CLE Program Title:

Supreme Court Roundup:
LGBTQ Rights and Religious Liberty in the 2017 Term

Date:

Tuesday, October 31st, 2017

Speaker:

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Program Description:

This term the Supreme Court has before them two cases of great significance for LGBTQ rights. Professor Franke will provide an overview of these cases, the specific legal questions at issue, and the larger stakes for civil rights law more generally. The first case, Masterpiece Cakeshop v. Colorado Civil Rights Commission, the Colorado Civil Rights Commission ruled that the owner of a bakery who refused to sell a wedding cake to a same-sex couple violated Colorado's anti-discrimination law. The baker claims that this ruling abridges his First Amendment rights to religious liberty and free expression insofar as the ruling imposes a substantial burden on his sincerely held religious belief that marriage is a sacrament between a man and a woman, and abridges his right to artistic expression. The Court is also considering whether to take an important sexual orientation discrimination case: Evans v. Georgia Regional Hospital. In this case the 11th Circuit ruled that the prohibition in Title VII of the Civil Rights Act of 1964 against employment discrimination "because of . . . sex" does not encompass discrimination based on an individual's sexual orientation. The 7th Circuit had previously held that sexual orientation discrimination claims were actionable as a form of sex discrimination under Title VII, so the Court is faced with a circuit split on this issue.

Reading Materials Enclosed (Table of Contents):

pursuant to the attorney fee provision of the lease and section 13–40–123, C.R.S.2014. Because the district court is better situated to address the necessary factual determinations related to the attorney fee request, we exercise our discretion under C.A.R. 39.5 and direct the district court on remand to award Zeke a reasonable amount of attorney fees incurred on appeal.

V. Conclusion

¶ 57 The district court's order is affirmed, and the case is remanded to the district court with directions to award Zeke a reasonable amount of attorney fees incurred in this appeal.

JUDGE LICHTENSTEIN and JUDGE FOX concur.

2015 COA 115

Charlie CRAIG and David Mullins, Petitioners–Appellees,

v.

MASTERPIECE CAKESHOP, INC., and any successor entity, and Jack C. Phillips, Respondents–Appellants,

and

Colorado Civil Rights Commission, Appellee.

Court of Appeals No. 14CA1351

Colorado Court of Appeals, Div. I.

Announced August 13, 2015

Background: Cake shop and its owner sought review of the Civil Rights Commission's decision and issuance of cease and desist order, requiring shop and owner not to discriminate against potential customers because of their sexual orientation, in same-sex couple's action against shop and owner for discrimination based on sexual orientation under Anti-Discrimination Act, stemming from shop's refusal to sell couple wedding cake.

Holdings: The Court of Appeals, Taubman, J., held that:

(1) as a matter of first impression, adding owner as respondent to couple's formal complaint was permissible under relation back doctrine;

(2) owner's refusal to create cake for couple violated public accommodation provision of Act;

(3) cease and desist order did not compel shop to express celebratory message about same-sex marriage in violation of right to free speech;

(4) Act was neutral law of general applicability, and thus needed only to be rationally related to legitimate governmental interest to survive challenge under Free Exercise Clause;

(5) Free Exercise Clause of state constitution did not require neutral laws of general applicability to be reviewed under heightened, strict scrutiny;

(6) Act's proscription of sexual orientation discrimination by places of public accommodation was rationally related to state's interest in eliminating discrimination; and

(7) cease and desist order did not exceed scope of Commission's authority.

Affirmed.

1. Civil Rights ⚿1709

Adding owner of cake shop as respondent to same-sex couple's formal complaint with Civil Rights Commission for discrimination based on sexual orientation under Anti-Discrimination Act, stemming from shop's refusal to sell couple wedding cake, was permissible under relation back doctrine; both initial charge of discrimination filed with Commission and formal complaint alleged identical conduct, owner was aware from beginning of litigation that he was the person whose conduct was at issue, and owner should have known that, but for couple's

oversight in not naming owner, owner would have been named in charge of discrimination. Colo. Rev. Stat. Ann. § 24-34-601(2); Colo. R. Civ. P. 15(c).

2. Civil Rights ⚿1711

Erroneous reference in Civil Rights Division's letter of probable cause determination to employment practices section of Anti-Discrimination Act, rather than public accommodation section under which same-sex couple filed discrimination complaint, did not violate requirement under Act that respondents be notified with specificity of legal authority and jurisdiction of Civil Rights Commission, in couple's action against cake shop and its owner for discrimination based on sexual orientation, stemming from shop's refusal to sell couple wedding cake, since it was not possible for shop and owner to have been misled about legal basis for Commission's findings; charge of discrimination and notice of determination correctly referenced public accommodation section of Act, and director's designee, who drafted notice of determination with incorrect citation, signed affidavit explaining that reference to employment practices section was a typographical error and that reference should have been to public accommodation section. Colo. Rev. Stat. Ann. §§ 24-34-306(2)(b)(II), 24-34-402, 24-34-601.

3. Civil Rights ⚿1049

Cake shop owner's refusal to create wedding cake for same-sex couple was because of couple's sexual orientation in violation of public accommodation provision of Anti-Discrimination Act, despite contention that owner refused to create cake because of owner's opposition to same-sex marriage; act of same-sex marriage was closely correlated to couple's sexual orientation, but for couple's sexual orientation, couple would not have sought to enter into same-sex marriage, and but for their intent to do so, owner would not have denied couple its services. Colo. Rev. Stat. Ann. §§ 24-34-301(7), 24-34-601(1).

4. Constitutional Law ⚿1493

State constitutional protection of freedom of speech provides greater protection than does First Amendment's free speech protection. U.S. Const. Amend. 1; Colo. Const. art. 2, § 10.

5. Constitutional Law ⚿1503, 1564

Freedom of speech protected by First Amendment includes the right to refrain from speaking and prohibits government from telling people what they must say. U.S. Const. Amend. 1.

6. Constitutional Law ⚿1490

Under First Amendment protection for freedom of speech, government cannot prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion by forcing individuals to publicly disseminate its own ideological message. U.S. Const. Amend. 1.

7. Constitutional Law ⚿1564

Under First Amendment protection for freedom of speech, government cannot require dissemination of an ideological message by displaying it on individual's private property in a manner and for express purpose that it be observed and read by the public. U.S. Const. Amend. 1.

8. Constitutional Law ⚿1564

Government may not require an individual to host or accommodate another speaker's message under First Amendment protection for freedom of speech. U.S. Const. Amend. 1.

9. Constitutional Law ⚿1580

Some forms of conduct are symbolic speech and deserve First Amendment freedom of speech protections. U.S. Const. Amend. 1.

10. Constitutional Law ⚿1497

First Amendment freedom of speech protections extend only to conduct that is inherently expressive. U.S. Const. Amend. 1.

11. Constitutional Law ⚿1497

In deciding whether conduct is inherently expressive, as required for conduct to fall under First Amendment freedom of speech protections, courts ask whether intent to convey a particularized message was present, and whether the likelihood was great that the

message would be understood by those who viewed it. U.S. Const. Amend. 1.

12. Constitutional Law ⚿1497

Message intended to be conveyed by conduct need not be narrow, or succinctly articulable in order for conduct to be inherently expressive, as required for conduct to fall under First Amendment freedom of speech protection. U.S. Const. Amend. 1.

13. Constitutional Law ⚿1564

In cases involving claims of compelled expression in violation of First Amendment freedom of speech, threshold question is whether compelled conduct is sufficiently expressive to trigger First Amendment protections. U.S. Const. Amend. 1.

14. Constitutional Law ⚿1038

Party asserting that conduct is expressive bears burden of demonstrating that First Amendment freedom of speech applies, and party must advance more than a mere plausible contention that its conduct is expressive. U.S. Const. Amend. 1.

15. Constitutional Law ⚿1497

Government can regulate communicative conduct without violating First Amendment protection for freedom of speech if it has important interest unrelated to suppression of the message and if impact on the communication is no more than necessary to achieve government's purpose. U.S. Const. Amend. 1.

16. Civil Rights ⚿1049

Constitutional Law ⚿1600

Civil Rights Commission's cease and desist order, requiring cake shop not to discriminate against potential customers because of their sexual orientation, issued in same-sex couple's action against shop for discrimination based on sexual orientation under Anti-Discrimination Act, stemming from shop's refusal to sell couple wedding cake, did not compel shop to express celebratory message about same-sex marriage in violation of First Amendment and state constitutional freedom of speech protections; compelled conduct under order was government's mandate that shop comport with Act, and act of designing and selling wedding cakes to all customers free of discrimination did not convey celebratory message about same-sex weddings likely to be understood by those who viewed it. U.S. Const. Amend. 1; Colo. Const. art. 2, § 10; Colo. Rev. Stat. Ann. §§ 24-34-301(7), 24-34-601(2).

17. Constitutional Law ⚿1497

When determining whether conduct is inherently expressive, as required for conduct to fall under First Amendment freedom of speech protections, courts must consider allegedly expressive conduct within the context in which it occurred. U.S. Const. Amend. 1.

18. Constitutional Law ⚿1303

Free exercise of religion under First Amendment and state constitution means, first and foremost, the right to believe and profess whatever religious doctrine one desires. U.S. Const. Amend. 1; Colo. Const. art. 2, § 4.

19. Constitutional Law ⚿1303

Free exercise of religion protected under First Amendment and state constitution also involves the performance of, or abstention from, physical acts. U.S. Const. Amend. 1; Colo. Const. art. 2, § 4.

20. Constitutional Law ⚿1308

If a law burdens religious practice and is not neutral or not generally applicable, it must be justified by a compelling government interest and must be narrowly tailored to advance that interest under First Amendment and state constitutional protections for free exercise of religion. U.S. Const. Amend. 1; Colo. Const. art. 2, § 4.

21. Constitutional Law ⚿1308

Law is not neutral, and thus is invalid under Free Exercise Clause of First Amendment unless justified by compelling interest and narrowly tailored to advance that interest, if the object of a law is to infringe upon or restrict practices because of their religious motivation. U.S. Const. Amend. 1.

22. Constitutional Law ⚿1308

Law is not generally applicable, and thus is invalid under Free Exercise Clause of First Amendment unless justified by compel-

ling interest and narrowly tailored to advance that interest, when it imposes burdens on religiously motivated conduct while permitting exceptions for secular conduct or for favored religions. U.S. Const. Amend. 1.

23. Constitutional Law ⇦1310

Anti-Discrimination Act is neutral law of general applicability, and thus Act need only be rationally related to legitimate governmental interest in order to survive constitutional challenge under First Amendment Free Exercise Clause; Act is not designed to impede religious conduct and does not impose burdens on religious conduct not imposed on secular conduct. U.S. Const. Amend. 1; Colo. Rev. Stat. Ann. § 24-34-601(2).

24. Constitutional Law ⇦1307

Law need not apply to every individual and entity to be generally applicable, as required for law to be rationally related to legitimate governmental interest in order to survive constitutional challenge under First Amendment Free Exercise clause; rather, law is generally applicable so long as it does not regulate only religiously motivated conduct. U.S. Const. Amend. 1.

25. Constitutional Law ⇦1307, 1308

Free Exercise Clause of state constitution did not require neutral laws of general applicability to be reviewed under heightened, strict scrutiny, but rather rational basis exception to strict scrutiny review applicable to free exercise claims under First Amendment applied to free exercise claims under state constitution, such that neutral laws of general applicability needed only to be related to legitimate governmental interest to survive constitutional challenge under state Free Exercise Clause; Free Exercise Clause of state constitution embodied same values of free exercise and government noninvolvement secured by religious clauses of First Amendment, and Free Exercise Clause of state constitution was consistently interpreted using First Amendment case law. U.S. Const. Amend. 1; Colo. Const. art. 2, § 4.

26. Constitutional Law ⇦1310

Anti-Discrimination Act's proscription of sexual orientation discrimination by places of public accommodation was rationally related to state's interest in eliminating discrimination in such places, and thus Act was a reasonable regulation that did not offend Free Exercise Clauses of First Amendment or state constitution; without Act, businesses would have been able to discriminate against potential patrons based on their sexual orientation, such discrimination in places of public accommodation had measurable adverse economic effects, and Act created hospitable environment for all consumers by preventing discrimination on basis of certain characteristics, including sexual orientation. U.S. Const. Amend. 1; Colo. Const. art. 2, § 4; Colo. Rev. Stat. Ann. §§ 24-34-301(7), 24-34-601(2).

27. Pretrial Procedure ⇦28

Trial court did not abuse its discretion by denying cake shop discovery as to type of wedding cake same-sex couple intended to order from shop and details of their wedding ceremony on review of Civil Rights Commission's decision in favor of couple in action against shop for discrimination based on sexual orientation under Anti-Discrimination Act, stemming from shop's refusal to sell couple wedding cake; type of cake and details of ceremony were not relevant to resolving essential issues at trial. Colo. Rev. Stat. Ann. § 24-34-601(2).

28. Civil Rights ⇦1711

Civil Rights Commission's cease and desist order, requiring cake shop not to discriminate against potential customers because of their sexual orientation, did not exceed scope of Commission's statutory authority in same-sex couple's action against shop for discrimination based on sexual orientation under Anti-Discrimination Act, stemming from shop's refusal to sell couple wedding cake; order was aimed at specific discriminatory or unfair practice involved in couple's complaint. Colo. Rev. Stat. Ann. §§ 24-34-601(2), 24-34-305(c)(I), 24-34-306(9).

West Codenotes

Recognized as Unconstitutional

Colo. Const. art. 2, § 31; 42 U.S.C.A. § 2000bb-1(b); Colo. Rev. Stat. Ann. § 14-2-104(1)(b)

Colorado Civil Rights Commission CR 2013–0008

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Opinion by JUDGE TAUBMAN

¶ 1 This case juxtaposes the rights of complainants, Charlie Craig and David Mullins, under Colorado's public accommodations law to obtain a wedding cake to celebrate their same-sex marriage against the rights of respondents, Masterpiece Cakeshop, Inc., and its owner, Jack C. Phillips, who contend that requiring them to provide such a wedding cake violates their constitutional rights to freedom of speech and the free exercise of religion.

¶ 2 This appeal arises from an administrative decision by appellee, the Colorado Civil Rights Commission (Commission), which upheld the decision of an administrative law judge (ALJ), who ruled in favor of Craig and Mullins and against Masterpiece and Phillips on cross-motions for summary judgment. For the reasons discussed below, we affirm the Commission's decision.

I. Background

¶ 3 In July 2012, Craig and Mullins visited Masterpiece, a bakery in Lakewood, Colorado, and requested that Phillips design and create a cake to celebrate their same-sex wedding. Phillips declined, telling them that he does not create wedding cakes for same-sex weddings because of his religious beliefs, but advising Craig and Mullins that he would be happy to make and sell them any other baked goods. Craig and Mullins promptly left Masterpiece without discussing with Phillips any details of their wedding cake. The following day, Craig's mother, Deborah Munn, called Phillips, who advised her that

Masterpiece did not make wedding cakes for same-sex weddings because of his religious beliefs and because Colorado did not recognize same-sex marriages.

¶ 4 The ALJ found that Phillips has been a Christian for approximately thirty-five years and believes in Jesus Christ as his Lord and savior. Phillips believes that decorating cakes is a form of art, that he can honor God through his artistic talents, and that he would displease God by creating cakes for same-sex marriages.

¶ 5 Craig and Mullins had planned to marry in Massachusetts, where same-sex marriages were legal, and later celebrate with friends in Colorado, which at that time did not recognize same-sex marriages.[1] *See* Colo. Const. art. 2, § 31; § 14–2–104(1)(b), C.R.S. 2014.

¶ 6 Craig and Mullins later filed charges of discrimination with the Colorado Civil Rights Division (Division), alleging discrimination based on sexual orientation under the Colorado Anti–Discrimination Act (CADA), §§ 24–34–301 to –804, C.R.S.2014. After an investigation, the Division issued a notice of determination finding probable cause to credit the allegations of discrimination. Craig and Mullins then filed a formal complaint with the Office of Administrative Courts alleging that Masterpiece had discriminated against them in a place of public accommodation because of their sexual orientation in violation of section 24–34–601(2), C.R.S.2014.

¶ 7 The parties did not dispute any material facts. Masterpiece and Phillips admitted that the bakery is a place of public accommodation and that they refused to sell Craig and Mullins a cake because of their intent to engage in a same-sex marriage ceremony. After the parties filed cross-motions for summary judgment, the ALJ issued a lengthy written order finding in favor of Craig and Mullins.

¶ 8 The ALJ's order was affirmed by the Commission. The Commission's final cease and desist order required that Masterpiece (1) take remedial measures, including comprehensive staff training and alteration to the company's policies to ensure compliance with CADA; and (2) file quarterly compliance reports for two years with the Division describing the remedial measures taken to comply with CADA and documenting all patrons who are denied service and the reasons for the denial.

¶ 9 Masterpiece and Phillips now appeal the Commission's order.

II. Motion to Dismiss

¶ 10 At the outset, Phillips and Masterpiece contend that the ALJ and the Commission erred in denying two motions to dismiss which they filed pursuant to C.R.C.P. 12(b)(1), (2), and (5). We disagree.

A. Standard of Review

¶ 11 We review the ALJ's ruling on a C.R.C.P. 12(b) motion to dismiss de novo. § 24–4–106(7), C.R.S. 2014; *Bly v. Story*, 241 P.3d 529, 533 (Colo.2010); *Tidwell ex rel. Tidwell v. City & Cnty. of Denver*, 83 P.3d 75, 81 (Colo.2003).[2]

1. On June 26, 2015, the United States Supreme Court announced *Obergefell v. Hodges*, 576 U.S. ——, ——, 135 S.Ct. 2584, 2604, 192 L.Ed.2d 609 (2015), reaffirming that the "right to marry is a fundamental right inherent in the liberty of the person" and holding that the Due Process and Equal Protection Clauses of the Fourteenth Amendment guarantee same-sex couples a fundamental right to marry. Colorado has recognized same-sex marriages since October 7, 2014, when, based on other litigation, then Colorado Attorney General John Suthers instructed all sixty-four county clerks in Colorado to begin issuing same-sex marriage licenses. *See* Jordan Steffen & Jesse Paul, *Colorado Supreme Court, Suthers Clear Way for Same–Sex Licenses*, Denver Post, Oct. 7, 2014, *available at* http://perma.cc/7N7G–4LD3.

2. Section 24–4–106(7), C.R.S.2014, outlines the scope of judicial review of agency action and provides:

> If the court finds no error, it shall affirm the agency action. If it finds that the agency action is arbitrary or capricious, a denial of statutory right, contrary to constitutional right, power, privilege, or immunity, in excess of statutory jurisdiction, authority, purposes, or limitations, not in accord with the procedures or procedural limitations of this article or as otherwise required by law, an abuse or clearly unwarranted exercise of discretion, based upon findings of fact that are clearly erroneous on the whole record, unsupported by substantial evidence when the record is considered as a whole, or otherwise contrary to law, then the court shall hold unlawful and set aside the

B. First Motion to Dismiss—Lack of Jurisdiction Over Phillips

[1] ¶ 12 Phillips filed a motion to dismiss pursuant to C.R.C.P. 12(b) alleging that the Commission lacked jurisdiction to adjudicate the charges against him.[3] Specifically, he claimed that it lacked jurisdiction because Mullins named only "Masterpiece Cakeshop," and not Phillips personally, as the respondent in the initial charge of discrimination filed with the Commission.

¶ 13 The ALJ, applying the relation back doctrine of C.R.C.P. 15(c), denied the motion. He concluded that adding Phillips as a respondent to the formal complaint was permissible for several reasons. First, he noted that both the charge of discrimination and the formal complaint alleged identical conduct. He further noted that Phillips was aware from the beginning of the litigation that he was the person whose conduct was at issue. Finally, the ALJ found that Phillips should have known that, but for Mullins' oversight in not naming Phillips, he would have been named as a respondent in the charge of discrimination. We agree with the ALJ.

¶ 14 Although no Colorado appellate court has previously addressed this issue, we conclude that the omission of a party's name from a CADA charging document should be considered under the relation back doctrine.

¶ 15 C.R.C.P. 15(c), which is nearly identical to Fed.R.Civ.P. 15(c)(1)(C), contains three requirements which, if met, allow for a claim in an amended complaint against a new party to relate back to the filing of the original: (1) the claim must have arisen out of the same transaction or conduct set forth in the original complaint; (2) the new party must have received notice of the action within the period provided by law for commencing the action; and (3) the new party must have known or reasonably should have known that, "but for a mistake concerning the identity of the proper party, the action would have been brought against him." *See S. Ute Indian Tribe v. King Consol. Ditch Co.*, 250 P.3d 1226, 1237 (Colo.2011); *Lavarato v. Branney*, 210 P.3d 485, 489 (Colo.App.2009). "Many courts have liberally construed [Fed.R.Civ.P. 15(c)(1)(C)] to find that amendments simply adding or dropping parties, as well as amendments that actually substitute defendants, fall within the ambit of the rule." 6 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1498.2 (3d ed.1998); *see also Goodman v. Praxair, Inc.*, 494 F.3d 458, 468 (4th Cir.2007).

¶ 16 Courts interpreting Fed.R.Civ.P. 15(c)(1)(C) have concluded that the pertinent question when amending any claim to add a new party is whether the party to be added, when viewed from the standpoint of a reasonably prudent person, should have expected that the original complaint might be altered to add the new party. *See Schiavone v. Fortune*, 477 U.S. 21, 31, 106 S.Ct. 2379, 91 L.Ed.2d 18 (1986) ("The linchpin is notice, and notice within the limitations period."); 6 Wright & Miller at § 1498.3 ("Relation back will be refused only if the court finds that there is no reason why the party to be added should have understood that it was not named due to mistake.").

¶ 17 Here, the ALJ properly found that the three requirements for application of the relation back doctrine were satisfied. First, the claim against Phillips arose out of the same transaction as the original complaint against Masterpiece. Second, Phillips received timely notice of the original charge

agency action and shall restrain the enforcement of the order or rule under review, compel any agency action to be taken which has been unlawfully withheld or unduly delayed, remand the case for further proceedings, and afford such other relief as may be appropriate. In making the foregoing determinations, the court shall review the whole record or such portions thereof as may be cited by any party. In all cases under review, the court shall determine all questions of law and interpret the statutory and constitutional provisions involved and shall apply such interpretation to the facts duly found or established.

3. In his procedural order, the ALJ notified the parties of his deadline for "filing all motions pursuant to Rule 12, Colorado Rules of Civil Procedure," and the parties proceeded as if the rules of civil procedure applied. Section 24–34–306(5), C.R.S.2014, provides that "discovery procedures may be used by the commission and the parties under the same circumstances and in the same manner as is provided by the Colorado rules of civil procedure."

filed against Masterpiece. Indeed, he responded to it on behalf of Masterpiece. Third, Phillips knew or reasonably should have known that the original complaint should have named him as a respondent. The charging document frequently referred to Phillips by name and identified him as the owner of Masterpiece Cakeshop and the person who told Craig and Mullins that his standard business practice was to refuse to make wedding cakes for same-sex weddings. Consequently, Phillips suffered no prejudice from not being named in the original complaint.

¶ 18 Based on these findings, we conclude that the ALJ did not err in applying C.R.C.P. 15(c)'s "relation back" rule. Accordingly, we conclude that the ALJ did not err when he denied Phillips' motion to dismiss.

C. Second Motion to Dismiss—Public Accommodation Charges

¶ 19 Phillips and Masterpiece jointly filed the second motion to dismiss. They alleged that the Commission lacked jurisdiction and failed to state a claim in its notice of determination as required by section 24–34–306(2)(b)(II), C.R.S.2014. We disagree.

¶ 20 Section 24–34–306(2)(b)(II) provides: "If the director or the director's designee determines that probable cause exists, the director or the director's designee shall serve the respondent with written notice stating with specificity the legal authority and jurisdiction of the commission and the matters of fact and law asserted."

[2] ¶ 21 The Division's letter of probable cause determination erroneously referenced section 24–34–402, C.R.S.2014, the employment practices section of CADA, and not section 24–34–601(2), the public accommodations section under which Craig and Mullins filed their complaint. According to Phillips and Masterpiece, this erroneous citation violated section 24–34–306(2)(b)(II)'s requirement that respondents be notified "with specificity" of the "legal authority and jurisdiction of the commission."

¶ 22 The ALJ denied the second motion to dismiss. He concluded that Masterpiece and Phillips could not have been misled by the error, because "[t]here is no dispute that this case does not involve either an allegation or evidence of discriminatory employment practices." Again, we agree with the ALJ.

¶ 23 The charge of discrimination and the notice of determination correctly referenced section 24–34–601, the public accommodations section of CADA, several times. Further, the director's designee who drafted the notice of determination with the incorrect citation signed an affidavit explaining that the reference to section 24–34–402 was a typographical error, and that the reference should have been to section 24–34–601. Because Masterpiece and Phillips could not have been misled about the legal basis for the Commission's findings, we perceive no error in the Commission's refusal to dismiss the charges against Masterpiece and Phillips because of a typographical error. *See Andersen v. Lindenbaum*, 160 P.3d 237, 238 (Colo.2007) (typographical error in letter constitutes reasonable explanation for incorrect date later attested to in deposition).

¶ 24 Accordingly, we conclude that the ALJ did not err when he denied Phillips' and Masterpiece's second motion to dismiss.[4]

III. CADA Violation

¶ 25 Masterpiece contends that the ALJ erred in concluding that its refusal to create a wedding cake for Craig and Mullins was "because of" their sexual orientation. Specifically, Masterpiece asserts that its refusal to create the cake was "because of" its opposition to same-sex marriage, not because of its opposition to their sexual orientation. We conclude that the act of same-sex marriage is closely correlated to Craig's and Mullins' sexual orientation, and therefore, the ALJ did not err when he found that Masterpiece's refusal to create a wedding cake for Craig and Mullins was "because of" their sexual orientation, in violation of CADA.

4. Having affirmed the denials of the motions to dismiss, we now refer to Masterpiece and Phillips collectively as "Masterpiece" in this opinion.

A. Standard of Review

¶ 26 Whether Masterpiece violated CADA is a question of law reviewed de novo. § 24–4–106(7).

