As newly installed Supreme Court Justice Neil Gorsuch explained in his very first Supreme Court opinion:

> If a statute needs repair, there's a constitutionally prescribed way to do it. It's called legislation. To be sure, the demands of bicameralism and presentment are real and the process can be protracted. But the **difficulty of making new laws** isn't some bug in the constitutional design: it's the point of the design, the better to **preserve liberty**. [Perry v. MSPB, 198 L.Ed.2d 527, 545 (2017) (Gorsuch, J., dissenting) (emphasis added).]

Consonant with this separation of powers principle, this Court must decline Lambda's invitation to disregard the original meaning of "because ... of sex," as it appears in Title VII of the 1964 Civil Rights Act, simply because the Supreme Court gave approval to same-sex sodomy in 2003 and same-sex marriage in 2015. *See* Lambda Br. at 10-11. While the latter two rulings no doubt have "enjoyed

wide and **enthusiastic** judicial support,"[6] that should not be the standard by which this Court should measure its own precedents, as Lambda urges. *Id.* at 2-3. Rather, as Sir William Blackstone has reminded us, a court precedent should not be abandoned unless "the former determination is most evidently contrary to reason, much more if it be contrary to the divine law." 1 W. Blackstone, Commentaries of the Laws of England at 69-70 (Univ. Chi. Facsimile ed.: 1765). In today's postmodern, evolutionary world, however, the temptation for judges to rule lawlessly is enormous, as judges and lawyers "wrestle with the problem of proving to mankind that the law was something fixed and settled, whose authority was beyond question, while at the same time enabling it to make constant readjustments and occasional radical changes under the pressure of infinite and variable human desires." *See* R. Pound, Introduction To The Philosophy of Law at 3 (Yale: 1922). Should the judges of this Court succumb to the temptation to appoint themselves as super legislators who can amend statutes based on their superior wisdom and power, they would do grave damage to the inherent authority of the law.

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[6] *See* Lambda Br. at 17 n.12 (emphasis added).

Lacking any support for its position in the text of Title VII or authorial intent of that law,[7] the Lambda brief invites the Court to ignore those two touchstones and come join its campaign for "legal evolution." It perceives an evolution that would bring us toward a modern, secular state, loosed from the chains of morality. Doubtless, the evolutionary trend toward sanctioning immoral behavior is occurring in the federal courts, but that does not mean that it is correct, constitutional, or without consequence. Indeed, with an evolutionary view of "law," society moves away from anything resembling the "rule of law," to "rule by man" exercised by unelected lawyers, acting as "philosopher kings," holding office as federal judges. Unable to obtain legislation fast enough to satisfy their appetites for change, those who embrace sexual immorality appeal to judges to usurp the power to legislate for the nation:

> Western society, in turning away from Christian faith, has turned to other things. This process is commonly called *secularization*, but that conveys only the negative aspect. The word connotes the turning away from the worship of God while ignoring the fact that something is being turned *to* in its place. [Herbert Schlossberg, Idols for Destruction (Crossway Books: 1990) at 6.]

Dr. Schlossberg explains that to which society is turning are idols — "properly understood as any substitution of what is created for the creator." *Id*. "When the society ... turns away from God to idols, it is an idolatrous society and therefore is

[7] *See* Hively at 353 (Posner, J., concurring).

heading for destruction." *Id*. "With their silver and gold, they made idols for their own destruction." Hosea 8:4. Various judges, drawn from "'the highly secularized intellectual elite"' have appointed themselves to lead the society toward the idol of sexual liberty. The temptation, Schlossberg concluded, is as old as the Garden of Eden, where the serpent told Eve:

> "You will be like God, *knowing good and evil.....*" The biblical view is that God informs humanity about what is good and what is evil, and the form this information takes is law... The alternate view is in the temptation, succumbed to by Eve and her humanist descendants, to make autonomous judgments about good and evil and so to be like God. [Schlossberg, *supra*, at 48-49.]

There is nothing new under the sun. Indeed, Professor Robert Lowry Clinton puts the matter in perspective:

> In the Old Testament, the Book of Judges tells the story ... of idol-worshiping peoples with ineffectual gods confounded by the presence of a people whose God was invisible yet effectual. It is also a story of ... idolatry, as shown in the repeated lapses of God's people and their consequent deliverance into the hands of their enemies. [R.L. Clinton, God & Man in the Law at 227-28 (U. Press Kan.: 1997).]

Professor Clinton explains that there is a way back:

> In the end, it was the judge who emerged to show the people the error of their immersion in visible matter and to deliver them back to the invisible God from the hands of their oppressors. The method was, and is, always the same: the judges accomplish their task not by calling the people to follow them into a hypothetical, abstract future but by calling them to reclaim the traditions of a real and concrete past. [*Id*.]

CONCLUSION

For the foregoing reasons, the Court should find, yet again, that Title VII of the Civil Rights Act of 1964 does not cover discrimination on the basis of sexual orientation.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

IT IS HEREBY CERTIFIED:

1. That the foregoing Brief of *Amici Curiae* Conservative Legal Defense and Education Fund, *et al.* in Support of Appellees and Affirmance complies with the type-volume limitation of Rule 32(a)(7)(B), Federal Rules of Appellate Procedure, because this brief contains 5,440 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

2. 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 this brief has been prepared in a proportionally spaced typeface using WordPerfect version 18.0.0.200 in 14-point Times New Roman.

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Dated: July 26, 2017

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing Brief *Amici Curiae* of Conservative Legal Defense and Education Fund, *et al.* in Support of Appellees and Affirmance was made, this 26th day of July 2017, by the Court's Case Management/ Electronic Case Files system upon the attorneys for the parties.

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