B. Applicable Law

¶ 27 Section 24–34–601(2)(a), C.R.S.2014, reads, as relevant here:

> It is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny to an individual or a group, because of . . . sexual orientation . . . the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation . . . .[5]

¶ 28 In *Tesmer v. Colorado High School Activities Association,* 140 P.3d 249, 254 (Colo.App.2006), a division of this court concluded that to prevail on a discrimination claim under CADA, plaintiffs must prove that, "but for" their membership in an enumerated class, they would not have been denied the full privileges of a place of public accommodation. The division explained that plaintiffs need not establish that their membership in the enumerated class was the "sole" cause of the denial of services. *Id.* Rather, it is sufficient that they show that the discriminatory action was based in whole or in part on their membership in the protected class. *Id.*

¶ 29 Further, a "place of public accommodation" is "any place of business engaged in any sales to the public and any place offering services, facilities, privileges, advantages, or accommodations to the public, including but not limited to any business offering wholesale or retail sales to the public." § 24–34–601(1). Finally, CADA defines "sexual orientation" as "an individual's orientation toward heterosexuality, homosexuality, bisexuality, or transgender status or another individual's perception thereof." § 24–34–301(7), C.R.S. 2014.

5. CADA also bars discrimination in places of public accommodation on the basis of disability, race, creed, color, sex, marital status, national origin, and ancestry. § 24–34–601(2)(a), C.R.S. 2014.

C. Analysis

[3] ¶ 30 Masterpiece asserts that it did not decline to make Craig's and Mullins' wedding cake "because of" their sexual orientation. It argues that it does not object to or refuse to serve patrons because of their sexual orientation, and that it assured Craig and Mullins that it would design and create any other bakery product for them, just not a wedding cake. Masterpiece asserts that its decision was solely "because of" Craig's and Mullins' intended conduct—entering into marriage with a same-sex partner—and the celebratory message about same-sex marriage that baking a wedding cake would convey. Therefore, because its refusal to serve Craig and Mullins was not "because of" their sexual orientation, Masterpiece contends that it did not violate CADA. We disagree.

¶ 31 Masterpiece argues that the ALJ made two incorrect presumptions. First, it contends that the ALJ incorrectly presumed that opposing same-sex marriage is tantamount to opposing the rights of gays, lesbians, and bisexuals to the equal enjoyment of public accommodations. Second, it contends that the ALJ incorrectly presumed that only gay, lesbian, and bisexual couples engage in same-sex marriage.

¶ 32 Masterpiece thus distinguishes between discrimination based on a person's status and discrimination based on conduct closely correlated with that status. However, the United States Supreme Court has recognized that such distinctions are generally inappropriate. *See Christian Legal Soc'y Chapter of Univ. of Cal., Hastings Coll. of Law v. Martinez,* 561 U.S. 661, 689, 130 S.Ct. 2971, 177 L.Ed.2d 838 (2010) ("[The Christian Legal Society] contends that it does not exclude individuals because of sexual orientation, but rather 'on the basis of a conjunction of conduct and the belief that the conduct is not wrong.' . . . Our decisions have declined to distinguish between status and conduct in this context."); *Lawrence v. Texas,* 539 U.S. 558, 575, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003) ("When homosexual conduct is made criminal by the law of the State, that declara-

tion in and of itself is an invitation to subject homosexual persons to discrimination."); *id.* at 583, 123 S.Ct. 2472 (O'Connor, J., concurring in the judgment) ("While it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, [the] law is ... directed toward gay persons as a class."); *see also Bob Jones Univ. v. United States,* 461 U.S. 574, 605, 103 S.Ct. 2017, 76 L.Ed.2d 157 (1983) (concluding that prohibiting admission to students married to someone of a different race was a form of racial discrimination, although the ban restricted conduct).

¶ 33 Further, in *Obergefell v. Hodges,* 576 U.S. ——, 135 S.Ct. 2584, 192 L.Ed.2d 609 (2015), the Supreme Court equated laws precluding same-sex marriage to discrimination on the basis of sexual orientation. *Id.* at ——, 135 S.Ct. at 2604 (observing that the "denial to same-sex couples of the right to marry" is a "disability on gays and lesbians" which "serves to disrespect and subordinate them"). The Court stated: "The nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality. This is true for all persons, whatever their *sexual orientation.*" *Id.* at ——, 135 S.Ct. at 2599 (emphasis added). "Were the Court to stay its hand ... it still would deny gays and lesbians many rights and responsibilities intertwined with marriage." *Id.* at ——, 135 S.Ct. at 2606.

¶ 34 In these decisions, the Supreme Court recognized that, in some cases, conduct cannot be divorced from status. This is so when the conduct is so closely correlated with the status that it is engaged in exclusively or predominantly by persons who have that particular status. We conclude that the act of same-sex marriage constitutes such conduct because it is "engaged in exclusively or predominantly" by gays, lesbians, and bisexuals. Masterpiece's distinction, therefore, is one without a difference. But for their sexual orientation, Craig and Mullins would not have sought to enter into a same-sex marriage, and but for their intent to do so, Masterpiece would not have denied them its services.

¶ 35 In *Elane Photography, LLC v. Willock,* the New Mexico Supreme Court rejected a similar argument raised by a wedding photographer. 309 P.3d 53, 60–64 (N.M. 2013). The court concluded that by prohibiting discrimination on the basis of sexual orientation, New Mexico's antidiscrimination law similarly protects "conduct that is inextricably tied to sexual orientation," including the act of same-sex marriage. *Id.* at 62. The court observed that "[o]therwise, we would interpret [the New Mexico public accommodations law] as protecting same-gender couples against discriminatory treatment, but only to the extent that they do not openly display their same-gender sexual orientation." *Id.* We agree with the reasoning of the New Mexico Supreme Court.[6]

¶ 36 Masterpiece relies on *Bray v. Alexandria Women's Health Clinic,* 506 U.S. 263, 113 S.Ct. 753, 122 L.Ed.2d 34 (1993), which declined to equate opposition to voluntary abortion with discrimination against women. *Id.* at 269–70, 113 S.Ct. 753. As in *Bray,* it asks us to decline to equate opposition to same-sex marriage with discrimination against gays, lesbians, and bisexuals. Masterpiece's reliance on *Bray* is misplaced.

¶ 37 *Bray* considered whether the defendants, several organizations that coordinated antiabortion demonstrations, could be subject to tort liability under 42 U.S.C. § 1985(3) (1988).[7] Established precedent required that plaintiffs in section 1985(3) actions prove that "some ... class-based, invidiously discrimi-

6. An Oregon ALJ reached a similar conclusion when addressing an Oregon bakery's argument that its refusal to create a wedding cake for a same-sex couple was not on account of the couple's sexual orientation, but rather the bakery's objection to participation in the event for which the cake would be prepared—a same-sex wedding ceremony. *In the Matter of Klein,* Nos. 44–14 & 45–15, 2015 WL 4503460, at *52 (Or. Comm'r of Labor & Indus. July 2, 2015) ("In conclusion, the forum holds that when a law prohibits discrimination on the basis of sexual orientation, that law similarly protects conduct that is inextricably tied to sexual orientation.").

7. That law creates a private cause of action for parties seeking remedies against public and private parties who conspired to interfere with their civil rights.

natory animus [lay] behind the [defendant's] actions." *Griffin v. Breckenridge*, 403 U.S. 88, 102, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971). However, CADA requires no such showing of "animus." *See Tesmer*, 140 P.3d at 253 (plaintiffs need only prove that "but for" their membership in an enumerated class they would not have been denied the full privileges of a place of public accommodation).

¶ 38 Further, Masterpiece admits that it refused to serve Craig and Mullins "because of" its opposition to persons entering into same-sex marriages, conduct which we conclude is closely correlated with sexual orientation. Therefore, even if we assume that CADA requires plaintiffs to establish an intent to discriminate, as in section 1985(3) action, the ALJ reasonably could have inferred from Masterpiece's conduct an intent to discriminate against Craig and Mullins "because of" their sexual orientation.

¶ 39 We also note that although the *Bray* Court held that opposition to voluntary abortion did not equate to discrimination against women, it observed that "[s]ome activities may be such an irrational object of disfavor that, if they are targeted, and if they also happen to be engaged in exclusively or predominantly by a particular class of people, an intent to disfavor that class can readily be presumed." 506 U.S. at 270, 113 S.Ct. 753. The Court provided, by way of example, that "[a] tax on wearing yarmulkes is a tax on Jews." *Id.* Likewise, discrimination on the basis of one's opposition to same-sex marriage is discrimination on the basis of sexual orientation.

¶ 40 We reject Masterpiece's related argument that its willingness to sell birthday cakes, cookies, and other non-wedding cake products to gay and lesbian customers establishes that it did not violate CADA. Masterpiece's potential compliance with CADA in this respect does not permit it to refuse services to Craig and Mullins that it otherwise offers to the general public. *See Elane Photography*, 309 P.3d at 62 ("[I]f a restaurant offers a full menu to male customers, it may not refuse to serve entrees to women, even if it will serve them appetizers.... Elane Photography's willingness to offer some services to [a woman entering a same-sex marriage] does not cure its refusal to provide other services that it offered to the general public.").[8]

8. This case is distinguishable from the Colorado Civil Rights Division's recent findings that Azucar Bakery, Le Bakery Sensual, and Gateaux, Ltd., in Denver did not discriminate against a Christian patron on the basis of his creed when it refused his requests to create two bible-shaped cakes inscribed with derogatory messages about gays, including "Homosexuality is a detestable sin. Leviticus 18:2." *Jack v. Azucar Bakery*, Charge No. P20140069X, at 2 (Colo. Civil Rights Div. Mar. 25, 2015), *available at* http://perma.cc/5K6D-VV8U; *Jack v. Le Bakery Sensual, Inc.*, Charge No. P20140070X (Colo. Civil Rights Div. Mar. 24, 2015), *available at* http://perma.cc/35BW–9C2N; *Jack v. Gateaux, Ltd.*, Charge No. P20140071X (Colo. Civil Rights Div. Mar. 24, 2015), *available at* http://perma.cc/JN4U-NE6V. The Division found that the bakeries did not refuse the patron's request because of his creed, but rather because of the offensive nature of the requested message. Importantly, there was no evidence that the bakeries based their decisions on the patron's religion, and evidence had established that all three regularly created cakes with Christian themes. Conversely, Masterpiece admits that its decision to refuse Craig's and Mullins' requested wedding cake was because of its opposition to same-sex marriage which, based on Supreme Court precedent, we conclude is tantamount to discrimination on the basis of sexual orientation.

For the same reason, this case is distinguishable from a Kentucky trial court's decision that a T-shirt printing company did not violate Lexington–Fayette County's public accommodations ordinance when it refused to print T-shirts celebrating premarital romantic and sexual relationships among gays and lesbians. *See Hands on Originals, Inc. v. Lexington–Fayette Urban Cnty. Human Rights Comm'n*, No. 14–CI–04474, slip op. at 9 (Fayette Cir. Ct. Apr. 27, 2015), *available at* http://perma.cc/75FY-Z77D. There, evidence established that the T-shirt printer treated homosexual and heterosexual groups alike. *Id.* Specifically, in the previous three years, the printer had declined several orders for T-shirts promoting premarital romantic and sexual relationships between heterosexual individuals, including those portraying strip clubs and sexually explicit videos. *Id.* Although the print shop, like Masterpiece, based its refusal on its opposition to a particular conduct—premarital sexual relationships—such conduct is not "exclusively or predominantly" engaged in by a particular class of people protected by a public accommodations statute. *See Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270, 113 S.Ct. 753, 122 L.Ed.2d 34 (1993). Opposition to premarital romantic and sexual relationships, unlike opposition to same-sex marriage, is not tantamount to discrimination on the basis of sexual orientation.

¶ 41 Finally, Masterpiece argues that the ALJ wrongly presumed that only same-sex couples engage in same-sex marriage. In support, it references the case of two heterosexual New Zealanders who married in connection with a radio talk show contest. However, as the *Bray* court explained, we do not distinguish between conduct and status where the targeted conduct is engaged in "predominantly by a particular class of people." 506 U.S. at 270, 113 S.Ct. 753. An isolated example of two heterosexual men marrying does not persuade us that same-sex marriage is not predominantly, and almost exclusively, engaged in by gays, lesbians, and bisexuals.

¶ 42 Therefore, we conclude that the ALJ did not err by concluding that Masterpiece refused to create a wedding cake for Craig and Mullins "because of" their sexual orientation. CADA prohibits places of public accommodations from basing their refusal to serve customers on their sexual orientation, and Masterpiece violated Colorado's public accommodations law by refusing to create a wedding cake for Craig's and Mullins' same-sex wedding celebration.

¶ 43 Having concluded that Masterpiece violated CADA, we next consider whether the Commission's application of the law under these circumstances violated Masterpiece's rights to freedom of speech and free exercise of religion protected by the United States and Colorado Constitutions.

IV. Compelled Expressive Conduct and Symbolic Speech

¶ 44 Masterpiece contends that the Commission's cease and desist order compels speech in violation of the First Amendment by requiring it to create wedding cakes for same-sex weddings. Masterpiece argues that wedding cakes inherently convey a celebratory message about marriage and, therefore, the Commission's order unconstitutionally compels it to convey a celebratory message about same-sex marriage in conflict with its religious beliefs.

¶ 45 We disagree. We conclude that the Commission's order merely requires that Masterpiece not discriminate against potential customers in violation of CADA and that such conduct, even if compelled by the government, is not sufficiently expressive to warrant First Amendment protections.

A. Standard of Review

¶ 46 Whether the Commission's order unconstitutionally infringes on Masterpiece's right to the freedom of expression protected by the First Amendment is a question of law that we review de novo. *Bose Corp. v. Consumers Union*, 466 U.S. 485, 499, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984); *Lewis v. Colo. Rockies Baseball Club, Ltd.*, 941 P.2d 266, 270–71 (Colo.1997).

B. Applicable Law

[4] ¶ 47 The First Amendment of the United States Constitution prohibits laws "abridging the freedom of speech." U.S. Const. amend. I; *Nev. Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 121, 131 S.Ct. 2343, 2347, 180 L.Ed.2d 150 (2011); *Curious Theatre Co. v. Colo. Dep't of Pub. Health & Env't*, 220 P.3d 544, 551 (Colo. 2009) ("The guarantees of the First Amendment are applicable to the states through the Due Process Clause of the Fourteenth Amendment."). Article II, section 10 of the Colorado Constitution, which provides greater protection of free speech than does the First Amendment, *see Lewis*, 941 P.2d at 271, provides that "[n]o law shall be passed impairing the freedom of speech; every person shall be free to speak, write or publish whatever he will on any subject." [9]

[5] ¶ 48 The freedom of speech protected by the First Amendment includes the "right to refrain from speaking" and prohibits the government from telling people what they must say. *Wooley v. Maynard*, 430 U.S. 705,

9. Although Masterpiece observes that the Colorado Constitution provides greater liberty of speech than the United States Constitution, it does not distinguish the two, and its argument relies almost exclusively on federal First Amendment case law. Therefore, we will not distinguish the First Amendment and article II, section 10 as applied to Masterpiece's freedom of speech claim.

714, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977); *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.,* 547 U.S. 47, 61, 126 S.Ct. 1297, 164 L.Ed.2d 156 (2006) (hereafter *FAIR*); *In re Hickenlooper,* 2013 CO 62, ¶ 23, 312 P.3d 153. This compelled speech doctrine, on which Masterpiece relies, was first articulated by the Supreme Court in *West Virginia Board of Education v. Barnette,* 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943), and has been applied in two lines of cases.

¶ 49 The first line of cases prohibits the government from requiring that an individual "speak the government's message." *FAIR,* 547 U.S. at 63, 126 S.Ct. 1297; *see also Wooley,* 430 U.S. at 715–17, 97 S.Ct. 1428 (holding that New Hampshire could not require individuals to have its slogan "Live Free or Die" on their license plates); *Barnette,* 319 U.S. at 642, 63 S.Ct. 1178 (holding that West Virginia could not require students to salute the American flag and recite the Pledge of Allegiance).

[6, 7] ¶ 50 These cases establish that the government cannot "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion" by forcing individuals to publicly disseminate its own ideological message. *Barnette,* 319 U.S. at 642, 63 S.Ct. 1178. The government also cannot require "the dissemination of an ideological message by displaying it on [an individual's] private property in a manner and for the express purpose that it be observed and read by the public." *Wooley,* 430 U.S. at 713, 97 S.Ct. 1428; *Barnette,* 319 U.S. at 642, 63 S.Ct. 1178 (observing that the state cannot "invade[ ] the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control").

[8] ¶ 51 The second line of compelled speech cases establishes that the government may not require an individual "to host or accommodate another speaker's message." *FAIR,* 547 U.S. at 63, 126 S.Ct. 1297. For example, in *Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241, 244, 94 S.Ct. 2831, 41 L.Ed.2d 730 (1974), the Supreme Court invalidated a Florida law which provided that, if a local newspaper criticized a candidate for public office, the candidate could demand that the newspaper publish his or her reply to the criticism free of charge. Similarly, in *Pacific Gas & Electric Co. v. Public Utilities Commission of California,* 475 U.S. 1, 4, 106 S.Ct. 903, 89 L.Ed.2d 1 (1986), the Supreme Court struck down a California Public Utilities Commission regulation that permitted third-party intervenors in ratemaking proceedings to include messages in the utility's billing envelopes, which it distributed to customers. These cases establish that the government may not commandeer a private speaker's means of accessing its audience by requiring that the speaker disseminate a third-party's message.

[9, 10] ¶ 52 The Supreme Court has also recognized that some forms of conduct are symbolic speech and deserve First Amendment protections. *United States v. O'Brien,* 391 U.S. 367, 376, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968) (holding that the public burning of draft cards during anti-war protest is a form of expressive conduct). However, because "[i]t is possible to find some kernel of expression in almost every activity a person undertakes," *City of Dallas v. Stanglin,* 490 U.S. 19, 25, 109 S.Ct. 1591, 104 L.Ed.2d 18 (1989), the Supreme Court has rejected the view that "conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea," *FAIR,* 547 U.S. at 65–66, 126 S.Ct. 1297 (some internal quotation marks omitted). Rather, First Amendment protections extend only to conduct that is "inherently expressive." *Id.*

[11, 12] ¶ 53 In deciding whether conduct is "inherently expressive," we ask whether " '[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.' " *Texas v. Johnson,* 491 U.S. 397, 404, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989) (quoting *Spence v. Washington,* 418 U.S. 405, 410–11, 94 S.Ct. 2727, 41 L.Ed.2d 842 (1974)). The message need not be "narrow," or "succinctly articulable." *Hurley v. Irish–American Gay, Lesbian & Bisexual Group of Boston,* 515 U.S. 557, 569, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995). The Supreme Court has recognized

expressive conduct in several cases. *See, e.g., id.* (marching in a parade in support of gay and lesbian rights); *United States v. Eichman*, 496 U.S. 310, 312–19, 110 S.Ct. 2404, 110 L.Ed.2d 287 (1990) (burning of the American flag in protest of government policies); *Johnson*, 491 U.S. at 399, 109 S.Ct. 2533 (burning of the American flag in protest of Reagan administration and various corporate policies); *Nat'l Socialist Party of Am. v. Vill. of Skokie*, 432 U.S. 43, 43, 97 S.Ct. 2205, 53 L.Ed.2d 96 (1977) (wearing of a swastika in a parade); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505–06, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969) (wearing an armband in protest of war).

¶ 54 However, other decisions have declined to recognize certain conduct as expressive. *See Carrigan*, 564 U.S. at 126, 131 S.Ct. at 2350 (legislators' act of voting not expressive because it "symbolizes nothing" about their reasoning); *Jacobs v. Clark Cnty. Sch. Dist.*, 526 F.3d 419, 437–38 (9th Cir. 2008) (wearing of nondescript school uniform did not convey particularized message of uniformity).

[13, 14] ¶ 55 Masterpiece's contentions involve claims of compelled expressive conduct. In such cases, the threshold question is whether the compelled conduct is sufficiently expressive to trigger First Amendment protections. *See Jacobs*, 526 F.3d at 437–38 (threshold question in plaintiff's claim that school uniform policy constituted compelled expressive conduct is whether the wearing of a uniform conveys symbolic messages and therefore was expressive). The party asserting that conduct is expressive bears the burden of demonstrating that the First Amendment applies and the party must advance more than a mere "plausible contention" that its conduct is expressive. *Clark v. Cmty. for Creative Non–Violence*, 468 U.S. 288, 293 n. 5, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984).

[15] ¶ 56 Finally, a conclusion that the Commission's order compels expressive conduct does not necessarily mean that the order is unconstitutional. If it does compel such conduct, the question is then whether the government has sufficient justification for regulating the conduct. The Supreme Court has recognized that "when 'speech' and 'non-speech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the non-speech element can justify incidental limitations on First Amendment freedoms." *O'Brien*, 391 U.S. at 376, 88 S.Ct. 1673. In other words, the government can regulate communicative conduct if it has an important interest unrelated to the suppression of the message and if the impact on the communication is no more than necessary to achieve the government's purpose. *Id.*; *see also Barnes v. Glen Theatre Inc.*, 501 U.S. 560, 567–68, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991); *Johnson*, 491 U.S. at 407, 109 S.Ct. 2533.

C. Analysis

[16] ¶ 57 Masterpiece contends that wedding cakes inherently communicate a celebratory message about marriage and that, by forcing it to make cakes for same-sex weddings, the Commission's cease and desist order unconstitutionally compels it to express a celebratory message about same-sex marriage that it does not support. We disagree.

¶ 58 The ALJ rejected Masterpiece's argument that preparing a wedding cake for same-sex weddings necessarily involves expressive conduct. He recognized that baking and creating a wedding cake involves skill and artistry, but nonetheless concluded that, because Phillips refused to prepare a cake for Craig and Mullins before any discussion of the cake's design, the ALJ could not determine whether Craig's and Mullins' desired wedding cake would constitute symbolic speech subject to First Amendment protections.

¶ 59 Masterpiece argues that the ALJ wrongly considered whether the "conduct" of creating a cake is expressive, and not whether the product of that conduct, the wedding cake itself, constitutes symbolic expression. It asserts that the ALJ wrongly employed the test for expressive conduct instead of that for compelled speech. However, Masterpiece's argument mistakenly presumes that the legal doctrines involving compelled speech and expressive conduct are mutually exclusive. As noted, because the First Amendment only protects conduct that con-

veys a message, the threshold question in cases involving expressive conduct—or as here, compelled expressive conduct—is whether the conduct in question is sufficiently expressive so as to trigger First Amendment protections. *See Jacobs,* 526 F.3d at 437–38.

¶ 60 We begin by identifying the compelled conduct in question. As noted, the Commission's order requires that Masterpiece "cease and desist from discriminating against [Craig and Mullins] and other same-sex couples by refusing to sell them wedding cakes or any product [it] would sell to heterosexual couples." Therefore, the compelled conduct is the Colorado government's mandate that Masterpiece comport with CADA by not basing its decision to serve a potential client, at least in part, on the client's sexual orientation. This includes a requirement that Masterpiece sell wedding cakes to same-sex couples, but only if it wishes to serve heterosexual couples in the same manner.

¶ 61 Next, we ask whether, by comporting with CADA and ceasing to discriminate against potential customers on the basis of their sexual orientation, Masterpiece conveys a particularized message celebrating same-sex marriage, and whether the likelihood is great that a reasonable observer would both understand the message and attribute that message to Masterpiece. *See Spence,* 418 U.S. at 410–11, 94 S.Ct. 2727.

¶ 62 We conclude that the act of designing and selling a wedding cake to all customers free of discrimination does not convey a celebratory message about same-sex weddings likely to be understood by those who view it. We further conclude that, to the extent that the public infers from a Masterpiece wedding cake a message celebrating same-sex marriage, that message is more likely to be attributed to the customer than to Masterpiece.

¶ 63 First, Masterpiece does not convey a message supporting same-sex marriages merely by abiding by the law and serving its customers equally. In *FAIR,* several law schools challenged a federal law that denied funding to institutions of higher education that either prohibit or prevent military recruiters from accessing their campuses. 547 U.S. at 64–65, 126 S.Ct. 1297. The law schools argued that, by forcing them to treat military and nonmilitary recruiters alike, the law compelled them to send "the message that they see nothing wrong with the military's policies [regarding gays in the military], when they do." *Id.* The Court rejected this argument, observing that students "can appreciate the difference between speech a school sponsors and speech the school permits because legally required to do so." *Id.* at 65, 126 S.Ct. 1297; *see also Rosenberger v. Rector & Visitors of Univ. of Va.,* 515 U.S. 819, 841–42, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995); *PruneYard Shopping Ctr. v. Robins,* 447 U.S. 74, 76–78, 100 S.Ct. 2035, 64 L.Ed.2d 741 (1980).

¶ 64 As in *FAIR,* we conclude that, because CADA prohibits all places of public accommodation from discriminating against customers because of their sexual orientation, it is unlikely that the public would view Masterpiece's creation of a cake for a same-sex wedding celebration as an endorsement of that conduct. Rather, we conclude that a reasonable observer would understand that Masterpiece's compliance with the law is not a reflection of its own beliefs.

¶ 65 The *Elane Photography* court distinguished *Wooley* and *Barnette,* and similarly concluded that New Mexico's public accommodations law did not compel the photographer to convey any particularized message, but rather "only mandates that if Elane Photography operates a business as a public accommodation, it cannot discriminate against potential clients based on their sexual orientation." 309 P.3d at 64. It concluded that "[r]easonable observers are unlikely to interpret Elane Photography's photographs as an endorsement of the photographed events." *Id.* at 69. We are persuaded by this reasoning and similarly conclude that CADA does not compel expressive conduct.[10]

10. The Oregon Bureau of Labor and Industry and the New Jersey Division of Civil Rights reached similar conclusions in related cases. *See Bernstein v. Ocean Grove Camp Meeting Ass'n,* No. CRT 614509, at 13 (N.J. Div. Civil Rights Oct. 22, 2012), *available at* http://perma.cc/G5VF-ZS2M ("Because there was no message inherent in renting the Pavilion, there was no

[17] ¶ 66 We do not suggest that Masterpiece's status as a for-profit bakery strips it of its First Amendment speech protections. *See Citizens United v. Fed. Election Comm'n,* 558 U.S. 310, 365, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010) (recognizing that corporations have free speech rights and holding that government cannot suppress speech on the basis of the speaker's corporate identity). However, we must consider the allegedly expressive conduct within "the context in which it occurred." *Johnson,* 491 U.S. at 405, 109 S.Ct. 2533. The public recognizes that, as a for-profit bakery, Masterpiece charges its customers for its goods and services. The fact that an entity charges for its goods and services reduces the likelihood that a reasonable observer will believe that it supports the message expressed in its finished product. Nothing in the record supports the conclusion that a reasonable observer would interpret Masterpiece's providing a wedding cake for a same-sex couple as an endorsement of same-sex marriage, rather than a reflection of its desire to conduct business in accordance with Colorado's public accommodations law. *See FAIR,* 547 U.S. at 64–65, 126 S.Ct. 1297.

¶ 67 For the same reason, this case also differs from *Hurley,* on which Masterpiece relies. There, the Supreme Court concluded that Massachusetts' public accommodations statute could not require parade organizers to include among the marchers in a St. Patrick's Day parade a group imparting a message the organizers did not wish to convey. 515 U.S. at 559, 115 S.Ct. 2338. Central to the Court's conclusion was the "inherent expressiveness of marching to make a point," and its observation that a "parade's overall message is distilled from the individual presentations along the way, and each unit's expression is perceived by spectators as part of the whole." *Id.* at 568, 577, 115 S.Ct. 2338. The Court concluded that spectators would likely attribute each marcher's message to the parade organizers as a whole. *Id.* at 576–77.

¶ 68 In contrast, it is unlikely that the public would understand Masterpiece's sale of wedding cakes to same-sex couples as endorsing a celebratory message about same-sex marriage. *See Elane Photography,* 309 P.3d at 68 ("While photography may be expressive, the operation of a photography business is not."); *see also Rosenberger,* 515 U.S. at 841–42, 115 S.Ct. 2510 (observers not likely to mistake views of university-supported religious newspaper with those of the university); *Turner Broad. Sys., Inc. v. FCC,* 512 U.S. 622, 655, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994) (cable viewers likely would not assume that the broadcasts carried on a cable system convey ideas or messages endorsed by the cable operators); *PruneYard,* 447 U.S. at 81, 100 S.Ct. 2035 (observers not likely to attribute speakers' message to owner of shopping center); *Nathanson v. Mass. Comm'n Against Discrimination,* No. 199901657, 2003 WL 22480688, at *6–*7 (Mass.Super.Ct. Sept. 16, 2003) (rejecting attorney's First Amendment compelled speech defense because she "operates more as a conduit for the speech and expression of the client, rather than as a speaker for herself").

¶ 69 By selling a wedding cake to a same-sex couple, Masterpiece does not necessarily lead an observer to conclude that the bakery supports its customer's conduct. The public has no way of knowing the reasons supporting Masterpiece's decision to serve or decline to serve a same-sex couple. Someone observing that a commercial bakery created a wedding cake for a straight couple or that it did not create one for a gay couple would have no way of deciphering whether the bakery's conduct took place because of its views on same-sex marriage or for some other reason.

¶ 70 We also find the Supreme Court's holding in *Carrigan* instructive. 564 U.S. at 119–20, 131 S.Ct. at 2346. There, the Court concluded that legislators do not have a personal, First Amendment right to vote in the legislative body in which they serve, and that restrictions on legislators' voting imposed by a law requiring recusal in instances of con-

credible threat to Respondent's ability to express its views."); *In the Matter of Klein,* 2015 WL 4503460, at *72 ("[T]hat Respondents bake a wedding cake for Complainants is not 'compelled speech' that violates the free speech clause of the First Amendment to the U.S. Constitution.").

flicts of interest are not restrictions on their protected speech. *Id.* The Court rejected the argument that the act of voting was expressive conduct subject to First Amendment protections. *Id.* Although the Court recognized that voting "discloses . . . that the legislator wishes (for whatever reason) that the proposition on the floor be adopted," it "symbolizes nothing" and is not "an act of communication" because it does not convey the legislator's reasons for the vote. *Id.* at 121, 131 S.Ct. at 2350.

¶ 71 We recognize that a wedding cake, in some circumstances, may convey a particularized message celebrating same-sex marriage and, in such cases, First Amendment speech protections may be implicated. However, we need not reach this issue. We note, again, that Phillips denied Craig's and Mullins' request without any discussion regarding the wedding cake's design or any possible written inscriptions.

¶ 72 Finally, CADA does not preclude Masterpiece from expressing its views on same-sex marriage—including its religious opposition to it—and the bakery remains free to disassociate itself from its customers' viewpoints. We recognize that section 24–34–601(2)(a) of CADA prohibits Masterpiece from displaying or disseminating a notice stating that it will refuse to provide its services based on a customer's desire to engage in same-sex marriage or indicating that those engaging in same-sex marriage are unwelcome at the bakery.[11] However, CADA does not prevent Masterpiece from posting a disclaimer in the store or on the Internet indicating that the provision of its services does not constitute an endorsement or approval of conduct protected by CADA. Masterpiece could also post or otherwise disseminate a message indicating that CADA requires it not to discriminate on the basis of sexual orientation and other protected characteristics. Such a message would likely have the effect of disassociating Masterpiece from its customers' conduct. *See PruneYard*, 447 U.S. at 87, 100 S.Ct. 2035 ("[S]igns, for example could disclaim any sponsorship of the message and could explain that the persons are communicating their own messages by virtue of state law.").

¶ 73 Therefore, we conclude that the Commission's order requiring Masterpiece not to discriminate against potential customers because of their sexual orientation does not force it to engage in compelled expressive conduct in violation of the First Amendment. Accordingly, because we conclude that the compelled conduct here is not expressive, the State need not show that it has an important interest in enforcing CADA.

V. First Amendment and Article II, Section 4—Free Exercise of Religion

¶ 74 Next, Masterpiece contends that the Commission's order unconstitutionally infringes on its right to the free exercise of religion guaranteed by the First Amendment of the United States Constitution and article II, section 4 of the Colorado Constitution. We conclude that CADA is a neutral law of general applicability and, therefore, offends neither the First Amendment nor article II, section 4.

A. Standard of Review

¶ 75 Whether the Commission's order unconstitutionally infringes on Masterpiece's free exercise rights, protected by the First Amendment and article II, section 4, is a question of law that we review de novo. § 24–4–106.

B. Applicable Law

¶ 76 The Free Exercise Clause of the First Amendment provides: "Congress shall make no law . . . prohibiting the free exercise [of

11. Section 24–34–601(2)(a) reads:

> It is discriminatory practice and unlawful for a [place of public accommodation] . . . to publish, circulate, issue, display, post, or mail any written, electronic, or printed communication, notice, or advertisement that indicates that the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation will be refused, withheld from, or denied an individual or that an individual's patronage or presence at a place of public accommodation is unwelcome, objectionable, unacceptable, or undesirable because of disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry.

religion]." U.S. Const. amend I. The First Amendment is binding on the States through incorporation by the Fourteenth Amendment. *See Cantwell v. Connecticut*, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940). Article II, section 4 of the Colorado Constitution provides: "The free exercise and enjoyment of religious profession and worship, without discrimination, shall forever hereafter be guaranteed."

[18, 19] ¶ 77 "The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires." *Emp't Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 877, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), *superseded on other grounds by statute as stated in Holt v. Hobbs*, 574 U.S. ——, 135 S.Ct. 853, 190 L.Ed.2d 747 (2015); *see also Van Osdol v. Vogt*, 908 P.2d 1122, 1126 (Colo.1996). Free exercise of religion also involves the "performance of (or abstention from) physical acts." *Smith*, 494 U.S. at 877, 110 S.Ct. 1595.

¶ 78 Before the Supreme Court's decision in *Smith*, the Court consistently used a balancing test to determine whether a challenged government action violated the Free Exercise Clause of the First Amendment. *See Wisconsin v. Yoder*, 406 U.S. 205, 215, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972); *Sherbert v. Verner*, 374 U.S. 398, 403, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963). That test considered whether the challenged government action imposed a substantial burden on the practice of religion, and, if so, whether that burden was justified by a compelling government interest. *Sherbert*, 374 U.S. at 403, 83 S.Ct. 1790.

¶ 79 In *Smith*, the Court disavowed *Sherbert*'s balancing test and concluded that the Free Exercise Clause "does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Smith*, 494 U.S. at 879, 110 S.Ct. 1595 (internal quotation marks omitted). The Court held that neutral laws of general applicability need only be rationally related to a legitimate governmental interest in order to survive a constitutional challenge. *Id.* As a general rule, such laws do not offend the Free Exercise Clause.[12]

[20] ¶ 80 However, if a law burdens a religious practice and is not neutral or not generally applicable, it "must be justified by a compelling government interest" and must be narrowly tailored to advance that interest. *Smith*, 494 U.S. at 883, 110 S.Ct. 1595; *Van Osdol*, 908 P.2d at 1126.

C. Analysis

1. First Amendment Free Exercise

¶ 81 Masterpiece contends that its claim is not governed by *Smith*'s rational basis exception to general strict scrutiny review of free exercise claims for two reasons: (1) CADA is not "neutral and generally applicable" and (2) its claim is a "hybrid" that implicates both its free exercise and free expression rights.[13] Again, we disagree.

12. In the wake of *Smith*, Congress passed the Religious Freedom Restoration Act (RFRA), which restored the *Sherbert* balancing test and provides that if government action substantially burdens a person's exercise of religion, the person is entitled to an exemption from the rule unless the government can demonstrate that the application of the burden to the person is the least restrictive means of furthering a compelling government interest. 42 U.S.C. § 2000bb–1(b) (1994). In *City of Boerne v. Flores*, 521 U.S. 507, 532, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997), *superseded by statute as stated in Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. ——, 134 S.Ct. 2751, 189 L.Ed.2d 675 (2014), the Supreme Court held that RFRA was unconstitutional as applied to the states. Colorado has not enacted a similar law, although many states have. *See* 2 W. Cole Durham et al., *Religious Organizations and the Law* § 10:53 (2015) (observing that sixteen states—Alabama, Arizona, Connecticut, Florida, Idaho, Illinois, Louisiana, Missouri, New Mexico, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, and Virginia—have passed versions of RFRA to restore pre-*Smith* scrutiny to their own laws that burden religious exercise).

13. The parties do not address whether for-profit entities like Masterpiece Cakeshop have free exercise rights under the First Amendment and article II, section 4 of the Colorado Constitution. Citing the Tenth Circuit's opinion in *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1137 (10th Cir.2013), the ALJ noted that "closely held for-profit business entities like Masterpiece Cakeshop also enjoy a First Amendment right to free

[21, 22] ¶ 82 First, we address Masterpiece's contention that CADA is not neutral and not generally applicable. A law is not neutral "if the object of a law is to infringe upon or restrict practices because of their religious motivation." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993). A law is not generally applicable when it imposes burdens on religiously motivated conduct while permitting exceptions for secular conduct or for favored religions. *Id.* at 543, 113 S.Ct. 2217. The Supreme Court has explained that an improper intent to discriminate can be inferred where a law is a "religious gerrymander[ ]" that burdens religious conduct while exempting similar secular activity. *Id.* at 534, 113 S.Ct. 2217. If a law is either not neutral or not generally applicable, it "must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Id.* at 531–32, 113 S.Ct. 2217.

¶ 83 The Court has found only one law to be neither neutral nor generally applicable. In *Church of Lukumi*, the Court considered the constitutionality of a municipal ordinance prohibiting ritual animal sacrifice. *Id.* at 534, 113 S.Ct. 2217. The law applied to any individual or group that "kills, slaughters, or sacrifices animals for any type of ritual, regardless of whether or not the flesh or blood of the animals is to be consumed." *Id.* at 527, 113 S.Ct. 2217 (internal quotation marks omitted).

¶ 84 Considering that the ordinance's terms such as "sacrifice" and "ritual" could be either secular or religious, the Court nevertheless concluded that the law was not neutral because its purpose was to impede certain practices of the Santeria religion. *Id.* at 534, 113 S.Ct. 2217. The Court further concluded that the law was not generally applicable because it exempted the killing of animals for several secular purposes, including the killing of animals in secular slaughterhouses, hunting, fishing, euthanasia of unwanted animals, and extermination of pests, *id.* at 526–28, 536, 543–44, 113 S.Ct. 2217, as well as the killing of animals by some religions, including at kosher slaughterhouses, *id.* at 536–37, 113 S.Ct. 2217.

a. Neutral Law of General Applicability

[23] ¶ 85 Masterpiece contends that, like the law in *Church of Lukumi*, CADA is neither neutral nor generally applicable. First, it argues that CADA is not generally applicable because it provides exemptions for "places principally used for religious purposes" such as churches, synagogues, and mosques, *see* § 24–34–601(1), as well as places that restrict admission to one gender because of a bona fide relationship to its services, *see* § 24–34–601(3). Second, it argues that the law is not neutral because it exempts "places principally used for religious purposes," but not Masterpiece.

[24] ¶ 86 We conclude that CADA is generally applicable, notwithstanding its exemptions. A law need not apply to every individual and entity to be generally applicable; rather, it is generally applicable so long as it does not regulate only religiously motivated conduct. *See Church of Lukumi*, 508 U.S. at 542–43, 113 S.Ct. 2217 ("[I]nequality results when a legislature decides that the governmental interests it seeks to advance are worthy of being pursued only against conduct

exercise of religion.'' That decision was later affirmed by the Supreme Court. *See Burwell*, 573 U.S. at ——, 134 S.Ct. at 2758.

However, both the Tenth Circuit and the Supreme Court held only that RFRA's reference to ''persons'' includes for-profit corporations like Hobby Lobby, and therefore that federal regulations restricting the activities of closely held for-profit corporation like Hobby Lobby must comply with RFRA. *See id.* at ——, 134 S.Ct. at 2775 (''[W]e hold that a federal regulation's restriction on the activities of a for-profit closely held corporation must comply with RFRA.''); *Hobby Lobby*, 723 F.3d at 1137 (''[W]e conclude that ... Hobby Lobby and Mardel ... qualify as ''persons'' under RFRA.''). Because RFRA does not apply to state laws infringing on religious freedoms, *City of Boerne*, 521 U.S. at 532, 117 S.Ct. 2157, it is unclear whether Masterpiece (as opposed to Phillips) enjoys First Amendment free exercise rights. Further, because Colorado appellate courts have not addressed the issue, it is similarly unclear whether Masterpiece has free exercise rights under article II, section 4.

Regardless, because the parties do not address this issue—and because our conclusion does not require us to do so—we will assume, without deciding, that Masterpiece has free exercise rights under both the First Amendment and article II, section 4.

with a religious motivation."). CADA does not discriminate on the basis of religion; rather, it exempts certain public accommodations that are "principally used for religious purposes." § 24–34–601(1).

¶ 87 In this regard, CADA does not impede the free exercise of religion. Rather, its exemption for "places principally used for religious purposes" reflects an attempt by the General Assembly to reduce legal burdens on religious organizations and comport with the free exercise doctrine. Such exemptions are commonplace throughout Colorado law, *e.g.,* § 24–34–402(7) (exempting religious organizations and associations from employment discrimination laws); § 24–34–502(3), C.R.S.2014 (exempting religious organizations and institutions from several requirements of housing discrimination laws), and, in some cases, are constitutionally mandated. *See, e.g., Hosanna–Tabor Evangelical Lutheran Church & Sch. v. EEOC,* 565 U.S. ——, ——, 132 S.Ct. 694, 705–06, 181 L.Ed.2d 650 (2012) (holding that the First Amendment prohibits application of employment discrimination laws to disputes between religious organizations and their ministers).

¶ 88 Further, CADA is generally applicable because it does not exempt secular conduct from its reach. *Church of Lukumi,* 508 U.S. at 543, 113 S.Ct. 2217 (Laws are not generally applicable when they "impose burdens" "in a selective manner."). In this respect, CADA's exemption for places that restrict admission to one gender because of a bona fide relationship to its services does not discriminate on the basis of religion. On its face, it applies equally to religious and nonreligious conduct, and therefore is generally applicable.

¶ 89 Second, we conclude that CADA is neutral. Masterpiece asserts that CADA is not neutral because, although it exempts "places primarily used for religious purposes," Masterpiece is not exempt. However, Masterpiece does not contend that its bakery is primarily used for religious purposes. CADA forbids all discrimination based on sexual orientation regardless of its motivation. Further, the existence of an exemption for religious entities undermines Masterpiece's contention that the law discriminates against its conduct because of its religious character. *See Priests for Life v. Dep't of Health & Human Servs.,* 772 F.3d 229, 268 (D.C.Cir.2014) ("[T]he existence of an exemption for religious employers substantially undermines contentions that government is hostile towards such employers' religion.").

¶ 90 Finally, we reiterate that CADA does not compel Masterpiece to support or endorse any particular religious views. The law merely prohibits Masterpiece from discriminating against potential customers on account of their sexual orientation. As one court observed in addressing a similar free exercise challenge to the 1964 Civil Rights Act:

> Undoubtedly defendant . . . has a constitutional right to espouse the religious beliefs of his own choosing, however, he does not have the absolute right to exercise and practice such beliefs in utter disregard of the clear constitutional rights of other citizens. This Court refuses to lend credence or support to his position that he has a constitutional right to refuse to serve members of the Negro race in his business establishment upon the ground that to do so would violate his sacred religious beliefs.

Newman v. Piggie Park Enters., Inc., 256 F.Supp. 941, 945 (D.S.C.1966), *aff'd in relevant part and rev'd in part on other grounds,* 377 F.2d 433 (4th Cir.1967), *aff'd and modified on other grounds,* 390 U.S. 400, 88 S.Ct. 964, 19 L.Ed.2d 1263 (1968).[14] Likewise, Masterpiece remains free to continue

14. At least two state supreme courts have rejected free exercise challenges to public accommodations laws in the commercial context, concluding that such laws are neutral and generally applicable. *See Swanner v. Anchorage Equal Rights Comm'n,* 874 P.2d 274, 279–80 (Alaska 1994) (Free Exercise Clause does not allow landlord to discriminate against unmarried couples in violation of public accommodations statute); *North Coast Women's Care Med. Grp., Inc. v. San Diego Cnty. Superior Court,* 44 Cal.4th 1145, 81 Cal.Rptr.3d 708, 189 P.3d 959, 967 (2008) ("[T]he First Amendment's right to the free exercise of religion does not exempt defendant physicians here from conforming their conduct to the Act's antidiscrimination requirements even if compliance poses an incidental conflict with defendants' religious beliefs.").

espousing its religious beliefs, including its opposition to same-sex marriage. However, if it wishes to operate as a public accommodation and conduct business within the State of Colorado, CADA prohibits it from picking and choosing customers based on their sexual orientation.

¶ 91 Therefore, we conclude that CADA was not designed to impede religious conduct and does not impose burdens on religious conduct not imposed on secular conduct. Accordingly, CADA is a neutral law of general applicability.

b. "Hybrid" Rights Claim

¶ 92 Next, we address Masterpiece's contention that its claim is not governed by *Smith*'s rational basis standard and that strict scrutiny review applies because its contention is a "hybrid" of both free exercise rights and free expression rights.

¶ 93 In *Smith,* the Supreme Court distinguished its holding from earlier cases applying strict scrutiny to laws infringing free exercise rights, explaining that the "only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated actions have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections." 494 U.S. at 881, 110 S.Ct. 1595. Masterpiece argues that this language created an exception for "hybrid-rights" claims, holding that a party can still establish a violation of the Free Exercise Clause, even where the challenged law is neutral and generally applicable, by showing that the claim comprises both the right to free exercise of religion and an independent constitutional right. *Id.*

¶ 94 We note that Colorado's appellate courts have not applied the "hybrid-rights" exception, and several decisions have cast doubt on its validity. *See, e.g., Grace United Methodist Church v. City of Cheyenne,* 451 F.3d 643, 656 (10th Cir.2006) ("The hybrid rights doctrine is controversial. It has been characterized as mere *dicta* not binding on lower courts, criticized as illogical, and dismissed as untenable." (citations omitted)). Regardless, having concluded above that the Commission's order does not implicate Masterpiece's freedom of expression, even if we assume the "hybrid-rights" exception exists, it would not apply here.

¶ 95 Accordingly, we hold that CADA is a neutral law of general applicability, and does not offend the Free Exercise Clause of the First Amendment.

2. Article II, Section 4 Free Exercise of Religion

[25] ¶ 96 Masterpiece argues that, although neutral laws of general applicability do not violate the First Amendment, *Smith,* 494 U.S. at 879, 110 S.Ct. 1595, the Free Exercise Clause of the Colorado Constitution requires that we review such laws under heightened, strict scrutiny. We disagree.

¶ 97 Masterpiece gives two reasons supporting this assertion. First, it argues that Colorado appellate courts uniformly apply strict scrutiny to laws infringing fundamental rights. *See, e.g., In re Parental Rights Concerning C.M.,* 74 P.3d 342, 344 (Colo.App. 2002) ("A legislative enactment that infringes on a fundamental right is constitutionally permissible only if it is necessary to promote a compelling state interest and does so in the least restrictive manner possible."). Second, it argues that the Colorado Constitution provides broader protections for individual rights than the United States Constitution. *See, e.g., Lewis,* 941 P.2d at 271 (Colorado Constitution provides greater free speech protection than the United States Constitution); *Bock v. Westminster Mall Co.,* 819 P.2d 55, 58 (Colo.1991) ("Consistent with the United States Constitution, we may find that our state constitution guarantees greater protections of [free speech rights] than [are] guaranteed by the First Amendment.").

¶ 98 We recognize that, with regard to some individual rights, the Colorado Constitution has been interpreted more broadly than the United States Constitution, and that we apply strict scrutiny to many infringements of fundamental rights. However, the Colorado Supreme Court has also recognized that article II, section 4 embodies "the same values of free exercise and governmental noninvolvement secured by the religious

clauses of the First Amendment." *Ams. United for Separation of Church & State Fund, Inc. v. State,* 648 P.2d 1072, 1081–82 (Colo.1982); *see also Conrad v. City & Cnty. of Denver,* 656 P.2d 662, 670–71 (Colo.1982) ("Because the federal and state constitutional provisions embody similar values, we look to the body of law that has been developed in the federal courts with respect to the meaning and application of the First Amendment for useful guidance."); *Young Life v. Div. of Emp't & Training,* 650 P.2d 515, 526 (Colo. 1982) ("Article II, Section 4 echoes the principle of constitutional neutrality underscoring the First Amendment.").

¶ 99 Colorado appellate courts have consistently analyzed similar free exercise claims under the United States and Colorado Constitutions, and have regularly relied on federal precedent in interpreting article II, section 4. *See, e.g., Ams. United,* 648 P.2d at 1072; *Conrad,* 656 P.2d at 670; *Young Life,* 650 P.2d at 526; *People in Interest of D.L.E.,* 645 P.2d 271, 275–76 (Colo.1982); *Johnson v. Motor Vehicle Div.,* 197 Colo. 455, 458, 593 P.2d 1363, 1364 (1979); *Pillar of Fire v. Denver Urban Renewal Auth.,* 181 Colo. 411, 416, 509 P.2d 1250, 1253 (1973); *Zavilla v. Masse,* 112 Colo. 183, 187, 147 P.2d 823, 825 (1944); *In re Marriage of McSoud,* 131 P.3d 1208, 1215 (Colo.App.2006); *In the Interest of E.L.M.C.,* 100 P.3d 546, 563 (Colo.App.2004); *see also* Paul Benjamin Linton, *Religious Freedom Claims and Defenses Under State Constitutions,* 7 U. St. Thomas J.L. & Pub. Pol'y 103, 116–17 (2013) (observing that "a claim or defense that would not prevail under the Free Exercise Clause of the First Amendment would not likely prevail under article II, section 4, either"). Finally, the Colorado Supreme Court has never indicated that an alternative analysis should apply.

¶ 100 Given the consistency with which article II, section 4 has been interpreted using First Amendment case law—and in the absence of Colorado Supreme Court precedent suggesting otherwise—we hesitate to depart from First Amendment precedent in analyzing Masterpiece's claims. Therefore, we see no reason why *Smith*'s holding—that neutral laws of general applicability do not offend the Free Exercise Clause—is not equally applicable to claims under article II, section 4, and we reject Masterpiece's contention that the Colorado Constitution requires the application of a heightened scrutiny test.

3. Rational Basis Review

[26] ¶ 101 Having concluded that CADA is neutral and generally applicable, we easily conclude that it is rationally related to Colorado's interest in eliminating discrimination in places of public accommodation. The Supreme Court has consistently recognized that states have a compelling interest in eliminating such discrimination and that statutes like CADA further that interest. *See Hurley,* 515 U.S. at 572, 115 S.Ct. 2338 (Public accommodation laws "are well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination. . . ."); *see also Bd. of Dirs. of Rotary Int'l v. Rotary Club,* 481 U.S. 537, 549, 107 S.Ct. 1940, 95 L.Ed.2d 474 (1987) (government had a compelling interest in eliminating discrimination against women in places of public accommodation); *Roberts v. United States Jaycees,* 468 U.S. 609, 623, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984) (same); *Bob Jones Univ.,* 461 U.S. at 604, 103 S.Ct. 2017 (government had a compelling interest in eliminating racial discrimination in private education).

¶ 102 Without CADA, businesses could discriminate against potential patrons based on their sexual orientation. Such discrimination in places of public accommodation has measurable adverse economic effects. *See* Mich. Dep't of Civil Rights, Report on LGBT Inclusion Under Michigan Law with Recommendations for Action 74–90 (Jan. 28, 2013), *available at* http://perma.cc/Q6UL-L3JR (detailing the negative economic effects of anti-gay, lesbian, bisexual, and transgender discrimination in places of public accommodation). CADA creates a hospitable environment for all consumers by preventing discrimination on the basis of certain characteristics, including sexual orientation. In doing so, it prevents the economic and social balkanization prevalent when businesses decide to serve only their own "kind," and ensures that the goods and services provided

by public accommodations are available to all of the state's citizens.

¶ 103 Therefore, CADA's proscription of sexual orientation discrimination by places of public accommodation is a reasonable regulation that does not offend the Free Exercise Clauses of the First Amendment and article II, section 4.

VI. Discovery Requests and Protective Order

[27] ¶ 104 We also disagree with Masterpiece's contention that the ALJ abused his discretion by denying it discovery as to the type of wedding cake Craig and Mullins intended to order and details of their wedding ceremony. *See* § 24–4–106(7); *DCP Midstream v. Anadarko Petroleum Corp.,* 2013 CO 36, ¶ 24, 303 P.3d 1187, 1192 (rulings on motions to compel discovery reviewed for an abuse of discretion).

¶ 105 We agree with the ALJ's conclusion that these subjects were not relevant in resolving the essential issues at trial. The only issues before the ALJ were (1) whether Masterpiece violated CADA by categorically refusing to serve Craig and Mullins because of its opposition to same-sex marriage and, if so, (2) whether CADA, as applied to Masterpiece, violated its rights to freedom of expression and free exercise of religion. Evidence pertaining to Craig's and Mullins' wedding ceremony—including the nature of the cake they served—had no bearing on the legality of Masterpiece's conduct. The decision to categorically deny service to Craig and Mullins was based only on their request for a wedding cake and Masterpiece's own beliefs about same-sex marriage. Because Craig and Mullins never conveyed any details of their desired cake to Masterpiece, evidence about their wedding cake and details of their wedding ceremony were not relevant.

¶ 106 Accordingly, we conclude that the ALJ did not abuse his discretion by denying Masterpiece's requested discovery.

VII. Commission's Cease and Desist Order

[28] ¶ 107 Finally, we reject Masterpiece's contention that the Commission's cease and desist order exceeded the scope of its statutory authority. Where the Commission finds that CADA has been violated, section 24–34–306(9) provides that it "shall issue and cause to be served upon the respondent an order requiring such respondent to cease and desist from such discriminatory or unfair practice and to take such action as it may order" in accordance with the provisions of CADA. *See also* § 24–34–305(c)(I), C.R.S. 2014 (The Commission is empowered to eliminate discriminatory practices by "formulat[ing] plans for the elimination of those practices by educational or other means.").

¶ 108 Masterpiece argues that the Commission does not have the authority to issue a cease and desist order applicable to unidentified parties, but rather, it may only issue orders with respect to the specific complaint or alleged discriminatory conduct in each proceeding. We disagree with Masterpiece's reading of the statute.

¶ 109 First, individual remedies are "merely secondary and incidental" to CADA's primary purpose of eradicating discriminatory practices. *Conners v. City of Colorado Springs,* 962 P.2d 294, 298 (Colo.App.1997); *see also Brooke v. Rest. Servs., Inc.,* 906 P.2d 66, 69 (Colo.1995) (observing that providing remedies for individual employees under CADA's employment discrimination provisions is merely secondary and incidental to its primary purpose of eradicating discrimination by employers); *Agnello v. Adolph Coors Co.,* 689 P.2d 1162, 1165 (Colo.App. 1984) (same).

¶ 110 Further, Masterpiece admitted that its refusal to provide a wedding cake for Craig and Mullins was pursuant to the company's policy to decline orders for wedding cakes for same-sex weddings and marriage ceremonies. The record reflects that Masterpiece refused to make wedding cakes for several other same-sex couples. In this respect, the Commission's order was aimed at the specific "discriminatory or unfair practice" involved in Craig's and Mullins' complaint. § 24–34–306(9).

¶ 111 Accordingly, we conclude that the Commission's cease and desist order did not exceed the scope of its powers.

VIII. Conclusion

¶ 112 The Commission's order is affirmed.

CHIEF JUDGE LOEB and JUDGE BERGER concur.

2015 COA 116

MCGILLIS INVESTMENT COMPANY, LLP, Plaintiff–Appellee,

v.

FIRST INTERSTATE FINANCIAL UTAH LLC, a Utah limited liability company; First Interstate Financial LLC, a Nevada limited liability company; and Paul Thurston, as a manager of First Interstate Financial Utah LLC, as a manager of First Interstate Financial LLC, and as an individual, Defendants–Appellants.

Court of Appeals No. 14CA1568

Colorado Court of Appeals,
Div. IV.

Announced August 13, 2015

Background: Assignor of interest in real property brought action against assignee to quiet title to the property, and sought damages for breach of fiduciary duty, unjust enrichment, breach of oral agreement, and constructive trust. The District Court, Weld County, No. 11CV542, granted summary judgment for assignee. Assignor appealed. The Court of Appeals affirmed in part and reversed in part, 2013 WL 2364643. The District Court, Julie C. Hoskins, J., entered judgment on special jury verdict for assignor and quieted title in assignor. Assignee appealed.

Holdings: The Court of Appeals, Graham, J., held that:

(1) admissibility of a nonparty's invocation of the Fifth Amendment privilege should be considered on a case-by-case basis;

(2) assignor's evidence of conspiracy supported admission of vendor's invocation of Fifth Amendment privilege;

(3) accrual date of claims for claim preclusion purposes was fact issue for jury; and

(4) prior Court of Appeals opinion did not have law of the case effect requiring trial court to find that claim preclusion applied.

Affirmed.

1. Appeal and Error ⚿893(1)

The question of whether a nonparty witness's invocation of the Fifth Amendment privilege constitutes admissible evidence in a civil case is a question of law reviewed de novo. U.S. Const. Amend. 5; Colo. R. Evid. 403.

2. Witnesses ⚿309

In civil cases, an adverse inference may be drawn against a party who invokes the Fifth Amendment privilege against self-incrimination. U.S. Const. Amend. 5.

3. Witnesses ⚿309

The admissibility of a nonparty's invocation of the Fifth Amendment privilege and the concomitant drawing of adverse inferences in a civil case should be considered by courts on a case-by-case basis to assure that any inference is reliable, relevant, and fairly advanced. U.S. Const. Amend. 5.

4. Witnesses ⚿309

When evidence of a nonparty witness's invocation of the Fifth Amendment privilege against self-incrimination is properly admitted, the jury need only be instructed that they are permitted, but not required, to draw an inference adverse to a party from a witness's invocation of the privilege, and that they should not draw such an inference if they find that the witness invoked the privilege for reasons unrelated to the case on trial. U.S. Const. Amend. 5.

5. Witnesses ⚿309

Assignor of interest in real property introduced sufficient circumstantial evidence

No. 17-___

IN THE

Supreme Court of the United States

JAMEKA K. EVANS,

Petitioner,

v.

GEORGIA REGIONAL HOSPITAL, ET AL.,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the prohibition in Title VII of the Civil Rights Act of 1964 against employment discrimination "because of . . . sex" encompasses discrimination based on an individual's sexual orientation.

PARTIES TO THE PROCEEDING

Petitioner, plaintiff below, is Jameka K. Evans.

Respondents, defendants below, are Georgia Regional Hospital at Savannah, Charles Moss, Lisa Clark, and Jamekia Powers.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jameka K. Evans respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit (Pet. App. 1a-54a) is published at 850 F.3d 1248. The Eleventh Circuit's order denying rehearing en banc (Pet. App. 68a-69a) is unpublished. The order of the district court (Pet. App. 55a) is unpublished but is available at 2015 WL 6555440. The report and recommendation of the magistrate judge (Pet. App. 56a-67a) is unpublished but is available at 2015 WL 5316694.

JURISDICTION

The judgment of the court of appeals was entered on March 10, 2017. Pet. App. 1a. The court of appeals denied a timely petition for rehearing en banc on July 6, 2017. Pet. App. 68a-69a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

42 U.S.C. § 2000e-2(a)(1) provides in pertinent part: "It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."

INTRODUCTION

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination "because of" an individual's "sex." 42 U.S.C. § 2000e-2(a)(1). This provision is designed "to strike at the entire spectrum of disparate treatment of men and women in employment," *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78 (1998) (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986))—even forms of gender discrimination beyond those with which Congress was principally concerned "when it enacted Title VII," *id.* at 79. And "recognizing that new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged," this Court has declared that discriminating against lesbian, gay, and bisexual people based on a "disapproval of their relationships" "diminish[es] their personhood" and "works a grave and continuing harm" that must be remedied. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602-04 (2015).

Yet it remains unresolved whether Title VII's ban on sex discrimination permits an employer to fire (or otherwise discriminate against) lesbian, gay, and bisexual people based on their sexual orientation. Earlier this year, the Seventh Circuit held that "[t]he logic of the Supreme Court's decisions, as well as the common-sense reality that it is actually impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex," dictate that Title VII prohibits discrimination based on sexual orientation. *Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339, 350-51 (7th Cir. 2017) (en banc). But in this case, the Eleventh Circuit refused to follow suit, citing

decades-old case law from several circuits and asserting that only "the Supreme Court" can bring Title VII into line with society's contemporary understandings concerning sexual orientation and sex discrimination. Pet. App. 12a.

This Court should carry out that task without delay. Ours is a national economy, and basic protections in the workforce should not depend on geography. More fundamentally, lesbian, gay, and bisexual Americans will not enjoy true legal equality until their sexual orientation is irrelevant not only to their right to enter into consenting relationships and to marry but also to their ability to maintain jobs and pursue their livelihoods. It cannot be that Title VII allows an employer to fire Sharon for exercising her constitutional right to marry her girlfriend while retaining her co-worker Samuel after he marries his.

STATEMENT OF THE CASE

1. From 2012 to 2013, petitioner Jameka Evans worked as a security officer at Georgia Regional Hospital at Savannah (the "Hospital"). Petitioner, who describes herself as a gay female, presented herself at work in stereotypically "male" ways—for example, she wore a male uniform, had a short haircut, and wore male shoes. Pet. App. 3a, 58a.

During her time at the Hospital, petitioner's supervisors "harassed her because of her perceived homosexuality, and she was otherwise punished because [of her] status as a gay female." Pet. App. 58a.[1] Among other things, Evans suffered harassment

[1] Because this case comes to the Court on a dismissal of the complaint for failure to state a claim, all factual allegations must be accepted as true. Pet. App. 8a.

intended to make her employment unbearable, received less desirable work schedules, and was singled out for alleged rule infractions. *Id.* 3a-4a. In addition, petitioner was passed over for a promotion in favor of "a less qualified individual" who is not gay and does not otherwise transgress gender norms. *Id.*

2. Petitioner filed an internal complaint about her most troublesome supervisor, Charles Moss, with Lisa Clark in the Hospital's human resources department. As part of its investigation of these allegations, a Senior Human Resources Manager, Jamekia Powers, inquired about petitioner's sexual orientation. Pet. App. 3a. Prior to that point, petitioner had not discussed her sexual orientation with the manager. The question alerted petitioner to the fact that "her sexuality was the basis of her harassment." *Id.* When the unbearable discriminatory working conditions persisted, petitioner left her job.

3. After exhausting her remedies with the Equal Employment Opportunity Commission ("EEOC" or "Commission"), Pet. App. 58a-59a n.4, petitioner timely filed a *pro se* complaint against the Hospital, Moss, Clark, and Powers in the United States District Court for the Southern District of Georgia, *id.* 2a. In her complaint, petitioner specifically alleged that she was subjected to workplace discrimination because her "status as a gay female did not conform to . . . gender stereotypes associated with women." *Id.* 58a. Petitioner also alleged she was targeted for

harassment for otherwise "failing to carry herself in a 'traditional woman[ly] manner.'" *Id.* 3a.[2]

Prior to service of the complaint, petitioner's motion was referred to a magistrate judge. The magistrate recommended that the complaint be dismissed with prejudice for failure to state a claim upon which relief could be granted. *See* 28 U.S.C. § 1915(e)(2)(B)(ii). In the magistrate's view, petitioner's claim of discrimination based on her sexual orientation failed because Title VII "was not intended to cover discrimination against homosexuals." Pet. App. 59a. Furthermore, the magistrate perceived Evans's claim of discrimination based on sex stereotypes as no different from her claim based on sexual orientation. As the magistrate put it, "to say that an employer has discriminated on the basis of gender non-conformity is just another way to claim discrimination based on sexual orientation." *Id.* 61a.

Petitioner, still proceeding *pro se*, filed timely objections to the magistrate judge's report and recommendation. Pet. App. 6a. She also argued that, as a *pro se* litigant, she should have been granted an opportunity to amend her complaint. *Id.* In support of her objections, Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal") sought and was granted leave to file a brief as *amicus curiae*. *Id.*

The district court adopted the magistrate judge's report and recommendation without addressing any of petitioner's objections. Pet. App. 7a. The district court then dismissed petitioner's case with prejudice and

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[2] Petitioner also alleged that she was subjected to unlawful retaliation, but the court of appeals later deemed that claim waived, Pet. App. 17a, and petitioner does not press it here.

appointed Lambda Legal as counsel to represent her on appeal. *Id.*

4. Petitioner appealed, and the EEOC filed a supportive *amicus* brief, maintaining that sexual orientation discrimination "fall[s] squarely within Title VII's prohibition against discrimination based on sex." EEOC CA11 Br. 1.

A divided panel of the Eleventh Circuit affirmed in part and reversed in part.

Rejecting the position advanced by petitioner and the EEOC, the majority held that petitioner could not "state[] a claim under Title VII by alleging that she endured workplace discrimination because of her sexual orientation." Pet. App. 11a. The majority noted that circuit precedent from 1979 dictated that "[d]ischarge for homosexuality is not prohibited by Title VII." *Id.* 11a (quoting *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979)). And the panel deemed itself bound to follow that precedent "unless and until it is overruled by [the Eleventh Circuit] en banc or by the Supreme Court." Pet. App. 12a (citation omitted).

At the same time, the panel held that "discrimination based on gender nonconformity is actionable." Pet. App. 9a. The court of appeals therefore vacated the part of the district court's order dismissing that claim and ordered that petitioner be granted "leave to amend such claim." Pet. App. 11a.

In a concurring opinion, Judge William Pryor defended the rule that Title VII does not cover discrimination based on sexual orientation. According to Judge Pryor, Title VII prohibits discriminating against someone because their "behavior" does not conform to sex stereotypes, but the statute does not

preclude discrimination based on the "status" of being lesbian, gay, or bisexual. Pet. App. 22a-23a.

In an opinion concurring in part and dissenting in part, Judge Rosenbaum disagreed with the majority's holding that sexual orientation discrimination is not a form of sex discrimination. Pet. App. 27a-54a. She explained that since *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), the law has been clear that "Title VII precludes discrimination on the basis of every stereotype of what a woman supposedly should be." Pet. App. 27a. Thus, "when a woman alleges, as Evans has, that she has been discriminated against because she is a lesbian, she necessarily alleges that she has been discriminated against because she failed to conform to the employer's image of what women should be—specifically, that women should be sexually attracted to men only." *Id.*

Judge Rosenbaum also recognized that an employer who discriminates against a woman who is attracted to women, but not against a man who is attracted to women, "treats women and men differently 'because of . . . sex.'" Pet. App. 35a n.9. Finally, Judge Rosenbaum criticized the concurrence's attempt to distinguish between conduct and status as "mak[ing] no sense from a practical, textual, or doctrinal point of view." *Id.* 39a.

5. Petitioner sought reconsideration en banc of the panel's holding regarding sexual orientation discrimination. She urged the Eleventh Circuit to adopt the view taken by Judge Rosenbaum and the EEOC—the same view the Seventh Circuit accepted in *Hively v. Ivy Tech Community College*, 853 F.3d 339 (7th Cir. 2017) (en banc). The Eleventh Circuit denied the petition without comment. Pet. App. 68a.

REASONS FOR GRANTING THE PETITION

The federal courts of appeals are irreconcilably divided on whether Title VII prohibits sexual orientation discrimination as part of its ban on sex discrimination. Likewise, the two federal agencies charged with enforcing Title VII have taken opposite positions on whether sexual orientation discrimination is a form of sex discrimination. This intractable conflict over the scope of Title VII has created uncertainty for employees and employers alike, compounding pervasive discrimination suffered by lesbian, gay, and bisexual individuals. Only this Court can resolve the disagreement on this important issue, and it is vital that the Court do so now.

I. The courts of appeals and federal agencies that enforce Title VII are divided over whether the statute covers discrimination based on sexual orientation.

Title VII mandates that "gender must be irrelevant to employment decisions." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240 (1989) (plurality opinion). Employers cannot rely "upon sex-based considerations." *Id.* at 242.

This mandate plays out in three related ways. First, Title VII forbids "treatment of a person in a manner which but for that person's sex would be different." *City of L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978) (citation omitted). Second, this Court has held that gender stereotyping—for example, refusing to promote a woman because she is too "aggressive"—falls within Title VII's prohibition against sex discrimination. *Price Waterhouse*, 490 U.S. at 250 (plurality opinion). Indeed, "[i]n forbidding

employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." *Manhart*, 435 U.S. at 707 n.13 (quoting *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971)). Third, Title VII prohibits discrimination against an employee based on the interaction of a protected aspect of the employee's identity with the identity of a person with whom the employee associates. An employer, for example, commits this forbidden "associational" discrimination when it treats an employee in an interracial relationship differently from other employees married to persons of the same race. *See, e.g.*, *Holcomb v. Iona Coll.*, 521 F.3d 130, 132 (2d Cir. 2008); *Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 892 (11th Cir. 1986); *cf. Loving v. Virginia*, 388 U.S. 1, 11 (1967) (punishing a person for marrying someone of a different race constitutes race discrimination).

Federal courts and federal agencies applying these doctrinal constructs are split over whether they dictate that Title VII covers discrimination based on sexual orientation.

A. The courts of appeals are divided.

1. In an en banc decision earlier this year, the Seventh Circuit held by an 8-3 vote that "discrimination on the basis of sexual orientation is a form of sex discrimination." *Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339, 341 (7th Cir. 2017) (en banc). The Seventh Circuit concluded that all three ways of conceptualizing Title VII's prohibition against sex discrimination "end up in the same place": "that a person who alleges that she experienced employment discrimination on the basis of her sexual orientation

has put forth a case of sex discrimination for Title VII purposes." *Id.* at 345, 351-52.

First, the Seventh Circuit explained that sexual orientation discrimination necessarily involves sex-based considerations because the discrimination endured by a woman based on her attraction to women is not suffered by any man with an identical attraction to women. *Hively*, 853 F.3d at 345.

Second, the Seventh Circuit reasoned that a woman's being a lesbian "represents the ultimate case of failure to conform to the female stereotype (at least as understood in a place such as modern America, which views heterosexuality as the norm and other forms of sexuality as exceptional)." *Hively*, 853 F.3d at 346. In other words, sexual orientation discrimination is a form of unlawful sex stereotyping because it rests on the assumption that people should pursue romantic relationships with (or be attracted to) only members of a different sex. Just as employers may not reject women from jobs in "traditionally male workplaces, such as fire departments," based on sex stereotypes, employers may not act "based on assumptions about the proper behavior for someone of a given sex" with respect to the sex of their romantic partner. *Id.*

Third, the Seventh Circuit concluded that sexual orientation discrimination "is discrimination based on an associational theory." It explained that this Court in *Loving* had "recognized that equal application of a law that prohibited conduct only between members of different races did not save it." *Hively*, 853 F.3d at 348. "So too, here. If we were to change the sex of one partner in a lesbian relationship, the [employment] outcome would be different. This reveals that the discrimination rests on distinctions drawn according

to sex." *Id.* at 349; *see also id.* at 359 (Flaum, J., concurring).

Also earlier this year, the majority of a Second Circuit panel likewise determined that: (1) "sexual orientation discrimination is sex discrimination for the simple reason that such discrimination treats otherwise similarly-situated people differently solely because of their sex"; (2) sexual orientation discrimination is sex discrimination "because such discrimination is inherently rooted in gender stereotypes"; and (3) sexual orientation discrimination is sex discrimination because it treats similarly situated people differently because of their sex, viewed in relation to the sex of the individuals with whom they associate (or to whom they are attracted). *Christiansen v. Omnicom Grp., Inc.*, 852 F.3d 195, 202-05 (2d Cir. 2017) (Katzmann, C.J., joined by Brodie, J., concurring). The Second Circuit has since granted en banc review in another case to consider the issue. *See Zarda v. Altitude Express, Inc.*, 855 F.3d 76 (2d Cir. 2017); Order, *Zarda v. Altitude Express, Inc.*, No. 15-3775 (2d Cir. May 25, 2017) (ECF No. 271).

2. "Almost all" of the remaining circuits have weighed in on the issue—some quite recently—and have held (or strongly suggested) that Title VII permits employment discrimination based on sexual orientation. *Hively*, 853 F.3d at 341-42 (citing *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999); *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 290 (3d Cir. 2009); *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 143 (4th Cir. 1996) (dicta); *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979); *Kalich v. AT&T Mobility, LLC*, 679 F.3d 464, 471 (6th Cir. 2012); *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989) (dicta); and

Medina v. Income Support Div., 413 F.3d 1131, 1135 (10th Cir. 2005)); *see also DeSantis v. Pac. Tel. & Tel. Co., Inc.*, 608 F.2d 327, 329-30 (9th Cir. 1979); Pet. App. 11a-16a (Eleventh Circuit's decision below). A common sentiment in these decisions is that in passing Title VII, "Congress had only the traditional notions of 'sex' in mind." *DeSantis*, 608 F.2d at 329. These courts similarly stress that "Congress has repeatedly rejected legislation that would have extended Title VII to cover sexual orientation." *Medina*, 413 F.3d at 1135 (citations omitted).

The Eleventh Circuit's 2-1 decision here cements the conflict with the Seventh Circuit and ensures that only this Court can resolve it. The Eleventh Circuit panel refused to revisit circuit precedent that Title VII does not reach discrimination against lesbian, gay, or bisexual individuals "unless and until it is overruled by this court en banc or by the Supreme Court." Pet. App. 12a, 14a (citation omitted). Judge William Pryor concurred to defend the decades-old Eleventh Circuit rule as a matter of first principles. *Id.* 19a-26a. Then, presented with a petition for rehearing en banc that asked the Eleventh Circuit to follow the Seventh Circuit's and the EEOC's lead, the Eleventh Circuit denied the petition without a single vote in favor of rehearing. *Id.* 68a-69a.

B. Federal agencies are divided.

Title VII empowers both the EEOC and the United States Department of Justice to enforce Title VII, depending on the identity of employers. Just like the courts of appeals, these federal agencies have split over how to interpret Title VII in this context.

1. The EEOC exercises significant enforcement powers with respect to Title VII claims. First and

foremost, the EEOC investigates charges that employers have engaged in discrimination in violation of Title VII. The Commission also issues findings and conciliates charges of discrimination under the statute.

Moreover, the EEOC may bring actions directly against private employers. *See, e.g.*, *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028 (2015). In this capacity, the EEOC has invoked Title VII's prohibition on sex discrimination to sue private employers who discriminate on the basis of sexual orientation. *See, e.g.*, *EEOC v. Scott Med. Health Ctr., P.C.*, 217 F. Supp. 3d 834 (W.D. Pa. 2016).

The EEOC also directly adjudicates discrimination claims by federal employees. "[I]f aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint," a federal employee may file a federal lawsuit. 42 U.S.C. § 2000e-16(c). But the federal government as employer may not appeal a final EEOC decision in an employee's favor to federal court.

Acting in its capacity as the adjudicator of federal employment cases, the Commission has held—consistent with its stance respecting private employers—that "allegations of discrimination on the basis of sexual orientation necessarily state a claim of discrimination on the basis of sex." *Baldwin v. Foxx*, No. 0120133080, 2015 WL 4397641, at *10 (EEOC July 16, 2015). This means that in EEOC enforcement proceedings against private and federal government employers, the Commission treats sexual orientation discrimination as a form of sex discrimination prohibited by Title VII.

2. The Department of Justice has taken the opposite position. While the EEOC has investigative and conciliatory authority respecting discrimination claims against state or local governments, the Attorney General makes the decision whether to bring an enforcement action against such a "government, governmental agency, or political subdivision." 42 U.S.C. § 2000e-5(f)(1).

In direct contrast to the EEOC, the Department of Justice recently announced, through an *amicus* brief, that it does not believe that Title VII prohibits sexual orientation discrimination. *See* Brief for the United States as *Amicus Curiae* Supporting Defendants-Appellees at 1, *Zarda v. Altitude Express, Inc.*, No. 15-3775 (2d Cir. July 26, 2017), 2017 WL 3277292. According to that brief, "discrimination because of sexual orientation is not discrimination because of sex under Title VII," *id.* at 6 (capitalization altered), and employers are free under federal law to fire or otherwise discriminate against employees and job applicants based on their sexual orientation.

That the federal agencies charged with enforcement of Title VII have staked out wholly contradictory positions regarding the scope of Title VII's prohibition on sex discrimination further reinforces the need for this Court's guidance. The protection that public employees have from sex-based discrimination should not depend on whether they work for the federal or a state or local government.

II. The question presented is exceptionally important.

For three overarching reasons, it is critical that this Court swiftly resolve the conflict over whether Title VII covers discrimination based on sexual orientation.

1. The current geographic checkerboard of Title VII's coverage is untenable for employees and employers alike. Take, for example, a gay person who lives in Michiana, Michigan. The current divide in the circuits means that if that person takes a job in his own neighborhood, he can be fired at any time based on his sexual orientation. If he commutes to a less desirable position in Michigan City, Indiana, he will enjoy job security impossible to obtain at home. Federal law should not put people in such a bind.

Nor should federal law place employees in a quandary over whether to accept a promotion or divulge their sexual orientation. Yet at present, a lesbian or bisexual employee working in Indianapolis, Indiana, who is offered a promotion that will require her to relocate to Indianola, Mississippi, is forced to choose between Title VII protection and advancing her career. Furthermore, lesbian, gay, and bisexual employees who are entitled to insurance and other forms of employment benefits for their spouses might be wary of telling their employers about their marital status, for fear of revealing their sexual orientation and subjecting themselves to termination on that basis.

Federal law should not leave national employers unsure of their legal obligations either. If, for instance, an airline has hubs in both Chicago and Miami (as American Airlines does), the human resources offices

in both cities should be able to advise management, train supervisors, and inform employees of their rights in the same way. The same goes for a company such as Boeing that designs and builds airplanes in Chicago and Atlanta, or a company such as Kohler that manufactures plumbing and other products in both Kohler, Wisconsin and Huntsville, Alabama. And so on. Yet the current state of affairs precludes such clarity.

2. Intervention by this Court is particularly warranted to relieve courts and litigants from having to adjudicate cases like this under the guise of "gender nonconformity" claims.

Like many other appellate courts that foreclose Title VII claims based directly on sexual orientation, the Eleventh Circuit allows lesbian, gay, and bisexual employees to allege that they have been subjected to disparate treatment because their personal appearances or mannerisms do not "conform to a gender stereotype." Pet. App. 10a-11a. "Numerous district courts throughout the country," however, have "found this approach to gender stereotype claims unworkable." *Christiansen v. Omnicom Grp.*, 852 F.3d 195, 205 (2d Cir. 2017) (Katzmann, C.J., concurring). The result is a "contradictory" and "confused hodge-podge of cases" attempting "to extricate the gender nonconformity claims from the sexual orientation claims." *Hively v. Ivy Tech Comm. Coll.*, 853 F.3d 339, 342 (7th Cir. 2017) (en banc) (citation omitted); *see also, e.g.*, *Boutillier v. Hartford Pub. Sch.*, 221 F. Supp. 3d 255, 269 (D. Conn. 2016) (requirement to exclude "sexual orientation discrimination . . . from the equation when determining whether allegations or evidence of gender non-conformity discrimination are sufficient is inherently unmanageable").

The core problem, as the Seventh Circuit has explained, is that it requires "considerable calisthenics to remove the 'sex' from 'sexual orientation.'" *Hively*, 853 F.3d at 350. Indeed, as several district courts have emphasized, "the line between sex discrimination and sexual orientation discrimination . . . does not exist, save as a lingering and faulty judicial construct." *Videckis v. Pepperdine Univ.*, 150 F. Supp. 3d 1151, 1159-60 (C.D. Cal. 2015); *see also Philpott v. New York*, ___ F. Supp. 3d ___, 2017 WL 1750398, at *2 (S.D.N.Y. May 3, 2017) ("I decline to embrace an 'illogical' and artificial distinction between gender stereotyping discrimination and sexual orientation discrimination, and in so doing, I join several other courts throughout the country."); *EEOC v. Scott Med. Health Ctr., P.C.*, 217 F. Supp. 3d 834, 841 (W.D. Pa. 2016) ("[T]he Court finds discrimination on the basis of sexual orientation is, at its very core, sex stereotyping plain and simple; there is no line separating the two.").

Circuit precedent forbidding Title VII claims based on sexual orientation but allowing "gender nonconformity" claims thus leaves district courts—not to mention litigants and their lawyers—utterly flummoxed. And lacking any logical compass, district courts often simply dismiss "gender nonconformity" claims from lesbian, gay, and bisexual plaintiffs. For instance, one court recently concluded that a plaintiff was impermissibly "attempting to bring a Title VII claim based on sexual orientation" because the complaint identified the plaintiff as a "male homosexual" and referred to the phrase "sexual orientation at least twice." *Garvey v. Childtime Learning Ctr.*, No. 5:16-CV-1073 (TJM/ATB), 2016 WL 6081436, at *3 (N.D.N.Y. Sept. 12, 2016). Even when

strong evidence of gender-based motivation exists, courts have pointed to the use of explicitly anti-gay epithets, such as "fag" or "queer," by a harasser to justify dismissing sex stereotyping claims. *See, e.g.*, *Kay v. Indep. Blue Cross*, 142 Fed. Appx. 48, 51 (3d Cir. 2005).

And even when courts entertain "gender nonconformity" claims from lesbian, gay, and bisexual plaintiffs, this creates problems. Forcing all sexual orientation discrimination claims into a sex stereotyping pigeonhole "creates an uncomfortable result in which the more visibly and stereotypically gay or lesbian a plaintiff is in mannerisms, appearance, and behavior, and the more the plaintiff exhibits those behaviors and mannerisms at work, the more likely a court is to recognize a claim of gender non-conformity which will be cognizable under Title VII as sex discrimination." *Hively v. Ivy Tech Cmty. Coll.*, 830 F.3d 698, 709-10 (7th Cir. 2016) (panel opinion) (collecting examples).

Conversely, "[p]laintiffs who do not look, act, or appear to be gender non-conforming but are merely known to be or perceived to be gay or lesbian do not fare as well in the federal courts." *Hively*, 830 F.3d at 710 (gathering examples). Likewise, if a male employee is harassed with taunts stereotypically associated with gay men but not necessarily with women, he too may see his claim dismissed. *See, e.g.*, *Anderson v. Napolitano*, No. 09-60744-CIV, 2010 WL 431898, at *6 (S.D. Fla. Feb. 8, 2010) (because lisping and being "too flamboyant" are not stereotypes associated with women, co-workers' harassment of a gay employee by speaking at him with a lisp and calling him "too flamboyant" did not support a claim of sex discrimination).

In short, "gender nonconformity" claims are "especially difficult for gay plaintiffs to bring." *Maroney v. Waterbury Hosp.*, No. 3:10-CV-1415 (JCH), 2011 WL 1085633, at *2 n.2 (D. Conn. Mar. 18, 2011). They are even harder for district courts to adjudicate. Litigants and courts should not be required to cram cases involving discrimination based on sexual orientation into this box.

3. Finally, it is important for this Court to address the question presented in light of the discrimination lesbian, gay, and bisexual people face in employment. This Court has repeatedly acknowledged the "long history of disapproval" of gay people that has led to their "subordinat[ion]," *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604 (2015), and to "discrimination both in the public and in the private spheres," *Lawrence v. Texas*, 539 U.S. 558, 575 (2003). *See also United States v. Windsor*, 133 S. Ct. 2675, 2694-95 (2013) (same); *Lawrence*, 539 U.S. at 581 (O'Connor, J., concurring) (describing the employment-related consequences of anti-sodomy laws). As the United States recently advised this Court:

> Employers and co-workers continue to discriminate against lesbian and gay people in the workplace. A set of 15 studies conducted since the mid-1990s has found that significant percentages of lesbian, gay, and bisexual people have experienced workplace discrimination, including being fired or refused employment; being denied promotion or given unfavorable performance reviews; being verbally or physically abused or experiencing workplace vandalism; and receiving unequal pay or benefits.

Brief for United States as *Amicus Curiae* Supporting Petitioners at 6, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (No. 14-556).

This pervasive discrimination exacts a heavy toll. Many lesbian, gay, and bisexual employees must "hide their identities, are paid less, and have fewer employment opportunities" than their co-workers. Brad Sears & Christy Mallory, *Employment Discrimination Against LGBT People: Existence and Impact*, *in* Gender Identity and Sexual Orientation Discrimination in the Workplace: A Practical Guide 40-13 (Christine Michelle Duffy ed., 2014), http://tinyurl.com/01Evans. "Research has also documented that [anti-gay] discrimination, as the expression of stigma and prejudice, also exposes" lesbian, gay, and bisexual individuals "to increased risk for poorer physical and mental health." *Id.* These problems are especially acute in states lacking explicit local protections against sexual orientation employment discrimination—which often are where sexual orientation stigma and economic disadvantages run highest. *See* Amira Hasenbush et al., Williams Inst., The LGBT Divide: A Data Portrait of LGBT People in the Midwestern, Mountain, and Southern States 1-7, 22 (2014), http://tinyurl.com/011Evans.

A decision from this Court clarifying that Title VII's prohibition against sex discrimination applies to sexual orientation discrimination will ease these burdens. Title VII's "'primary objective,' like that of any statute meant to influence primary conduct, is not to provide redress but to avoid harm." *Faragher v. City of Boca Raton*, 524 U.S. 775, 806 (1998) (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975)); *see also Romer v. Evans*, 517 U.S. 620, 627 (1996) (noting that legal rules shape "transactions and

relations" between individuals "in both the private and governmental spheres"). And studies confirm that workplace discrimination wanes when legal rules clearly prohibit it. *See* Laura G. Barron & Michelle Hebl, *The Force of Law: The Effects of Sexual Orientation Antidiscrimination Legislation on Interpersonal Discrimination in Employment*, 19 Psychol. Pub. Pol'y & L. 191, 200-02 (2013).

Conversely, the current legal landscape, which leaves lesbian, gay, and bisexual people in large swaths of the country unprotected, sends a strong message that it is acceptable to discriminate against employees based on their constitutionally protected love for a person of the same sex.

III. This case offers an ideal vehicle to resolve the issue.

This case is in a perfect posture for this Court to decide whether Title VII's ban on sex discrimination encompasses sexual orientation discrimination. The case comes to this Court on review of a complaint's sufficiency, cleanly presenting a clear-cut question of law. And judges at the district court and appellate level have thoroughly ventilated the arguments for and against Title VII coverage. *Compare* Pet. App. 27a-54a (Rosenbaum, J., concurring in part and dissenting in part), *with id.* 19a-26a (William Pryor, J., concurring), *and id.* 56a-67a (magistrate judge's opinion).

That the Eleventh Circuit granted petitioner leave to amend her complaint to allege that a "decision" to "present herself in a masculine manner" caused the adverse employment actions, Pet. App. 10a, only reinforces the propriety of using this case to resolve the question presented. As noted above, there is no

way to know exactly how the district court might attempt to manage such a "gender nonconformity" claim under the Eleventh Circuit's artificial construct. But, almost by definition, the construct seems designed to limit petitioner's ability to plead, obtain discovery, and prove that her sexual orientation led to adverse action against her in violation of Title VII. It would be much better to get the overall law right before going down those litigation pathways and potentially having to start all over again.

Finally, it is worth noting that the very fact that this case has made it to this Court is a plus. Previous cases involving the rights of lesbian, gay, and bisexual people have shown that losers in such cases are not always willing to seek appellate review, and winners are not always interested in defending their victories. *See, e.g.*, *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2660 (2013); *Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014) (state officials refused to defend district court decision upholding state constitutional amendments banning same-sex couples from marriage); *Whitewood v. Wolf*, 992 F. Supp. 2d 410 (M.D. Pa. 2014) (defendants declined to appeal decision invalidating equivalent state law).

Those same phenomena are playing out regarding the question presented here as well. The employer that lost in *Hively v. Ivy Tech Community College*, 853 F.3d 339 (7th Cir. 2017) (en banc), announced immediately that it would not seek certiorari. Cristian Farias, *Losing Employer Won't Ask Supreme Court to Overturn Landmark Gay Rights Ruling*, HuffPost (Apr. 5, 2017), http:// tinyurl.com/0111Evans. Similarly, after the U.S. District Court for the District of Columbia held (in the absence of D.C. Circuit authority on the issue) that an individual could pursue

a Title VII claim for discrimination based on sexual orientation, *see Terveer v. Billington*, 34 F. Supp. 3d 100, 116 (D.D.C. 2014), the defendant settled the case in lieu of taking an appeal, *see* Order Approving Joint Stipulation of Dismissal, *Terveer v. Billington*, No. 1:12-CV-01290-CKK (D.D.C. Dec. 11, 2015) (ECF No. 69). In short, if this Court were to pass on this case, another opportunity to resolve whether Title VII covers discrimination based on sexual orientation may not reach the Court for a long while.

IV. The Eleventh Circuit's decision is wrong.

The Eleventh Circuit's decision here, and the decisions of other courts of appeals holding that Title VII does not reach discrimination on the basis of sexual orientation, cannot be reconciled with either the text of the statute or this Court's decisions construing it. Simply put, it is discrimination "because of . . . sex" for an employer to treat female employees, like petitioner, who are attracted to women differently from male employees who are attracted to women. The three strands of this Court's decisions confirm this point.

1. Discriminating against lesbian, gay, or bisexual employees inherently involves treating them adversely based on their sex. For more than forty years, it has been settled that Title VII forbids an employer from having "one hiring policy for women and another for men." *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (per curiam). One way to articulate this "simple test" is that it forbids any "treatment of a person in a manner which but for that person's sex would be different." *City of L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978) (citation omitted).

It is straightforward to see how discrimination against a lesbian or bisexual female employee fails this but-for test. If, for example, a female employee can show that her employer provides spousal health-insurance benefits to a male employee married to a woman but has fired her because she is married to a woman, then she has "prove[d] that the employer relied upon sex-based considerations in coming to its decision." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 242 (1989) (plurality opinion). The female employee would have been treated differently had she been a man.

2. Discrimination based on sexual orientation rests on impermissible sex stereotyping. This Court's decision in *Price Waterhouse* makes clear that Title VII does not permit employers to "evaluate employees by assuming or insisting that they match[] the stereotype associated with their group." 490 U.S. at 251 (plurality opinion). Such assumptions and demands, when they result in adverse employment consequences for workers who do not fit the stereotypes, constitute discrimination because of sex.

Discrimination on the basis of sexual orientation is rooted in stereotypes about what it means to be a man or to be a woman and about how men and women should conduct their lives. It rests on the idea that women should not be attracted to women and that men should not be attracted to men. "In fact, stereotypes about homosexuality are directly related to our stereotypes about the proper roles of men and women." *Christiansen v. Omnicom Grp., Inc.*, 852 F.3d 195, 205 (2d Cir. 2017) (Katzmann, C.J., concurring) (citation omitted); *see also Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339, 346 (7th Cir. 2017) (en banc). As this Court explained last Term, "[f]or close to a half century" it

has been the law that "overbroad generalizations about the different talents, capacities, or preferences of males and females" constitute sex discrimination. *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1692 (2017) (quoting *United States v. Virginia*, 518 U.S. 515, 533 (1996), and citing *Weinberger v. Wiesenfeld*, 420 U.S. 636, 643, 648 (1975)).

3. Discrimination on the basis of sexual orientation constitutes "associational" discrimination forbidden by Title VII. In *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669 (1983), this Court held that an employment practice premised on the sex of an employee's spouse can constitute sex discrimination. The practice at issue there was the denial of spousal pregnancy benefits in an employer's healthcare plan. Title VII had been amended to provide that discrimination on the basis of pregnancy is discrimination "because of sex." Because, at the time, "the sex of the spouse [was] always the opposite of the sex of the employee," male employees were being subjected to discrimination because they had female spouses. *Id.* at 684.

In a similar vein, every circuit to have addressed the question, including the Eleventh Circuit, has held that discrimination based on the race of a person with whom an employee has a relationship constitutes a form of discrimination "because of . . . race" prohibited by Title VII. In *Parr v. Woodmen of the World Life Insurance Co.*, 791 F.2d 888 (11th Cir. 1986), for example, the Eleventh Circuit held that "[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; *see also Holcomb v. Iona Coll.*, 521 F.3d 130, 138 (2d Cir. 2008); *Tetro v.*

Elliott Popham Pontiac, Oldsmobile, Buick, & GMC Trucks, Inc., 173 F.3d 988, 994 (6th Cir. 1999); *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 156 F.3d 581, 589 (5th Cir. 1998), *opinion reinstated on reh'g en banc sub nom. Williams v. Wal-Mart Stores, Inc.*, 182 F.3d 333 (5th Cir. 1999).

The logic of the cases involving race is inescapable here: treating an employee differently because of the sex of the person to whom he or she is married, or with whom he or she has an intimate relationship, is discrimination because of sex. *See Hively*, 853 F.3d at 347-48; *id.* at 359 (Flaum, J., concurring); *Christiansen*, 852 F.3d at 204 (Katzmann, C.J., concurring). Title VII "treats each of the enumerated categories exactly the same." *Price Waterhouse*, 490 U.S. at 243 n.9 (plurality opinion). So just as "[c]hanging the race of one partner made a difference in determining the legality of" the marriage at issue in *Loving v. Virginia*, 388 U.S. 1 (1967), the employer in a case involving discrimination based on sexual orientation would have acted differently "if we were to change the sex of one partner." *Hively*, 853 F.3d at 348-49.

4. Neither the absence of the explicit phrase "sexual orientation" in Title VII nor congressional inaction after enactment of Title VII, Pet. App. 25a, undercuts treating discrimination on the basis of sexual orientation as "because of . . . sex." Petitioner does not ask this Court to add a new protected category to the list provided by Congress. Rather, as the EEOC has explained, she asks only that she be provided the same protection against sex discrimination that applies in any other case where an employer "has 'relied on sex-based considerations' or 'take[n] gender into account' when taking the challenged employment

action." *Baldwin v. Foxx*, No. 0120133080, 2015 WL 4397641, at *4 (EEOC July 16, 2015) (quoting *Price Waterhouse*, 490 U.S. at 239, 241-42 (plurality opinion)). Petitioner's claim rests on the fact that if she were a man, or if she dressed and behaved in a more stereotypically feminine way, or if she were attracted to men rather than to women, respondents would have treated her differently. This is sex discrimination, pure and simple. Title VII nowhere carves out lesbian, gay, and bisexual people from its categorical protection against sex discrimination.

To be sure, in 1964 when it enacted Title VII, Congress was not thinking about discrimination against lesbian, gay, or bisexual people. Nor, of course, was it thinking about male-on-male sexual harassment. But as this Court explained in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), "statutory prohibitions often go beyond the principal evil" targeted by the Congress that enacted them "to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Id.* at 79. Discrimination against individuals on the basis of their sexual orientation, like the same-sex sexual harassment at issue in *Oncale*, "meets the statutory requirements" for sex discrimination prohibited by Title VII, *id.* at 80. Courts cannot "rewrite the statute so that it covers only what [they] think is necessary to achieve what [they] think Congress really intended." *Lewis v. City of Chicago*, 560 U.S. 205, 215-17 (2010). They must instead apply the statute as written.

Nor does congressional inaction support excluding claims of discrimination on the basis of sexual orientation that fit within one or more of the three

categories already recognized by this Court. As this Court has repeatedly cautioned, "subsequent legislative history" provides "a particularly dangerous ground on which to rest an interpretation of a prior statute when it concerns . . . a proposal that does not become law." *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990). Given the multitude of reasons the various proposals to add "sexual orientation" to Title VII might not have been adopted, the congressional inaction over the years here has "no persuasive significance." *United States v. Wise*, 370 U.S. 405, 411 (1962); *see also Christiansen*, 852 F.3d at 206 (Katzmann, C.J., concurring).

5. The Eleventh Circuit's decision in this case also ignores the enormous change in the understanding of sexual orientation worked by this Court's decisions in *Romer v. Evans*, 517 U.S. 620 (1996), *Lawrence v. Texas*, 539 U.S. 558 (2003), *United States v. Windsor*, 133 S. Ct. 2675 (2013), and *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). As this Court observed in *Lawrence*, "times can blind us to certain truths." 539 U.S. at 579. One of those truths is that subjecting lesbian, gay, and bisexual employees to adverse treatment fits firmly within the contours of Title VII's prohibition on discrimination because of sex. When this Court "held in *Lawrence* [that] same-sex couples have the same right as opposite-sex couples to enjoy intimate association," *Obergefell*, 135 S. Ct. at 2600, it was squarely articulating a fundamental basis for holding that discrimination against lesbian, gay, and bisexual people is sex discrimination: it denies them rights due to their sex and the sex of the person with whom they form a couple.

As Justice O'Connor explained, one of the consequences of the legal regime that existed prior to

this Court's decisions recognizing the equal dignity of lesbian, gay, and bisexual individuals was "legally sanction[ed] discrimination" against them in areas such as "employment." *Lawrence*, 538 U.S. at 582 (O'Connor, J., concurring). *Romer*, *Lawrence*, *Windsor*, and *Obergefell* "reflect a shift in the perception, both of society and of the courts, regarding the protections warranted for same-sex relationships and the men and women who engage in them." *Christiansen v. Omnicom Grp., Inc.*, 167 F. Supp. 3d 598, 619 (S.D.N.Y. 2016), *aff'd in part and rev'd in part*, 852 F.3d 195 (2d Cir. 2017). As the Seventh Circuit's recent en banc decision put it, "[t]he goalposts have been moving over the years, as the Supreme Court has shed more light on the scope of the language that already is in the statute: no *sex* discrimination." *Hively*, 853 F.3d at 344. It is time for this Court to resolve the uncertainty in the lower courts and ensure that Title VII's protection against sex discrimination protects lesbian, gay, and bisexual employees to the same extent it protects all other workers.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 7, 2017

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 15-15234

D.C. Docket No. 4:15-cv-00103-JRH-GRS

JAMEKA K. EVANS,

Plaintiff-Appellant,

versus

GEORGIA REGIONAL HOSPITAL, CHARLES MOSS, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Georgia

(March 10, 2017)

Before WILLIAM PRYOR and ROSENBAUM, Circuit Judges, and MARTINEZ,[*] District Judge.

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[*] Honorable Jose E. Martinez, United States District Judge for the Southern District of Florida, sitting by designation.

MARTINEZ, District Judge:

Jameka Evans appeals the *sua sponte* dismissal of her employment discrimination complaint, filed pursuant to 42 U.S.C. § 2000e *et seq.*, in which she alleged that she was discriminated against because of her sexual orientation and gender non-conformity, and retaliated against after she lodged a complaint with her employer's human resources department. We have carefully reviewed the Appellant's and amicus curiae's initial and supplemental briefs,[1] and have had the benefit of oral argument. For the reasons set forth below, we affirm the district court's dismissal order in part, and vacate and remand in part.

I.

Evans filed a *pro se* complaint against Georgia Regional Hospital ("Hospital"), Chief Charles Moss, Lisa Clark, and Senior Human Resources Manager Jamekia Powers, alleging employment discrimination under Title VII in her job as a security officer at the Hospital. Evans also moved for leave to proceed *in forma pauperis* before the district court, and for appointment of counsel. In her complaint, Evans alleged the following facts, which this Court accepts as true.[2]

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[1] This appeal arises from Evans's decision to proceed *in forma pauperis*, and the district court reviewed the allegations without appellees receiving service. 28 U.S.C. § 1915(e)(2)(B)(ii). Appellees did not file a brief for this Court's consideration or otherwise appear on appeal, apart from informing the Court via letter that the district court dismissed the action before service was perfected on them.

[2] *Hughes v. Lott*, 350 F.3d 1157, 1159-60 (11th Cir. 2003).

Evans worked at the Hospital as a security officer from August 1, 2012, to October 11, 2013, when she left voluntarily. During her time at the Hospital, she was denied equal pay or work, harassed, and physically assaulted or battered. She was discriminated against on the basis of her sex and targeted for termination for failing to carry herself in a "traditional woman[ly] manner." Although she is a gay woman, she did not broadcast her sexuality. However, it was "evident" that she identified with the male gender, because of how she presented herself—"(male uniform, low male haircut, shoes, etc.").

Evans had not met Powers before the harassment began and had never discussed her sexual preference with her. Yet, Evans was punished because her status as a gay female did not comport with Moss's gender stereotypes and this caused her to experience a hostile work environment. For example, a less qualified individual was appointed to be her direct supervisor. Moreover, internal e-mails provided evidence that Moss was trying to terminate Evans by making her employment unbearable, because she had too much information about his wrongdoing in the security department.

Evans also explained that her employers had violated some regulations or policies and that she had initiated an investigation. After Evans lodged her complaints about these violations, Powers asked Evans about her sexuality, causing Evans and "others" to infer that her sexuality was the basis of her harassment and that upper management had discussed it during the investigation. Finally, Evans provided that she was harassed and retaliated against

because she spoke to human resources about Moss's discriminatory behavior. Evans also reserved the right to amend her complaint should new information arise.

Evans attached to her complaint a "Record of Incidents." This report stated that Moss had repeatedly closed a door on Evans in a rude manner, that she experienced scheduling issues and a shift change, and that a less qualified individual was promoted as her supervisor. She detailed the problems she had with her new supervisor, Corporal Shanika Johnson, and asserted that Johnson scrutinized and harassed her. Evans also asserted that someone had tampered with her equipment, including her radio, clip, and shoulder microphone.

Evans also included an e-mail from Harvey Sanchez Pegues, which stated that Moss had harassed Pegues on a daily basis, had a habit of favoritism, changed Pegues's schedule frequently, had created a tense and unpleasant work environment, and had a habit of targeting people for termination. Evans also attached a letter from Jalisia Bedgard, which stated that Johnson and Moss had expected Evans to quit because of Johnson's promotion and, if not, because of a bad shift change that would cause Evans scheduling conflicts. Another attached letter from Cheryl Sanders, Employee Relations Coordinator in the human resources department at the Hospital, indicated that the Hospital had investigated Evans's complaints of favoritism, inconsistent and unfair practices, and inappropriate conduct, and had found no evidence that she had been singled out and targeted for termination. Finally, Evans attached e-mail correspondence between Pegues and Evans, which indicated that: (1)

Pegues believed that Moss was trying to target Evans for termination because she had substantial evidence of wrongdoing against him, and (2) Moss had changed the qualifications of a job to prevent other candidates from qualifying.

A magistrate judge subsequently issued a report and recommendation ("R&R"), wherein the magistrate judge granted Evans leave to proceed *in forma pauperis*, denied her request for appointment of counsel, and *sua sponte* screened her complaint, pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii). The magistrate judge preliminarily noted that that while the Equal Employment Opportunity Commission ("EEOC") had not indicated that there was an untimeliness issue, Evans reportedly worked at the Hospital from August 2012 through October 2013, and thus, only had 180 days from the alleged discriminatory conduct to file. The magistrate judge also noted that Evans's complaint in the district court needed to be consistent with her EEOC complaint. With respect to Evans's claim of discrimination based on her sexual orientation, or status as a gay female, the magistrate judge reasoned that—based on case law from all circuits that had addressed the issue—Title VII "was not intended to cover discrimination against homosexuals." With regard to Evans's claim of discrimination based on gender non-conformity, the magistrate judge concluded that it was "just another way to claim discrimination based on sexual orientation," no matter how it was otherwise characterized. Additionally, the magistrate judge recommended dismissal of the retaliation claim on the basis that Evans failed to allege that she opposed an

unlawful employment practice, given that sexual orientation was not protected under Title VII. Additionally, the R&R noted that Moss, Clark, and Powers were coworkers or supervisors sued in their individual capacities and, therefore, were not actionable defendants under Title VII. Finally, the magistrate judge recommended dismissing all of Evans's claims, with prejudice, without allowing her to leave to amend, because she pled no actionable claim nor seemed likely to be able to do so.

Evans timely objected to the R&R. In particular, Evans argued that her gender non-conformity and sexual orientation discrimination claims were actionable under Title VII as sex-based discrimination. She also argued that, as a *pro se* litigant, she should have been permitted to amend her complaint, stating that "new supplemental evidence ha[d] arisen that affirm[ed] the consistency of the claims alleged in [her] complaint with the claims investigated in the EEOC charge, satisfying the administrative consistency doctrine," and noting that she had reserved her right to amend in her complaint.

The Lambda Legal Defense and Education Fund, Inc., ("Lambda Legal") requested permission to file an *amicus curiae* brief in support of Evans's objections to the R&R, which the district court granted. Lambda Legal argued that an employee's status as lesbian, gay, bisexual or transgender ("LGBT"), does not defeat a claim based on gender non-conformity. Lambda Legal also disputed the magistrate judge's assertion that sexual orientation is not an actionable basis under Title VII, and disputed the assertion that all other courts have held so. Lambda Legal also argued that

Evans did not need to plead a *prima facie* case to survive dismissal at the pleading stage. It also disputed the magistrate judge's recommendation that Evans's retaliation claim be dismissed with prejudice, arguing that Evans did not need to actually engage in protected activity to state a claim for retaliation so long as her belief that sexual orientation was covered by Title VII was not unreasonable. Lambda Legal also argued that the magistrate judge's remarks that Evans's claims were untimely and that her complaint was inconsistent with the EEOC investigation were "speculati[ve]" and "premature at best." Lastly, it argued that Evans was entitled to leave to amend, because any necessary amendment would not be futile given Evans's colorable claims.

The district court conducted a *de novo* review of the entire record and adopted—without further comment—the R&R, dismissed the case with prejudice, and appointed counsel from Lambda Legal to represent Evans on appeal.

On appeal, Evans, with the support of the EEOC as amicus curiae, argues that the district court erred in dismissing her claim that she was discriminated against for failing to conform to gender stereotypes, because an LGBT person may properly bring a separate discrimination claim for gender non-conformity in this Circuit. Evans also argues that, contrary to the district court's assertion, sexual orientation discrimination is, in fact, sex discrimination under Title VII. Evans further argues that the district court erred in concluding that she did not meet the requirements to bring a retaliation claim, because a plaintiff can establish a *prima facie* case of

unlawful retaliation if there is a good faith, reasonable belief that the employer was acting unlawfully. Finally, Evans argues that the district court erred in failing to allow her leave to amend her complaint, because *pro se* litigants should be allowed to amend their complaints when they have a viable argument. We address each argument in turn.

II.

We review *de novo* a district court's *sua sponte* dismissal for failure to state a claim under 28 U.S.C. § 1915(e)(2)(B)(ii), viewing the allegations in the complaint as true. *Hughes v. Lott*, 350 F.3d 1157, 1159-60 (11th Cir. 2003). Dismissal under § 1915(e)(2)(B)(ii) is governed by the same standard as a dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure. *Mitchell v. Farcass*, 112 F.3d 1483, 1490 (11th Cir. 1997). However, "[*p*]*ro se* pleadings are held to a less stringent standard than pleadings drafted by attorneys and will, therefore, be liberally construed." *Tannenbaum v. United States*, 148 F.3d 1262, 1263 (11th Cir. 1998). Moreover, we may affirm on any ground supported by the record, regardless of whether that ground was relied on or considered below. *Thomas v. Cooper Lighting, Inc.*, 506 F.3d 1361, 1364 (11th Cir. 2007).

To survive a motion to dismiss, a complaint must contain sufficient factual matter, which, accepted as true, states a claim for relief that is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A claim is plausible on its face when there is a "reasonable inference that the defendant is liable for the misconduct alleged." *Id.* A Title VII complaint need

not allege facts sufficient to make out a classic *prima facie* case, but must simply provide enough factual matter to plausibly suggest intentional discrimination. *See Surtain v. Hamlin Terrace Found.*, 789 F.3d 1239, 1246 (11th Cir. 2015).

III.

First, Evans argues that the district court erred in dismissing her claim that she was discriminated against for failing to conform to gender stereotypes, because an LGBT person may bring a separate discrimination claim for gender nonconformity.[3] She contends that her status as a lesbian supports her claim of sex discrimination, because discrimination against someone for her orientation often coincides with discrimination for gender non-conformity. Evans further asserts that discrimination based on gender stereotypes is a broad claim that encompasses more than just her appearance, but also provides for suits based on various other stereotypes, such as family structure.

Even though we hold, *infra*, that discrimination based on gender nonconformity is actionable, Evans's *pro se* complaint nevertheless failed to plead facts sufficient to create a plausible inference that she

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[3] Evans also briefly mentions that the district court erred in speculating about the timeliness of her EEOC charge and whether the allegations in her complaint were sufficiently similar to the EEOC's investigation. However, Evans provided only a passing reference to these issues, and no real argument to them. Therefore, as a passing reference is insufficient to preserve an issue on appeal, we consider these issues abandoned. *See Greenbriar, Ltd. v. City of Alabaster*, 881 F.2d 1570, 1573 n.6 (11th Cir. 1989).

suffered discrimination. *See Surtain*, 789 F.3d at 1246. In other words, Evans did not provide enough factual matter to plausibly suggest that her decision to present herself in a masculine manner led to the alleged adverse employment actions. *Id.* Therefore, while a dismissal of Evan's gender non-conformity claim would have been appropriate on this basis, these circumstances entitle Evans an opportunity to amend her complaint one time unless doing so would be futile.

When "a more carefully drafted complaint might state a claim, a plaintiff must be given at least one chance to amend the complaint before the district court dismisses the action with prejudice." *Bryant v. Dupree*, 252 F.3d 1161, 1163 (11th Cir. 2001) (citation omitted). Although a *pro se* litigant generally should be permitted to amend her complaint, a district court need not allow amendment when it would be futile. *Cockrell v. Sparks*, 510 F.3d 1307, 1310 (11th Cir. 2007). "Leave to amend a complaint is futile when the complaint as amended would still be properly dismissed or be immediately subject to summary judgment for the defendant." *Id.*

Here, Evans, a *pro se* litigant, has not previously amended her complaint, and it cannot be said that any attempt to amend would be futile with respect to her gender non-conformity claim and possibly others. *See Bryant*, 252 F.3d at 1163; *Sparks*, 510 F.3d at 1310. Discrimination based on failure to conform to a gender stereotype is sex-based discrimination. *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011) (c*iting Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), *superseded* by statute on other grounds, 42 U.S.C. § 2000e-5(g)(2)(B) (1991), *as stated in Landgraf v. USI*

Film Prods., 511 U.S. 244, 251 (1994)). Specifically, in *Glenn*, we held that discrimination against a transgender individual because of gender-nonconformity was sex discrimination. 663 F.3d at 1317 (applying gender-nonconformity sex discrimination in a 42 U.S.C. § 1983 action). In that decision, we stated that "[a]ll persons, whether transgender or not, are protected from discrimination on the basis of gender stereotype," and we reasoned that, because those protections apply to everyone, a transgender individual could not be excluded. *Id.* at 1318-19. We hold that the lower court erred because a gender non-conformity claim is not "just another way to claim discrimination based on sexual orientation," but instead, constitutes a separate, distinct avenue for relief under Title VII.

Accordingly, we vacate the portion of the district court's order dismissing Evans's gender non-conformity claim with prejudice and remand with instructions to grant Evans leave to amend such claim.

IV.

Evans next argues that she has stated a claim under Title VII by alleging that she endured workplace discrimination because of her sexual orientation. She has not. Our binding precedent forecloses such an action. *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979)[4] ("Discharge for homosexuality is not prohibited by Title VII . . . ."). "Under our prior

[4] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), this Court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to close of business on September 30, 1981.

precedent rule, we are bound to follow a binding precedent in this Circuit unless and until it is overruled by this court en banc or by the Supreme Court." *Offshore of the Palm Beaches, Inc. v. Lynch*, 741 F.3d 1251, 1256 (11th Cir. 2014) (internal quotations omitted).

The EEOC argues that the statement in *Blum* regarding discharge for homosexuality is dicta and not binding precedent. We disagree. Before making such statement, the panel in *Blum* remarked: "We comment briefly on the other issues *raised on appeal*." 597 F.2d at 938 (emphasis added). As a result, the statement in *Blum* concerning the viability of a sexual orientation claim was not dicta, but rather directly addressed a question before the Court. Even if *Blum* is read as disposing of the sexual orientation claim for another reason,[5] an alternative reason does not render as dicta this Court's holding that there is no sexual orientation action under Title VII.

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[5] The Court in *Blum* stated, in pertinent part:

> It is questionable whether appellant has presented a prima facie Title VII case of racial, sexual, or religious discrimination. However, even if he has done so, Gulf articulated a legitimate reason for his discharge: Mr. Blum admitted using Gulf's telephones for his own business. From what Gulf then knew of appellant's use as opposed to his later explanations and qualifications it had a legitimate reason for terminating him. Although he has attempted to show that this reason was a pretext, he has not shown that anyone in authority was aware that other employees used Gulf telephones for non-Gulf business.

597 F.2d at 937–38 (internal citations omitted).

In *Hitchcock v. Sec'y, Florida Dep't of Corr.*, 745 F.3d 476 (11th Cir. 2014), this Court addressed whether an alternative holding is dicta:

> [A]n alternative holding is not dicta but instead is binding precedent. *See, e.g., Massachusetts v. United States,* 333 U.S. 611, 623, 68 S. Ct. 747, 754, 92 L. Ed. 968 (1948) (explaining that where a case has "been decided on either of two independent grounds" and "rested as much upon the one determination as the other," the "adjudication is effective for both"); *Richmond Screw Anchor Co. v. United States,* 275 U.S. 331, 340, 48 S. Ct. 194, 196, 72 L. Ed. 303 (1928) ("It does not make a reason given for a conclusion in a case obiter dictum, because it is only one of two reasons for the same conclusion."); *United States v. Title Ins. & Trust Co.,* 265 U.S. 472, 486, 44 S. Ct. 621, 623, 68 L. Ed. 1110 (1924) ("[W]here there are two grounds, upon either of which an appellate court may rest its decision, and it adopts both, the ruling on neither is obiter, but each is the judgment of the court, and of equal validity with the other.") (quotation marks omitted); *Bravo v. United States,* 532 F.3d 1154, 1162 (11th Cir. 2008) (explaining that an "alternative holding counts because in this circuit additional or alternative holdings are not dicta, but instead are as binding as solitary holdings"); *Johnson v. DeSoto Cnty. Bd. of Comm'rs,* 72 F.3d 1556, 1562 (11th Cir. 1996) ("[W]e are bound by alternative holdings."); *McLellan v. Miss.*

> *Power & Light Co.,* 545 F.2d 919, 925 n.21 (5th Cir. 1977) (en banc) ("It has long been settled that all alternative rationales for a given result have precedential value.").

745 F.3d at 484 n.3. Applying this well-established law, the statement from *Blum* regarding a sexual orientation claim is not dicta, but rather binding precedent.

Evans and the EEOC also argue that the Supreme Court decisions in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), and *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998), support a cause of action for sexual orientation discrimination under Title VII. Again, we disagree. The fact that claims for gender non-conformity and same-sex discrimination can be brought pursuant to Title VII does not permit us to depart from *Blum*. *See Randall v. Scott*, 610 F.3d 701, 707 (11th Cir. 2010) ("While an intervening decision of the Supreme Court can overrule the decision of a prior panel of our court, the Supreme Court decision must be clearly on point." (citation omitted)); *N.L.R.B. v. Datapoint Corp.*, 642 F.2d 123, 129 (5th Cir. 1981) ("Without a clearly contrary opinion of the Supreme Court or of this court sitting en banc, we cannot overrule a decision of a prior panel of this court . . . ."). *Price Waterhouse* and *Oncale* are neither clearly on point nor contrary to *Blum*. These Supreme Court decisions do not squarely address whether sexual orientation discrimination is prohibited by Title VII.

Finally, even though they disagree with the decisions, Evans and the EEOC acknowledge that

other circuits have held that sexual orientation discrimination is not actionable under Title VII. *See, e.g.*, *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999) ("Title VII does not proscribe harassment simply because of sexual orientation."); *Simonton v. Runyon*, 232 F.3d 33, 36 (2d Cir. 2000) ("Simonton has alleged that he was discriminated against not because he was a man, but because of his sexual orientation. Such a claim remains non-cognizable under Title VII."); *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 261 (3d Cir. 2001) ("Title VII does not prohibit discrimination based on sexual orientation."); *Wrightson v. Pizza Hut of Am.*, 99 F.3d 138, 143 (4th Cir. 1996), *abrogated on other grounds by Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75 (1998) ("Title VII does not afford a cause of action for discrimination based upon sexual orientation . . . ."); *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 762 (6th Cir. 2006) ("[S]exual orientation is not a prohibited basis for discriminatory acts under Title VII."); *Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc.*, 224 F.3d 701, 704 (7th Cir. 2000) ("[H]arassment based solely upon a person's sexual preference or orientation (and not on one's sex) is not an unlawful employment practice under Title VII."); *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989) ("Title VII does not prohibit discrimination against homosexuals."); *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1063-64 (9th Cir. 2002) ("[A]n employee's sexual orientation is irrelevant for purposes of Title VII. It neither provides nor precludes a cause of action for sexual harassment. That the harasser is, or may be, motivated by hostility based on sexual orientation is similarly irrelevant, and

neither provides nor precludes a cause of action."); *Medina v. Income Support Div.*, 413 F.3d 1131, 1135 (10th Cir. 2005) ("Title VII's protections, however, do not extend to harassment due to a person's sexuality . . . . Congress has repeatedly rejected legislation that would have extended Title VII to cover sexual orientation.") (internal quotations omitted). Evans and the EEOC question these decisions, in part, because of *Price Waterhouse* and *Oncale*. Whether those Supreme Court cases impact other circuit's [sic] decisions, many of which were decided after *Price Waterhouse* and *Oncale*, does not change our analysis that *Blum* is binding precedent that has not been overruled by a clearly contrary opinion of the Supreme Court or of this Court sitting en banc. Accordingly, we affirm the portion of the district court's order dismissing Evan's sexual orientation claim.

V.

Evans also argues that the district court erred in concluding that she did not meet the requirements for a retaliation claim, because a plaintiff can establish a *prima facie* case of unlawful retaliation if there was a good faith, reasonable belief that the employer was acting unlawfully.

However, we will generally not review a magistrate judge's findings or recommendations if a party failed to object to those recommendations below. *See* 11th Cir. R. 3-1. Title 28 of the United States Code, Section 636(b)(1) provides that, within 14 days of being served with a copy of a magistrate judge's recommendations or findings, a party may file written objections with the court, and the court shall conduct a *de novo* review of

the issues raised. 28 U.S.C. § 636(b)(1). Pursuant to 11th Cir. R. 3-1, a party who fails to object to a magistrate judge's findings or recommendations in an R&R "waives the right to challenge on appeal the district court's order based on unobjected-to factual and legal conclusions," provided the party was given proper notice of the objection time period and the consequences of failing to do so, as was the case here. Consequently, we will only review a waived objection, for plain error, if necessary in the interests of justice. *Id.* Review for plain error "rarely applies in civil cases." *Ledford v. Peeples*, 657 F.3d 1222, 1258 (11th Cir. 2011). Even when it does, we require a greater showing of error than in criminal appeals. *United States v. Levy*, 391 F.3d 1327, 1343 n.12 (11th Cir. 2004). We find nothing in the record that suggests that plain error review is appropriate in this appeal.

Further, we do not consider an *amicus curiae* to be a party in the case where it appears. *See In re Bayshore Ford Truck Sales, Inc.*, 471 F.3d 1233, 1249 n.34 (11th Cir. 2006). Moreover, without "exceptional circumstances, *amici curiae* may not expand the scope of an appeal to implicate issues not presented by the parties to the district court." *Richardson v. Ala. State Bd. of Educ.*, 935 F.2d 1240, 1247 (11th Cir. 1991) (regarding issues raised on appeal by *amici curiae* that were not raised in the appellant's brief on appeal).

Here, Evans failed to object to the district court's dismissal of her retaliation claim. While Evans specifically objected to the dismissal of her claims for discrimination based on gender non-conformity and sexual orientation, as well as the magistrate judge's denial of her request for leave to amend her complaint,

notably absent from her filing was any mention of her retaliation claim. Additionally, although an *amicus curiae* brief was filed by Lambda Legal, which included an objection on this matter, Lambda Legal was not a party to the litigation, or Evans's counsel at the time, and thus could not preserve that objection for her. *See Bayshore*, 471 F.3d at 1249 n.34. For these reasons, we consider any challenge to the district court's treatment of Evan's retaliation claim waived. 11th Cir. R. 3-1.

For the foregoing reasons, the district court's order dismissing Evans's action with prejudice is affirmed in part, and vacated in part and remanded for further proceedings consistent with this opinion.

AFFIRMED IN PART, VACATED IN PART AND REMANDED.

WILLIAM PRYOR, Circuit Judge, concurring:

I concur in the majority opinion, but I write separately to explain the error of the argument of the Equal Employment Opportunity Commission and the dissent that a person who experiences discrimination because of sexual orientation necessarily experiences discrimination for deviating from gender stereotypes. Although a person who experiences the former will sometimes also experience the latter, the two concepts are legally distinct. And the insistence otherwise by the Commission and the dissent relies on false stereotypes of gay individuals. I also write separately to explain that the dissent would create a new form of relief based on status that runs counter to binding precedent and would undermine the relationship between the doctrine of gender nonconformity and the enumerated classes protected by Title VII.

The majority opinion correctly holds that a claim of discrimination for failure to conform to a gender stereotype is not "just another way to claim discrimination based on sexual orientation." Maj. Op. at 12. Like any other woman, Evans can state a claim that she experienced, for example, discrimination for wearing a "male haircut" if she includes enough factual allegations. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Glenn v. Brumby*, 663 F.3d 1312, 1314, 1320–1321 (11th Cir. 2011). But just as a woman cannot recover under Title VII when she is fired because of her heterosexuality, neither can a gay woman sue for discrimination based on her sexual orientation. Deviation from a particular gender stereotype may correlate disproportionately with a particular sexual orientation, and plaintiffs who allege discrimination on

the basis of gender nonconformity will often also have experienced discrimination because of sexual orientation. *See, e.g.*, *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 287, 289, 291 (3d Cir. 2009) (Hardiman, J.) (holding that Title VII protects a gay man for deviating from gender stereotypes but not for his sexual orientation). But under Title VII, we ask only whether the individual experienced discrimination for deviating from a gender stereotype. *Cf. id.* at 291.

The unsurprising reality that some individuals who have experienced discrimination because of sexual orientation will also have experienced discrimination because of gender nonconformity by no means establishes that *every* gay individual who experiences discrimination because of sexual orientation has a "triable case of gender stereotyping discrimination." *Id.* at 292. The Commission and the dissent would have us hold that sexual orientation discrimination always constitutes discrimination for gender nonconformity. They contend, for example, that all gay individuals necessarily engage in the same behavior. *E.g.*, Amicus Br. at 14 ("[A]ll homosexuals, by definition, fail to conform to traditional gender norms *in their sexual practices*." (quoting *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 764 (6th Cir. 2006))) (alteration in original) (emphasis added); Dissenting Op. at 40–41 (same); Amicus Br. at 15 (arguing that the stereotype exists that "'real' men should *date* women, and not other men" (quoting *Centola v. Potter*, 183 F. Supp. 2d 403, 410 (D. Mass. 2002))) (emphasis added). But that argument stereotypes all gay individuals in the same way that the Commission and the dissent allege that the Hospital stereotyped Evans.

By assuming that all gay individuals behave the same way or have the same interests, the Commission and the dissent disregard the diversity of experiences of gay individuals. Some gay individuals adopt what various commentators have referred to as the gay "social identity" but experience a variety of sexual desires. *E.g.*, E.J. Graff, *What's Wrong with Choosing to Be Gay?*, The Nation (Feb. 3, 2014) (recounting experiences of gay individuals); *see also* Brandon Ambrosino, *I Wasn't Born This Way. I Choose to Be Gay*, The New Republic (Jan. 28, 2014) (arguing against the belief that "none of us has any control over our sexual identities"). Like some heterosexuals, some gay individuals may choose not to marry or date at all or may choose a celibate lifestyle. And other gay individuals choose to enter mixed-orientation marriages. *See, e.g.*, Brief of Amici Curiae Same-Sex Attracted Men and Their Wives in Support of Respondents and Affirmance at 2–3, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (Nos. 14–556, 14–562, 14–571, 14–574). A gay individual may establish with enough factual evidence that she experienced sex discrimination because her behavior deviated from a gender stereotype held by an employer, but our review of that claim would rest on behavior alone.

The dissent asserts that discrimination on the basis of sexual orientation "clearly violates Title VII," Dissenting Op. at 30, yet as the majority opinion explains, every circuit to have reviewed this issue, including our own, has arrived at the opposite conclusion, Maj. Op. at 15–16. The dissent compares gay females to heterosexual males, Dissenting Op. at 37 n.4, but it does not follow that an employer who

treats one differently from the other does so "because of . . . sex" instead of "because of sexual orientation." The dissent also crafts a new, status-based class of protection that betrays a misreading of *Price Waterhouse* and *Glenn* and would undercut the relationship between the doctrine of gender nonconformity and the classes enumerated in Title VII.

The dissent misreads our precedent by framing the pertinent question in an appeal involving the doctrine of gender nonconformity as whether an employee's *status* deviated from the ideal held by an employer as to what a woman "should be." Dissenting Op. at 34–35. Not shy about this invention, the dissent repeats it on nearly every page. *Id.* at 29, 31–32, 35–42, 44–52, 55. But *Price Waterhouse* and *Glenn* concerned claims that an employee's *behavior*, not status alone, deviated from a gender stereotype held by an employer.

The dissent derives much of its analytic framework from legal commentary, Dissenting Op. at 31, but even that commentary accepts that *Price Waterhouse* concerned behavior, not status, and that current doctrine does not protect on the basis of status alone. Zachary R. Herz, Note, *Price's Progress: Sex Stereotyping and Its Potential for Antidiscrimination Law*, 124 Yale L.J. 396, 406–07, 433 (2014) (stating that the stereotype the plaintiff in *Price Waterhouse* deviated from was not "*behaving* as a woman 'should'" and that the "basic problem" today is that "employers are evaluating employees . . . according to discriminatory ideas about how men and women should *behave*" (emphases added)); *id.* at 432 (acknowledging that "the current regime . . . protects stereotypically "gay" *conduct* without protecting LGBT

status" (emphases added)). The only possible "status" in *Price Waterhouse* was the employee's status as an "aggressive" woman. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989). But it is overbroad to say, as the dissent does, that *Price Waterhouse* asked about "status" in general when the decision clearly pertained to behavior.

The dissent also asserts that we provided Glenn relief "solely for *being* transsexual," which the dissent proclaims deviated from what the employer thought Glenn "should be," Dissenting Op. at 38 (emphasis added), but we did not afford relief based on status alone. Instead, Glenn's claim was successful because Glenn was fired after choosing to "beg[i]n to take steps to transition." Glenn "present[ed]" and "dressed as a woman" at work and notified the supervisor that Glenn intended to continue this behavior. Because Glenn "was born a biological male," Glenn's employer believed these choices were "unsettling," "unnatural," and "not appropriate." *Glenn*, 663 F.3d at 1314, 1320–21. Title VII would have protected any biological male under those facts, not because of status, but because of behavior.

The dissent's revision of the doctrine of gender nonconformity from a behavior-based inquiry into a status-based one does more than misread precedent; it also does violence to the relationship between the doctrine and the enumerated classes of Title VII. The dissent would have us hold that "discrimination because an employee is gay violates Title VII[]" automatically under the doctrine. Dissenting Op. at 36. But *Price Waterhouse* is clear that gender nonconformity does not "inevitably" lead to protection.

490 U.S. at 251. The doctrine of gender nonconformity is not an independent vehicle for relief; it is instead a proxy a plaintiff uses to help support her argument that an employer discriminated on the basis of the enumerated sex category by holding males and females to different standards of behavior.

Because a claim of gender nonconformity is a behavior-based claim, not a status-based claim, a plaintiff still "must show that the employer actually relied on her gender in making its decision." *Id.* That is, the employer must additionally establish that discrimination occurred on the basis of an enumerated class in Title VII. Remarks based on gender nonconformity are only "*evidence* that gender played a part" in the employer's decision and are not always determinative. *Id.* For example, under Title VII, an employee could fire a male who wore a dress to work—even if that violated the employer's gender stereotypes—if the reason for the firing was that all employees were required to wear a uniform that included pants. *See id.* at 252. The doctrine of gender nonconformity is, and always has been, behavior based. Status-based protections must stem from a separate doctrine or directly from the text of Title VII. The dissent's contrary view would undermine the evidentiary approach established by *Price Waterhouse* and the relationship of that doctrine to the text of Title VII.

The willingness to accept that *Price Waterhouse* and *Glenn* deal only with behaviors that deviate from gender stereotypes does not put one "at war with *Glenn*." Dissenting Op. at 37. Instead, it acknowledges that the doctrine of gender nonconformity is not and

cannot be an independent vehicle for relief because the only status-based classes that provide relief are those enumerated within Title VII. We review claims of gender nonconformity the same way in all appeals regardless of a plaintiff's sexual orientation. Any correlation that might exist between a particular sexual orientation and deviation from a particular gender stereotype does not overcome this settled rule.

Because Congress has not made sexual orientation a protected class, the appropriate venue for pressing the argument raised by the Commission and the dissent is before Congress, not this Court. And for decades, members of Congress have introduced bills for that purpose. *See, e.g.*, Equality Act, H.R. 3185, 114th Cong. (2015); Employment Non-Discrimination Act, S. 815, 113th Cong. (2013), S. 811, 112th Cong. (2011), S. 1584, 111th Cong. (2009), H.R. 3685, 110th Cong. (2007), H.R. 3285, 108th Cong. (2003), S. 1284, 107th Cong. (2002), H.R. 2355, 106th Cong. (1999), H.R. 1858, 105th Cong. (1997), S. 2056, 104th Cong. (1996), H.R. 4636, 103d Cong. (1994); Civil Rights Act, H.R. 431, 103d Cong. (1993); Civil Rights Amendments Act, H.R. 423, 103d Cong. (1993), S. 574, 102d Cong. (1991); S. 430, 98th. Cong. (1983); S. 1708, 97th Cong. (1981); S. 2081, 96th Cong. (1979). Contrary to the dissent's assertions, Dissenting Op. at 52, we cite this pattern of legislation not because it does or can suggest legislative intent but because it illustrates that Congress is the appropriate branch in which to raise the arguments raised by the dissent. The dissent's disagreement boils down to incredulity that "[i]t cannot possibly be the case that" the combination of the text of Title VII and *Price Waterhouse* leave some individuals

unprotected from discrimination. Dissenting Op. at 42. But as a Court, "[o]ur province is to decide what the law is, not to declare what it should be. . . . If the law is wrong, it ought to be changed; but the power for that is not with us." *Minor v. Happersett*, 88 U.S. 162, 178 (1874).

ROSENBAUM, Circuit Judge, concurring in part and dissenting in part:

A woman should be a "woman." She should wear dresses, be subservient to men, and be sexually attracted to only men. If she doesn't conform to this view of what a woman should be, an employer has every right to fire her.

That was the law in 1963—before Congress enacted Title VII of the Civil Rights Act of 1964. But that is not the law now. And the rule that Title VII precludes discrimination on the basis of every stereotype of what a woman supposedly should be—including each of those stated above—has existed since the Supreme Court issued *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), *superseded in part by* The Civil Rights Act of 1991, Tit. I, § 107(a), 105 Stat. 1075 (codified at 42 U.S.C. § 2000e–2(m)), 28 years ago.

Yet even today the panel ignores this clear mandate. To justify its position, the panel invokes 38-year-old precedent—issued ten years before *Price Waterhouse* necessarily abrogated it—and calls it binding precedent that ties our hands. I respectfully disagree.

Plain and simple, when a woman alleges, as Evans has, that she has been discriminated against because she is a lesbian, she necessarily alleges that she has been discriminated against because she failed to conform to the employer's image of what women should be—specifically, that women should be sexually attracted to men only. And it is utter fiction to suggest that she was not discriminated against for failing to

comport with her employer's stereotyped view of women. That is discrimination "because of . . . sex," 42 U.S.C. § 2000e-2(a)(1), and it clearly violates Title VII under *Price Waterhouse*.

So I dissent from Part IV of the panel's opinion. On remand, Evans should be allowed to amend her complaint to state such a claim.

I.

In 1989 *Price Waterhouse* rocked the world of Title VII litigation. Before *Price Waterhouse*, the Supreme Court had recognized only one type of discrimination rooted in stereotyping that Title VII prohibits: discrimination based on the employer's assumption that, merely by virtue of membership in a protected group, the plaintiff possesses an attribute or will act against the employer's desire, in conformity with a supposed stereotypical characteristic of the group.

So, for example, in the pre-*Price Waterhouse* days, the Supreme Court held that the employers' practices in *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971), and *Los Angeles Department of Water & Power v. Manhart*, 435 U.S. 702 (1978), violated Title VII.[6] In *Phillips*, the employer hired men with young children but not women with young children, based on the employer's gender-based stereotype that women with young children—unlike men with young children—would be incapable of balancing their "family obligations" with their work obligations. *See*

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[6] In *Phillips*, the Court concluded that the policy violated Title VII to the extent that it did not fit the exception for bona fide occupational qualifications.

400 U.S. at 544. Similarly, in *Manhart*, the employer had a policy that required women to contribute a greater percentage of their salary to a pension fund than men had to, based on the statistic that, as a general matter, women lived longer than men. *See* 435 U.S. at 705.

In these cases, the employer violated Title VII by ascribing certain characteristics to individual women—without considering whether any individual woman actually possessed the characteristics—based on the employer's stereotyping of women as a group. So the employer discriminated because it *assumed* that all members of the protected group *would conform to* an undesired characteristic of the employer's stereotyped perception of the group. At least one commentator has referred to this view of Title VII as prohibiting "ascriptive" stereotyping. Zachary R. Herz, *Price's Progress: Sex Stereotyping and Its Potential for Antidiscrimination Law*, 124 Yale L.J. 396, 405 (2014).

But *Price Waterhouse* substantially broadened the scope of actionable discriminatory stereotyping under Title VII. In that case, the Supreme Court for the first time recognized that discrimination because of an individual plaintiff's *failure to conform* to the discriminator's desired and stereotyped perception of how members of the individual's protected group should be or act—essentially the mirror image of ascriptive stereotyping—violated Title VII. This kind of stereotyping has been called "prescriptive" stereotyping, presumably because discrimination occurs on the basis that an employee does not satisfy an employer's stereotyped prescription of what the

employee of that protected group should be or how the employee should act. Herz, *supra*, at 406-07.

To understand why *Price Waterhouse* was so revolutionary, we need to consider the facts of that case. The accounting firm Price Waterhouse denied partnership to Ann Hopkins, a female senior manager, because, in the eyes of her employer, she had qualities that defied stereotypes of how women should look and act. Among other criticisms, Price Waterhouse employees described Hopkins as "abrasive[,]" "brusque[,]" and "macho"; they also complained that she "overcompensated for being a woman" and that she should have "walk[ed] more femininely, talk[ed] more femininely, dress[ed] more femininely, w[orn] make-up, ha[d] her hair styled, and w[orn] jewelry." *Price Waterhouse*, 490 U.S. at 234-35 (alterations added).

Hopkins's claim could not have qualified for relief under the ascriptive-stereotyping theory that prevailed before *Price Waterhouse* was decided: Price Waterhouse had not declined to make Hopkins a partner because it assumed that Hopkins would act in conformance with a stereotyped "feminine" manner. Just the opposite: Price Waterhouse had passed over Hopkins for partner because it *insisted* that she should act in a stereotyped "feminine" manner, and she did not.

Despite the fact that Price Waterhouse had not ascriptively stereotyped Hopkins, the Supreme Court found that Price Waterhouse's actions violated Title VII. Describing Price Waterhouse's employees' comments as "show[ing] sex stereotyping at work," the Supreme Court held that Title VII prohibited an

employer from "evaluat[ing] employees by assuming or insisting that they matched the stereotype associated with their group." *Id.* at 251. The second part of this statement—"or insisting that [employees] matched the stereotype associated with their group"—opened a whole new avenue for Title VII claims by substantially expanding Title VII's previously understood reach of precluding discrimination based on only the first half of the statement—"assuming . . . that [employees] matched the stereotype associated with their group."

Applying this broader understanding, the Supreme Court concluded, "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." *Id.* at 250 (emphasis added). Because Price Waterhouse had allegedly discriminated against Hopkins for being, in its view, as a woman "must not be," the Court determined that Price Waterhouse's conduct fell within the bounds of Title VII.

Nor did *Price Waterhouse* leave any doubt about its scope. In its holding, the Court emphasized that, "[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the *entire spectrum* of disparate treatment of men and women resulting from sex stereotypes." *Id.* at 251 (quoting *Manhart*, 435 U.S. at 707 n.13 (quoting *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971))) (emphasis added). The Supreme Court's message was plain: regardless of the kind of prescriptive stereotype of women that a particular woman failed to satisfy, no employer—and no court—could hold that against her.

We in the Eleventh Circuit heard the Supreme Court's message loud and clear. In *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011), the employer fired Glenn, a transgender woman, because the employer learned that Glenn intended to proceed with gender transition. *Id.* at 1313, 1320-21. In fact, the employer testified that he terminated Glenn's employment "based on 'the sheer fact of the transition.'" *Id.* at 1320-21.

We relied on *Price Waterhouse*'s reasoning to find that the employer's testimony "provide[d] ample direct evidence . . . that [the employer] acted on the basis of Glenn's gender non-conformity." *Id.* at 1321. For this reason, we concluded that the employer had violated Title VII.[7] *Id.* at 1321. So we applied prescriptive-stereotyping theory to hold that discrimination against a transgender employee merely because the employee fails to conform to the employer's view of what a member of the employee's birth-assigned sex should be violates Title VII.

We reached this conclusion despite noting that before *Price Waterhouse*, "several courts" had determined that Title VII offered no relief to transgender victims of sex discrimination. *Id.* at 1318 n.5. These pre-*Price Waterhouse* opinions had reasoned that discrimination against a transgender or

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[7] Although *Glenn* was decided under the Equal Protection Clause, Title VII's standard is easier to satisfy than the Equal Protection Clause's standard. *See Glenn*, 663 F.3d at 1321. In *Glenn*, we also recognized the cross-applicability of principles between Title VII and Equal Protection cases by relying extensively on the rationale of Title VII decisions, particularly *Price Waterhouse*.

transsexual person occurred "not because she is female, but because she is transsexual." *Id.* (quoting *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1087 (7th Cir. 1984)). That is the same position that the panel and Judge William Pryor's concurrence take today: by their reasoning, discrimination against a lesbian happens not because she is a woman, but because she is a lesbian, as though being sexually attracted to men only is somehow divorced from a prescriptive stereotype of women.

But that is precisely the reasoning that we—including Judge Pryor—rejected in *Glenn*. The pre-*Price Waterhouse* opinions that we concluded *Price Waterhouse* had abrogated applied only ascriptive-stereotyping theory. They found that the employer had not discriminated against the transsexual or transgender employee in violation of Title VII because the employer had not assumed that the employee would conform to what the employer viewed as an undesired characteristic of the employee's birth-assigned gender.

These courts did not consider prescriptive-stereotyping theory, so they failed to ask whether the employer discriminated against the transgender or transsexual employee because the employee failed to meet the employer's stereotype of what a person of the employee's birth-assigned gender should be. As a result, these courts did not inquire into Title VII's full scope. For this reason, we wholly dismissed the holdings of these other courts' opinions, concluding in the strongest of terms that *Price Waterhouse* had "eviscerated" them. *Id.* (quoting *Smith v. City of Salem*,

378 F.3d 566, 573 (6th Cir. 2004)) (quotation marks omitted).

Price Waterhouse and *Glenn* likewise demand the conclusion that discrimination because an employee is gay violates Title VII's proscription on discrimination "because of . . . sex." By definition, a gay employee is sexually attracted to members of her own sex. *See Gay*, The American Heritage Dictionary (5th ed. 2011) ("Of, relating to, or having a sexual orientation to persons of the same sex."). So when an employer discriminates against an employee solely because she is a lesbian, the employer acts against the employee only because she is sexually attracted to women, instead of being attracted to only men, like the employer prescriptively believes women should be. This is no different than when an employer discriminates against an employee because she is an aggressive or "macho" woman or solely because she is a transgender woman. In all cases, the employer discriminates against the employee because she does not conform to the employer's prescriptive stereotype of what a person of that birth-assigned gender should be.[8] And so the

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[8] I do not mean to suggest any judgments about the reasons for why an employer might hold any given prescriptive stereotype. The reasons for it are irrelevant to whether prescriptive stereotyping actually occurs under Title VII. All that matters is that the employer discriminates against the employee because the woman employee's sexual attraction to women fails to comport with the employer's view of what a woman should be. *Cf. Manhart*, 435 U.S. at 707 (finding that discrimination based on even "unquestionably true" ascriptive stereotypes constitutes discrimination against an "individual" "because of . . . sex" and therefore violates Title VII).

employer discriminates against the employee "because of . . . sex."[9] 42 U.S.C. § 2000e-2(a)(1).

II.

Despite the fact that my colleague Judge William Pryor joined in all aspects of the *Glenn* opinion—including its discussion of why *Price Waterhouse* abrogated other courts' conclusions that Title VII does not protect transgender people from discrimination—today his concurrence takes a position at war with *Glenn*: it asserts that an employer who discriminates against a woman employee solely because she is a lesbian and therefore fails to conform to the employer's prescriptive stereotype of what a woman should be does not violate Title VII's ban on sex-based prescriptive stereotyping.

To justify its contradictory conclusion, Judge Pryor's concurrence attempts to distinguish *Glenn* by ignoring its facts. To be sure, as the concurrence emphasizes, *see* W. Pryor Op. at 24-25, before Glenn's employer ended her employment, he disciplined her for dressing as a woman when she worked for him.

But the concurrence conveniently overlooks the fact that the employer did not fire Glenn for that. Rather, Glenn's employer fired Glenn *before* her transition "because 'Glenn's *intended* gender transition was inappropriate . . . .'" *Glenn*, 663 F.3d at 1314

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[9] This type of discrimination is discrimination "because of . . . sex" for another reason as well. When an employer discriminates against a woman because she is sexually attracted to women but does not discriminate against a man because he is sexually attracted to women, the employer treats women and men differently "because of . . . sex."

(emphasis added). He readily admitted that he terminated her "based on 'the *sheer fact* of the transition'" that she had not yet undertaken but had expressed an intent to undertake.[10] *Glenn*, 663 F.3d at 1314, 1320-21 (emphasis). In other words, he fired her solely for being transsexual—that is, for failing to conform to her employer's view of what a birth-assigned male should be. We said that was enough for Glenn to state a Title VII claim for discrimination based on her *termination*. *Id.* at 1321.

And discrimination against an employee solely because she fails to conform to the employer's view that a woman should be sexually attracted to men only is no different than discrimination against a transsexual because she fails to conform to the employer's view that a birth-assigned male should

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[10] Judge Pryor's concurrence tries valiantly to escape this inconvenient fact, arguing that the employer's statement that he "fired Glenn because he considered it 'inappropriate' for her to appear at work dressed as a woman and that he found it 'unsettling' and 'unnatural' that Glenn would appear wearing women's clothing," *Glenn*, 663 F.3d at 1320, demonstrates that Glenn was not fired "solely for being transsexual." W. Pryor Op. at 24. This argument is wrong on three counts. First, the opinion in *Glenn* reflects that Glenn actually wore women's clothing to work only once (on Halloween) *before* she was fired, and on that occasion, she was asked to leave—she was not terminated—so plainly, Glenn was not fired for actually having worn women's clothing to work. Second, it is clear that the employer's statement on which the concurrence relies expressed concern only that Glenn would appear at work as a woman *after* her transition, but that never occurred since the employer fired her before her transition. Finally, the employer candidly admitted that he fired Glenn "based on 'the *sheer* fact of the transition.'" *Glenn*, 663 F.3d at 1320-21 (emphasis added).

have male anatomy. In both cases, the employer discriminates because the employee does not comport with the employer's vision of what a member of that particular gender should be. It's just as simple as that.

To avoid this obvious conclusion, the concurrence recharacterizes the discrimination that a lesbian experiences when her employer discriminates against her for failure to conform to the employer's view that women should not be sexually attracted to women; the concurrence says that this is discrimination based on sexual orientation, and sexual orientation is not a protected class under Title VII. *See* Pryor Op. at 21, 27. But the fact that such discrimination may be alternatively characterized does not make the employer's discrimination any less based on the employee's failure to conform to the employer's prescriptive gender stereotype. Nor does it make the discrimination any less actionable under *Price Waterhouse*'s gender nonconformity theory.

If it did, Glenn's termination claim would have been dismissed. But instead, we correctly found that Title VII did not allow Glenn's employer to fire her for failing to conform to the employer's prescriptive stereotype of what a birth-assigned male should be because doing so constituted discrimination "because of . . . sex." Our conclusion did not change the fact that Glenn is transsexual, and Title VII does not protect transsexuals as a class. Rather, our conclusion was in spite of those facts. *See Glenn*, 663 F.3d at 1318 n.5 (recognizing that pre-*Price Waterhouse* decisions had concluded that a claim based on discrimination against a transsexual woman for being transsexual was not actionable under Title VII because it stated a claim of

discrimination "not because she is female, but because she is transsexual," and transsexuals are not a protected class under Title VII) (citations and quotation marks omitted).

As the concurrence itself notes, "[U]nder Title VII, we ask only whether the individual experienced discrimination for deviating from a gender stereotype." Pryor Op. at 21. When the answer is "yes," the plaintiff has stated a claim, and the fact that Title VII does not protect homosexuals as a class is entirely irrelevant. The concurrence offers no answer to this hole in its reasoning.

Instead, it changes the subject, pointing to an artificial line between discrimination because an employee has not behaved in a way that the employer thinks a person of that gender should, on the one hand, and discrimination because an employee is not the way that the employer thinks a person of that gender should be, on the other. Pryor Op. at 23. As a matter of logic, no basis exists for this arbitrary line. Even a circuit that has declined to apply gender-stereotyping to a plaintiff's claim that he was discriminated against because he is gay has essentially admitted as much: in *Vickers v. Fairfield Medical Center*, 453 F.3d 757, 762 (6th Cir. 2006), the Sixth Circuit expressed concern that recognizing the Title VII claim of a man who asserted that he was harassed and discriminated against because his co-workers perceived him to be gay would allow "any discrimination based on sexual orientation [to] be actionable under a [prescriptive] sex stereotyping theory . . . , *as all homosexuals, by definition, fail to conform to traditional gender norms*

in their sexual practices." 453 F.3d at 764 (emphasis added).

If an employer discriminates against a lesbian solely because she fails to conform to the employer's view that women should be sexually attracted to only men, the employer clearly discriminates against that woman for failure to conform to gender stereotypes as much as if the employer discriminates against a woman because she engages in the behavior of dating women.

But in the concurrence's world, only the person who acts on her feelings enjoys the protection of Title VII. This makes no sense from a practical, textual, or doctrinal point of view.

As a practical matter, this construction protects women who act or dress in ways that the employer perceives as gay, because that behavior fails to conform to the employer's view of how a woman should act. But it allows employers to freely fire women that the employer perceives to be lesbians—as long as the employer is smart enough to say only that it fired the employee because it thought that the employee was a lesbian, without identifying the basis for the employer's conclusion that she was a lesbian. It cannot possibly be the case that a lesbian who is private about her sexuality—or even a heterosexual woman who is mistakenly perceived by her employer to be a lesbian—can be discriminated against by the employer because she does not comport with the employer's view of what

a woman should be, while the outwardly lesbian plaintiff enjoys Title VII protection.[11]

The concurrence's distinction between behavior and being also enjoys no textual support. Title VII prohibits discrimination "because of . . . sex." 42 U.S.C. § 2000e-2(a)(1). It doesn't distinguish between discrimination "because of . . . sex," based on behaving "like a woman," and discrimination "because of . . . sex" based on being a woman. To take an analogous example, by prohibiting discrimination "because of . . . religion," Title VII does not allow an employer to

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[11] The concurrence takes a phrase of this sentence out of context and uses it to mischaracterize this dissent as amounting to nothing more than a disagreement with Congress since Congress did not specifically intend to protect lesbians from discrimination on the basis that they are sexually attracted to women. *See* W. Pryor Op. at 27. But, in reality, the concurrence is the one with the disagreement—only it's a disagreement with the text of Title VII, Supreme Court precedent, our precedent, and even logic. True, my conclusion—that discrimination against a lesbian because she fails to comport with the employer's view of what a woman should be violates Title VII's ban on discrimination "because of . . . sex"—likely is not what Congress had in mind when it enacted Title VII. But "male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII," *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998). Yet the Supreme Court found that irrelevant to whether Title VII's text prohibited it. So the mere fact that we may believe that Congress may not have specifically intended the meaning of what a statute actually says is not a basis for failing to apply the textual language. This dissent relies on the text of Title VII, as well as Supreme Court precedent, this Court's opinion in *Glenn*, and logic, not on some "disagreement" with Congress. Of course, the concurrence is free to ignore my analysis rather than respond to it, but that doesn't make it go away.

discriminate against a non-practicing Catholic for simply being a Catholic any more than it allows an employer to discriminate against a Catholic for coming to work on Ash Wednesday with a cross of ashes on her forehead. The Title VII text that prohibits discrimination against a Catholic simply for being a Catholic is exactly the same as the Title VII text that prohibits discrimination against women, except that it refers to "religion" instead of "sex." If that language does not permit an employer to discriminate against a Catholic for being Catholic, it does not allow an employer to discriminate against a woman for being a woman, regardless of whether she behaves the way her employer thinks a woman should.

The Supreme Court has likewise not found a distinction between behavior and being in applying Title VII's proscription of discrimination "because of . . . sex." In the ascriptive-stereotyping case *Manhart*, which involved the policy charging women more than men for pension benefits, living longer was a matter of being rather than behaving. But the Supreme Court found that the policy nonetheless violated Title VII, despite the fact that the plaintiffs were not discriminated against for their behavior. And that's because Title VII's broad language "strike[s] at the *entire spectrum* of disparate treatment of men and women resulting from sex stereotypes." *Price Waterhouse*, 490 U.S. at 251 (emphasis added) (citations and quotation marks omitted).

Finally, as a doctrinal matter, neither the concurrence nor any other source, to my knowledge, has satisfactorily explained how a woman who behaves in a manner that is inconsistent with the employer's

vision of how a woman should act is discriminated against any more on the basis of her gender than a woman who is discriminated against because, by being sexually attracted to women, she fails to conform to the employer's view of what a woman should be. The concurrence's distinction between "behavior" and "being" is a construct that is both illusory in its defiance of logic and artificial in its lack of a legal basis.

Perhaps because the dichotomy that the concurrence advocates cannot find logical support, the concurrence constrictively reads *Price Waterhouse* and reinvents *Glenn* to support its theory. *See* Pryor Op. at 23-26. While the concurrence correctly notes that Price Waterhouse did not promote Hopkins because she acted in a manner that did not conform to its view of women, nothing in *Price Waterhouse* purports to limit its reasoning to only those cases involving discrimination on the basis of behavior (as opposed to interests or attractions) that does not comport with the employer's prescriptive gender stereotype.[12] True, Price

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[12] The concurrence relies on Zachary Herz's legal commentary for the proposition that "current doctrine does not protect on the basis of status alone." Pryor Op. at 24. While Herz does note that "the current regime . . . protects stereotypically 'gay' conduct without protecting LGBT status," as the concurrence notes, *id.* at 5 (quoting Herz, *supra*, at 432), Herz was suggesting, among other things, that *Price Waterhouse* supports a broader reading than some courts at that time were giving it. *See* Herz, *supra*, *e.g.*, at 399 ("a broader application of *Price Waterhouse*'s view of discrimination has the potential to resolve, or at least to ameliorate, a serious problem in American antidiscrimination law—the inability of traditional Title VII approaches to address the realities of modern workplace bias"). Since Herz's note was

Waterhouse discriminated against Hopkins based on characteristics Hopkins demonstrated in the workplace that were inconsistent with Price Waterhouse's prescriptive stereotype of women. But that is simply how the facts in *Price Waterhouse* arose. Nothing in *Price Waterhouse*'s reasoning or construction of Title VII justifies limiting *Price Waterhouse*'s holding to cases involving discrimination against women for their behavior, as opposed to discrimination against women for being women or for their interests and attractions. Nor, for the reasons I have discussed, does it make sense to do so. The concurrence likewise points to nothing in *Price Waterhouse* that so limits its reasoning.

As for *Glenn*, I have already explained how the concurrence tries to use this case as a do-over of that one. But *Glenn* says what it says—namely, that discrimination solely because a birth-assigned male failed to conform to the employer's prescriptive stereotype for what men should be by being transsexual constitutes gender-based discrimination in violation of Title VII. Whether the concurrence likes it or not—and whether the concurrence recognizes it or not—we are bound by *Glenn*, and *Glenn* cannot be reconciled with our holding today.

So the concurrence tries a different tack. It argues essentially that it's for lesbian employees' own good that we should not recognize that Title VII prohibits

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published, other cases have recognized the extent of *Price Waterhouse*'s reasoning. *See*, *e.g.*, *Winstead v. Lafayette Cty. Bd. of Cty. Comm'rs*, ___ F. Supp. 3d ___, No. 1:16CV00054-MWGRJ, 2016 WL 3440601, at *5-9 (N.D. Fla. June 20, 2016).

discrimination against lesbians on the basis that they fail to conform to the employer's view of what a woman should be. *See* W. Pryor Op. at 20-21. In the concurrence's view, we shouldn't apply *Price Waterhouse*'s prescriptive-stereotyping theory to preclude discrimination against a lesbian for failure to comply with the employer's ideal view of women because doing so somehow "rel[ies] on false stereotypes of gay individuals." *Id.*

Judge Pryor's concurrence then embarks on an irrelevant journey through some of the different ways in which a gay person may express—or suppress—her sexual attraction. *See id.* at 3. It asserts, for example, that "[s]ome gay individuals adopt the gay 'social identity' but experience a variety of sexual desires. . . . [S]ome gay individuals may choose not to marry or date at all or may choose a celibate lifestyle. And other gay individuals choose to enter mixed-orientation marriages." *Id.* (citations omitted).

The concurrence's argument seems to fundamentally misunderstand what it means to be a lesbian. Lesbians are women who are sexually attracted to women. That's not a stereotype; it's a definition.

And if an employer discriminates against a woman for the reason that the employer believes the employee is sexually attracted to women, how the employee expresses—or suppresses—her feelings of sexual attraction is irrelevant to the fact that the employer has discriminated against the woman for failing to conform to the employer's stereotype that women

should be sexually attracted to only men.[13] That discrimination violates Title VII's proscription against discrimination "because of . . . sex," under *Price Waterhouse* and *Glenn*, just as much as if the discrimination were for the failure of a woman to be demure or a birth-assigned male to refrain from identifying as a woman.[14]

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[13] I nevertheless note that even under Judge Pryor's limited view, discrimination against an employee for "adopt[ing]" what Judge Pryor's concurrence describes as the "gay 'social identity,'" for marrying or dating someone of the same sex, for choosing not to marry or date at all, or for entering into so-called mixed-orientation marriages, is still discrimination in its own right because the employer holds a prescriptive stereotype that members of a given sex should not act in these ways. Judge Pryor's concurrence may dress up the prescriptive stereotype that the employer applies however he wishes, but all of this discrimination is discrimination because of the employee's failure to comport with the employer's idealized version of what a member of a given sex should be. So all of it violates Title VII under *Price Waterhouse* and *Glenn.*

[14] The concurrence seems to suggest that I am proposing that merely alleging that an employer has discriminated because an employee is a lesbian somehow suffices to prove the claim. *See* W. Pryor Op. at 25-26 ("Because a claim of gender nonconformity is a behavior-based claim, not a status-based claim, a plaintiff still 'must show that the employer actually relied on her gender in making its decision.'"). To be clear, that is not what I am saying. Of course, a plaintiff who alleges that her employer discriminated against her because she failed to conform to the employer's view that women should be sexually attracted to only men must prove that, in fact, that was a motivating factor in why her employer took adverse employment action against her. She can do so through either direct or circumstantial evidence. But at the pleading stage, all she must do is allege facts that, taken as true, establish that her employer discriminated against her because she

The panel opinion's reasons for rejecting this conclusion fare no better than Judge Pryor's concurrence's. The panel opinion makes two arguments in defense of its position. First, the panel opinion asserts that, under our prior-panel-precedent rule, we have no choice but to hold that discrimination against a woman for being a lesbian and therefore failing to conform to her employer's stereotype of what a woman should be does not violate Title VII. And second, the panel opinion contends that its holding is correct because "other circuits have held that sexual orientation discrimination is not actionable under Title VII." Maj. Op. at 15. Neither argument can withstand scrutiny.

Beginning with the panel opinion's contention that our precedent dictates our result today, our prior-panel-precedent rule states that we must follow a prior panel's decision, even if we disagree with it—*unless* a later en banc or Supreme Court opinion overrules or undermines the prior precedent to the point of abrogation. *Chambers v. Thompson*, 150 F.3d 1324, 1326 (11th Cir. 1998). We have said that where a Supreme Court opinion "directly conflict[s] with" a prior precedent, the prior panel precedent has been abrogated. *United States v. Kaley*, 579 F.3d 1246, 1255 (11th Cir. 2009). Contrary to the panel opinion's position in Evans's case, the exception governs here.

The panel opinion hangs its hat on *Blum v. Gulf Oil Corp.*, 597 F.2d 936 (5th Cir. 1979), a case our predecessor court decided 38 years ago—ten years

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did not comport with the employer's vision of what a woman should be.

before the Supreme Court recognized prescriptive-stereotyping theory in *Price Waterhouse*. In *Blum*, we said, "Discharge for homosexuality is not prohibited by Title VII . . . ." *Id.* at 938. This ruling allows an employer to discriminate against a woman solely because she is a lesbian and does not fulfill the employer's version of what a woman should be.

But that result "directly conflict[s] with" *Price Waterhouse*'s holding that Title VII prohibits an employer from discriminating against its employee on the basis that she fails to conform to the employer's view of what a woman should be. Indeed, *Price Waterhouse* "eviscerate[s]" *Blum*'s holding no less than we found it did other courts' pre-*Price Waterhouse* holdings that employers did not violate Title VII when they discriminated against their transgender employees simply because the employees failed to conform to the employers' view of what a member of the employee's birth-assigned sex should be. *See Glenn*, 663 F.3d at 1318 n.5 (quoting *Smith*, 378 F.3d at 573) (quotation marks omitted).

Simply put, *Price Waterhouse* requires us to apply the rule that "[a]n individual cannot be punished because of his or her perceived gender-nonconformity." *See id.* at 1319. Since continued application of *Blum* would allow a woman to be punished precisely because of her perceived gender nonconformity—in this case, sexual attraction to other women—*Price Waterhouse* undermines these cases to the point of abrogation. *See Kaley*, 579 F.3d at 1255; *Chambers*, 150 F.3d at 1326.

And even if it didn't—a position that is not supported by the reality of what *Blum*'s holding does—

Blum's failure to account for prescriptive-stereotyping theory in its "analysis"[15] demands reexamination after *Price Waterhouse*. For this reason, since the panel concludes that *Blum* continues to bind us even after *Price Waterhouse*, we should rehear this case en banc on this issue. *Cf., e.g.*, *Flanigan's Enters., Inc. of Ga. v. City of Sandy Springs, Ga.*, 831 F.3d 1342, 1348 (11th Cir. 2016) (encouraging appellants to "petition the court to reconsider our decision en banc" where prior precedent appeared to conflict with recent Supreme Court law).

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[15] In *Blum*, we actually engaged in no discussion or reasoning related to our statement, "Discharge for homosexuality is not prohibited by Title VII . . . ." 597 F.2d at 938. Rather, we simply cited *Smith v. Liberty Mutual Insurance Co.*, 569 F.2d 325, 327 (5th Cir. 1978). In *Smith*, we characterized the plaintiff as arguing that Title VII precludes discrimination "based on affectional or sexual preference." *Id.* at 326. Finding no cause of action for the plaintiff under Title VII, we explained our holding in ascriptive-stereotyping-theory terms: "Here the claim is not that [the plaintiff] was discriminated against because he was a male, but because as a male, he was thought to have those attributes more generally characteristic of females and epitomized in the descriptive 'effeminate.'" *Id.* at 327. In other words, we found that Title VII could not assist the plaintiff because his employer did not assume that, since he was a man, he would comport with an undesired stereotype of men. And although the plaintiff presented a prescriptive-stereotyping theory—that is, the theory that his employer discriminated against him under Title VII by insisting that the plaintiff comply with its view of what a man should be—we rejected it. This is perhaps understandable, since the Supreme Court did not recognize the theory for another eleven years after we issued *Smith*. But now, 39 years later and 28 years after the Supreme Court issued *Price Waterhouse*, our continuing refusal to recognize the significance of *Price Waterhouse* is not.

Turning to the panel opinion's second basis for its holding, the opinion wrongly finds comfort in other circuits' rulings on this issue. To be sure, we should carefully consider our sister circuits' opinions and the bases for them, for our colleagues are a thoughtful and learned bunch. But to put it colloquially, the mere fact that our friends may jump off a bridge does not, in and of itself, make it a good idea for us to do so.

Our sister circuits' decisions are not correct. Not one of the justifications they offer for concluding that Title VII does not protect a man or woman from discrimination because he is gay or she is a lesbian holds up to examination.

I begin by noting that several circuits have opined that discrimination against a man or woman because he or she is gay does not fall into any of the following categories of discrimination: discrimination based on sexually charged interactions, on ascriptive stereotyping, or on differences in treatment between men and women. But even if that is accurate,[16] discrimination doesn't have to comport with one of these theories in order to qualify under Title VII as discrimination "because of . . . sex."

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[16] As I have noted, *see supra* at n.4, discrimination against a woman because she is sexually attracted to women can qualify as well as discrimination based on differences in treatment between men and women. When an employer discriminates against a woman because she is sexually attracted to women but does not discriminate against a man because he is sexually attracted to women, the employer treats women and men differently "because of . . . sex."

Under *Price Waterhouse*, when an employer discriminates because of an employee's failure to conform to the employer's view of what a member of that sex should be, that employer has discriminated, in violation of Title VII, "because of . . . sex." *See Price Waterhouse*, 490 U.S. at 251. That is all that is required to establish a claim for discrimination under Title VII.

Nor does it matter to the viability of an employee's claim that, as some courts have phrased it, "[s]exual orientation is not a classification that is protected under Title VII." *See*, *e.g.*, *Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc.*, 224 F.3d 701, 707 (7th Cir. 2000); *see also Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999); *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000); *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 261 (3d Cir. 2001); *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 143 (4th Cir. 1996); *Vickers*, 453 F.3d at 762. The concurrence relies on this rationale as well; as I have already explained, that reliance is grossly misplaced.

Some of our sister circuits, like the concurrence here, have also noted that "Congress has repeatedly rejected legislation that would have extended Title VII to cover sexual orientation." *Bibby*, 260 F.3d at 261. But the Supreme Court has emphasized that "it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed. Title VII prohibits 'discriminat[ion] . . . because of . . . sex' in the 'terms' or 'conditions' of employment." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79-80 (1998). This necessarily "extend[s] to [discrimination 'because of . . . sex'] of any

kind that meets the statutory requirements." *Id.* at 80. Indeed, the Court in *Oncale* made clear that we must apply Title VII's text alone, without regard to what we may divine Congress's concerns to be. And *Price Waterhouse* establishes that discrimination based on an employee's failure to comport with the employer's view of what a member of the employee's sex should be is discrimination "because of . . . sex" that meets Title VII's statutory requirements.

It likewise makes no difference to the viability of a Title VII claim whether the employee has "readily demonstra[ted]" in the workplace the characteristic on which the discrimination is based. *Vickers*, 453 F.3d at 763. This argument is a variation on Judge Pryor's concurrence's contention that Title VII and *Price Waterhouse* somehow prohibit discrimination based on behavior only and not on being, so it fails for the same reasons that the concurrence does.

Finally, the panel opinion cites *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061 (9th Cir. 2002), for the proposition that "an employee's sexual orientation is irrelevant for purposes of Title VII." Maj. Op. at 16 (quotation marks omitted). In the context of *Rene*'s facts, I agree that the plaintiff's sexual orientation was irrelevant—but only because the plaintiff alleged that he was discriminated against "because of . . . sex" under Title VII when he was subjected to "severe, pervasive, and unwelcome 'physical conduct of a sexual nature' in the workplace." *Rene*, 305 F.3d at 1063.

As I have noted, discrimination that occurs in the form of physical sexual conduct satisfies a category of discrimination "because of . . . sex" without

consideration of whether it also constitutes discrimination "because of . . . sex" under any other theories. But the mere fact that sexual orientation may be irrelevant when a plaintiff alleges discrimination "because of . . . sex" under Title VII based on an unwanted-sexual-conduct theory does not mean that it is irrelevant when a plaintiff alleges discrimination "because of . . . sex" based on a prescriptive-stereotyping theory.

I am not the first person to conclude that discrimination against an employee because of her sexual orientation is discrimination against an employee "because of . . . sex." In recent years in particular, numerous district courts, including two in our Circuit, have also reached this conclusion. *See, e.g.*, *Winstead v. Lafayette Cty. Bd. of Cty. Comm'rs*, ___ F. Supp. 3d ___, No. 1:16CV00054-MW-GRJ, 2016 WL 3440601, at *5-9 (N.D. Fla. June 20, 2016); *Isaacs v. Felder Servs., LLC*, 143 F. Supp. 3d 1190, 1193-94 (M.D. Ala. 2015); *Videckis v. Pepperdine Univ.*, 150 F. Supp. 3d 1151, 1159-61 (C.D. Cal. 2015); *Deneffe v. SkyWest, Inc.*, No. 14-cv-00348-MEH, 2015 WL 2265373, at *5-6 (D. Colo. May 11, 2015); *Terveer v. Billington*, 34 F. Supp. 3d 100, 116 (D.D.C. 2014); *Boutillier v. Hartford Pub. Schs.*, No. 3:13CV1303 WWE, 2014 WL 4794527, at *2 (D. Conn. Sept. 25, 2014); *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212, 1224 (D. Or. 2002); *see also Christiansen v. Omnicom Grp., Inc.*, 167 F. Supp. 3d 598, 618-22 (S.D.N.Y. 2016) (adhering to circuit precedent foreclosing a sexual-orientation claim under Title VII but explaining why that precedent rests on shaky ground).

And the U.S. Equal Employment Opportunity Commission has taken the same position as these district courts, both in a recent administrative decision, *see Baldwin v. Foxx*, EEOC Appeal No. 0120133080, 2015 WL 4397641 (July 15, 2015), and in this litigation in the capacity as an *amicus curiae*. It is time that we as a court recognized that Title VII prohibits discrimination based on an employee's sexual orientation since that is discrimination "because of . . . sex."

III.

Presidential-Medal-of-Freedom recipient Marlo Thomas has expressed the sentiment that "[i]n this land, every girl grows to be her own woman."[17] Title

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[17] STEPHEN J. LAWRENCE & BRUCE HART, *Free to Be . . . You and Me*, *on* FREE TO BE . . . YOU AND ME (Bell Records 1972); *see also President Obama Announces the Presidential Medal of Freedom Recipients*, The White House, https://obamawhitehouse.archives.gov/blog/2014/ 11/10/president-obama-announcespresidential-medal-freedom-recipients (last visited Feb. 22, 2017). Marlo Thomas and Friends created the album *Free to Be . . . You and Me*, a children's record with multiple songs, skits, stories, and poems, that has been praised for its "potent message of freedom, equality, and personal liberation." *Free to Be . . . You and Me at 40*, The Paley Center for Media, https://www.paleycenter.org/2014-free-to-be-you-and-me-at-40 (last visited Feb. 19, 2017). After the album went platinum, Thomas created a best-selling book and an award-winning television special of the same name. *Id.* Much of the album emphasizes the idea that a person should be what she wishes—not be forced to conform to another's view of her gender. Some of the album's more famous songs that focus on this notion include "Parents are People," "William's Doll," and "It's Alright to Cry." *Id.* In addition to Thomas, Alan Alda, Harry Belafonte, Mel Brooks, Rita Coolidge, Billy DeWolfe, Roberta Flack, Rosey Grier,

VII codifies the promise that when she does, she will not be discriminated against on the job, regardless of whether she conforms to what her employer thinks a woman should be. Because the panel does not read Title VII to fulfill that promise, I respectfully dissent.

Michael Jackson, Kris Kristofferson, The New Seekers (who performed the title track), Tom Smothers, The Voices of East Harlem, and Dionne Warwick appear on the album. *Free to Be You and Me*, Amazon, https://www.amazon.com/Free-Be-You-Marlo-Thomas/dp/B00005OKQT (last visited Feb. 20, 2017). The White House cited Thomas's work on *Free to Be . . . You and Me* in its announcement of her Presidential Medal of Freedom.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

JAMEKA K. EVANS, Plaintiff, v. GEORGIA REGIONAL HOSPITAL, *et al.*, Defendants.	)	Case No. CV415-103

After a careful, *de novo* review of the entire record, the Court concurs with the Magistrate Judge's Report and Recommendation, doc. 4, to which an objection has been filed. Doc. 9. In addition, the Court **GRANTS** the Lambda Legal Defense & Education Fund, Inc.'s motion for leave to file its *Amicus* brief, doc. 10, which is already in the record (doc. 11) and illuminates the conflicting legal currents in this realm.

To that end, the Court **APPOINTS** *pro hac vice* counsel Gregory R. Nevins to represent plaintiff on appeal.

ORDER ENTERED at Augusta, Georgia, this 29th day of October, 2015.

/s J. Randal Hall
Honorable J. Randal Hall
United States District Judge
Southern District of Georgia

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

JAMEKA K. EVANS, Plaintiff,	)	
v.	)	Case No. CV415-103
GEORGIA REGIONAL HOSPITAL, *et al.*, Defendants.	)	

REPORT AND RECOMMENDATION

Proceeding *pro se,* Jameka K. Evans filed this action against her ex-employer, the Georgia Regional Hospital, plus three individuals, for violating Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e, *et seq.*[1] Doc. 1 at 1. She moves for leave to file this case *in forma pauperis* ("IFP") and for appointment of counsel. Doc. 2. Finding her indigent, the Court grants her IFP motion (doc. 2) and addresses

[1] Title VII prohibits discrimination with respect to an employee's "compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a). It thus makes it unlawful for an employer:

> to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, *sex,* or national origin.

42 U.S.C. § 2000e-2(a)(1) (emphasis added).

her "counsel" motion below. Doc. 2. It will now screen her case under 28 U.S.C. § 1915(e)(2)(B)(ii), which requires a district court to dismiss an IFP complaint "at any time" it is determined to fail to state a claim for relief. *See Hamzah v. Woodmans Food Mkt., Inc.*, 2014 WL 1207428 at *1 (W.D. Wis. Mar. 24, 2014).

I. ANALYSIS

A. Substantive Claim

A complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). In other words, Evans' factual allegations must enable the Court "to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). She also must plead a Title VII prima facie case establishing that: (1) she is a member of a protected class; (2) she was subjected to an adverse employment action; (3) her employer treated similarly situated employees outside of her protected class more favorably than she was treated; and (4) the employment action was causally related to the protected status. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973).

Evans alleges that, during her 2012-2013 employment[2] with the hospital as a "security officer,"

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[2] Her Complaint asserts she worked there from "8/1/12 - 10/11/13." Doc. 1 at 3. No untimeliness finding (*i.e.*, that she took too long after any complained-of acts to file her EEOC complaint) is reflected in the EEOC's January 22, 2015, Right to Sue letter. Doc 1-1 at 9. *See Russell v. City of Mobile*, 2013 WL 1567372 at *4 (S.D. Ala. Apr. 12, 2013) ("A charge not made within 180 days of

she was "targeted [by her supervisor] for termination" because she was perceived as gay and, while she did not broadcast her sexuality, "it is evident that I identify with the male gender because I presented myself visually (male uniform, low male haircut, shoes, etc.)." Doc. 1 at 3; *see also* doc. 2 at 4. She claims that her supervisors harassed her because of her perceived homosexuality, and she was otherwise "punished because my status as a gay female did not conform to my department head's . . . gender stereotypes associated with women. This caused a great strain on me and created a hostile work environment. Chief [Charles] Moss also appointed/promoted a less qualified person[3] with no prior security experience as my direct supervisor." Doc. 1 at 4 (footnote added). Evans "left the job voluntarily." *Id.* at 3. She wants the named defendants to "be held liable [for discriminating against her] based on [her] sex as a gay female in violation of Title VII . . ." *Id.* at 5.

Evans is alleging discrimination on the basis of her homosexuality (gay female) and gender non-conformity (appearing "male").[4] "Although the Eleventh Circuit

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the alleged discriminatory action becomes time barred. 42 U.S.C. § 2000e5(e)(1).").

[3] She does not specify that person's gender or sexual orientation.

[4] While the Court construes *pro se* complaints liberally, it cannot raise theories of recovery for, or plug holes in, legal arguments raised by litigants. *Boles v. Riva*, 565 F. App'x 845, 846 (11th Cir. 2014) ("[E]ven in the case of *pro se* litigants this leniency does not give a court license to serve as *de facto* counsel for a party, or to rewrite an otherwise deficient pleading in order to sustain an action.") (quotes and cite omitted); *Sec'y, Fla. Dep't of Corr. v. Baker*, 406 F. App'x 416, 422 (11th Cir. 2010). Evans

has not addressed this issue, every court has done so has found that Title VII . . . was not intended to cover discrimination against homosexuals. *See, e.g.*, *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000) ('The 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.')." *Arnold v. Heartland Dental, LLC*, ___ F. Supp. 3d ___, 2015 WL 1456661 at *5

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has accompanied her complaint with an EEOC right to sue letter (hence, she evidently has exhausted, as Title VII commands, her administrative remedies); a one-page handwritten EEOC-stamped-received complaint; and her own typed materials and emails covering the 2013-2014 period. Doc. 1-1.

Significantly, however, *none* of these materials recount discriminatory acts based on gender, homosexuality, or sexual orientation. And, although Evans does not disclose any details of the EEOC's investigation here, she is reminded of the administrative consistency doctrine. *McIntyre v. Aurora Cares, LLC*, 2011 WL 2940939 at *2 (S.D. Ala. July 21, 2011); *see also Russell*, 2013 WL 1567372 at *8; *Tillery v. ATSI, Inc.*, 2003 WL 25699080 at *1 (N.D. Ala. Apr. 14, 2003) ("As a general rule, a Title VII plaintiff cannot bring claims in a lawsuit that were not included in her EEOC charge. . . . [A]llowing a complaint to encompass allegations outside the ambit of the predicate EEOC charge would frustrate the EEOC's investigatory and conciliatory role, as well as deprive the charged party of notice of the charge.") (quotes and cite omitted); *see also id.* ("[T]he claims that may be alleged in a judicial complaint are limited by four boundaries: (i) the specific claims alleged in the underlying EEOC charge; (ii) those claims which are like or reasonably related to those alleged in the underlying charge; (iii) the scope of the EEOC investigation that can reasonably be expected to grow out of the charge of discrimination; and (iv) those discriminatory acts which were in fact considered during the EEOC's investigation." (quotes and footnotes omitted).

(M.D. Fla. Mar. 30, 2015).[5] *See also Fredette v. BVP Mgmt. Assocs.*, 112 F.3d 1503, 1510 (11th Cir. 1997) (noting, in a same-sex harassment case: "We do not hold that discrimination because of sexual orientation is actionable"). Other courts have held that homosexuality is *not* a "protected class" within the meaning of Title VII, which means any substantive discrimination claims based on it fail as a matter of law. *Harder v. New York*, ___ F. Supp. 3d ___, 2015 WL 4614233 at *5 (N.D.N.Y. Aug. 3, 2015) (state employee failed to establish prima facie case of disparate treatment, hostile work environment, or constructive discharge under Title VII through allegations that his roommate/coworkers continued comments to staff and residents at training academy where they resided and at their first work assignment created the false impression that he was homosexual; perceived sexual orientation was not a protected class); *Hively v. Ivy Tech Cmty. College*, 2015 WL 926015 at *3 (N.D. Ind. Mar. 3, 2015) ("[S]exual orientation is not recognized as a protected class under Title VII"). So while same-sex harassment *(e.g.*, a homosexual supervisor's advances upon a same-sex employee), can

[5] In *Arnold,* however, the plaintiff stated such a claim—under *state* law. *Id.* at *5 (claims by female who identified as a gender non-conforming female homosexual, that employer's discriminatory actions were related to her gender non-conforming status, rather than her sexual orientation, were sufficient to allege sex discrimination, as required to state claims for hostile work environment and disparate treatment under state civil rights act). Also, Arnold cited to a comparator, *id.*, while Evans does not.

be actionable under Title VII,[6] Title VII discrimination claims based upon the plaintiff's sexual orientation or perceived sexual orientation are not. *Stevens*, 2015 WL 1245355 at *7 (collecting cases); *see also id.* ("In sum, there is no support for plaintiff's claim that Title VII gives rise to protection for discrimination based upon a supervisor's perception that she is a lesbian.").

Finally, to say that an employer has discriminated on the basis of gender non-conformity is just another way to claim discrimination based on sexual orientation. To inflict an adverse employment action (unfair discipline, denied promotion, etc.) because a male is too effeminate or a female too masculine is to discriminate based on sexual orientation ("gender nonconformity"), which is reflected in the gender image one presents to others—that of a male, even if one is biologically a female. Hence, Evans' allegations about discrimination in response to maintaining a male visage also do not place her within Title VII's protection zone, even if labeled a "gender conformity" claim, because it rests on her sexual orientation no matter how it is otherwise characterized. *Cf. Thomas v. Osegueda*, 2015 WL 3751994 at *4 (N.D. Ala. June 16, 2015) (applying analogous federal housing law principles to conclude that while gay sexual stereotyping cases "often involve harassment that is offensive, relief for 'sex' discrimination is

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[6] *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 82 (1998) ("[S]ex discrimination consisting of same-sex sexual harassment is actionable under Title VII"); *Stevens v. Ala. Dep't of Corr.*, 2015 WL 1245355 at *7 (N.D. Ala. Mar. 18, 2015).

narrowly limited and expanding such protections further would 'require action by Congress.'")[7]

B. Retaliation Claim

Evans also raises a retaliation claim. Doc. 1 at 5. Retaliation is unlawful:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has *opposed any practice made an unlawful employment practice* by this subchapter . . . .

42 U.S.C. § 2000e-3(a) (emphasis added). A plaintiff must plead a *prima facie* case: "(1) that she engaged in *protected* conduct and (2) suffered an adverse employment action that was (3) causally connected to the protected expression." *Stevens,* 2015 WL 1245355 at *10 (citing *Bolivar v. Univ. of Ga. Survey and Research*, 2012 WL 4928893 at *8 (M.D. Ga. Oct. 16,

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[7] Other courts have similarly rejected gender non-conformity claims stemming from a plaintiffs [sic] homosexuality. *See Anderson v. Napolitano,* 2010 WL 431898 at *6 (S.D. Fla. Feb. 8, 2010) (rejecting implication that all homosexual men fail to comply with male stereotypes because they are homosexual, stating "that would mean 'that every case of sexual orientation discrimination [would] translate into a triable case of gender stereotyping discrimination, which would contradict Congress's decision not to make sexual orientation discrimination cognizable under Title VII"), cited in *Arnold*, 2015 WL 1456661 at *7; *see also* Zachary R. Herz, *Price's Progress: Sex Stereotyping And Its Potential For Antidiscrimination Law*, 124 YALE L.J. 396, 430 (2014) ("courts have generally frowned on attempts to read conduct that is neither universal to a group nor limited to its members as functionally equivalent to a protected Title VII status. . . .").

2012) and *Taylor v. Runyon,* 175 F.3d 861, 868 (11th Cir. 1999)).

Evans alleges that on one occasion a supervisor "repeatedly shut the door on me without giving me the opportunity to move." Doc. 1 at 5 (here she cites a state ethics code and insists that such behavior violated it). "Also, by me going to HR chief Moss was trying [sic] to find ways of terminating me, this is evidence of retaliation. This information is from Sgt. Harvey Pegue who worked closely with Chief Moss." *Id.* Moss "did everything he could to terminate me including several notices. He went as far as stating to Sgt. Pegue of getting rid of me [sic] because I had too much information of wrong during [sic] by him in the department." *Id.* at 4 (citing to emails furnished with her complaint).

The problem for Evans is that she has failed to allege that she opposed "an unlawful employment practice" and the retaliators knew that (and retaliated against her because of her "protected activity"). As noted above, it is simply *not* unlawful under Title VII to discriminate against homosexuals or based on sexual orientation. Hence, Evans fails to meet the causation element:

> The plaintiff has the obligation to show a causal connection by showing "that the decision makers were aware of the protected activity and the protected activity and the adverse action were not *wholly unrelated*." *Bass v. Board of County Comm'rs.*, *Orange County,* 256 F.3d 1095, 1119 (11th Cir. 2001) (overturned on other grounds). The causal link

> requirement is to be construed broadly, and . . . "a plaintiff need only show that the protected activity and the adverse action were not wholly unrelated." *Brungart v. Bellsouth Telecommunications, Inc.*, 231 F.3d 791, 799 (11th Cir. 2000) (quoting *Clover v. Total Sys. Servs., Inc.*, 176 F.3d 1346, 1354 (11th Cir. 1999)). However, to meet even this low threshold of proof of causation, the plaintiff must offer some evidence from which a jury could infer that the *protected activity* caused the adverse employment action.

Stevens, 2015 WL 1245355 at *10. But there evidently was *no* protected activity here. Again, plaintiff was complaining about an employment practice (homosexual or sexual orientation discrimination) that is not unlawful under Title VII.[8] As explained by another district court:

> Although Title VII does not prohibit sexual orientation discrimination, it arguably does

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[8] That court reasoned:

> Here, Hamzah has alleged an adverse employment action—termination—and has alleged that his termination was due to the complaints he filed, but has not alleged that those complaints opposed a practice that is unlawful under Title VII and has not been specific as to other possible claims. Rather, he simply alleges that he filed internal complaints about "various forms of harassment." Particularly since Hamzah has specifically alleged some harassment based on sexual preference—which is not prohibited by Title VII—his broad claim of retaliation is not enough by itself to make his Title VII claim plausible.

Hamzah, 2014 WL 1207428 at *5.

> prohibit retaliation against persons who file charges of discrimination based on a reasonable, good-faith (albeit mistaken) belief that the complained-of practice was *prohibited. Clark County School Dist. v. Breeden*, 532 U.S. 268, 270 (2001), citing 42 U.S.C. § 2000e-3(a). Theoretically, an employee who mistakenly believes that federal law prohibits discrimination on the basis of sexual orientation and files a complaint of discrimination on that ground might contend that he nevertheless engaged in protected conduct under Title VII. In such circumstances, the critical question would appear to be whether the employee's mistaken belief as to the reach of Title VII was reasonable. Nevertheless, this Court is aware of no authority adopting this proposition, and indeed, there is some caselaw to the contrary. *See Hamner v. St. Vincent Hosp.*, 224 F.3d 701, 707 (7th Cir. 2000); *see also Howell v. North Central College*, 331 F.Supp.2d 660, 663-64 (N.D. Ill. 2004) (applying Title IX).

Cunningham v. City of Arvada, 2012 WL 3590797 at *1 (D. Colo. 2012); *see also Hamner*, 224 F.3d at 707 ("The plaintiff must not only have a subjective (sincere, good faith) belief that he opposed an unlawful practice; his belief must also be objectively reasonable, which means that the complaint must involve discrimination that is prohibited by Title VII."). "Because [Evans] has not alleged that she put [her employer] on notice of a violation of [Title VII], she [also] has failed to allege

that she engaged in statutorily protected expression." *Arnold*, 2015 WL 1456661, *6.

Additionally, Evans also sues three individuals—Charles Moss, Lisa Clark and Jamekia Powers, doc. 1 at 1, 3—but Title VII permits suits only against a plaintiff's *employer,* not against co-employees or supervisors in their individual capacity. *Bryant v. Dougherty Cnty. Sch. Sys.*, 382 F. App'x 914, 916 n. 1 (11th Cir. 2010); *Fuist v. Thompson*, 2009 WL 4153222 at *3-4 (S.D. Ohio Nov. 20, 2009) ("Supervisory employees are not typically proper defendants under Title VII because they do not fall within the definition of 'employer.'"). Hence, the Court advises that her case against those defendants be dismissed with prejudice.

III. CONCLUSION

In that Evans has pled no actionable claim nor seems likely to, her case should be **DISMISSED WITH PREJUDICE** with no "second-chance" amendment option. *Langlois v. Traveler's Ins. Co.*, 401 F. App'x 425, 426-27 (11th Cir. 2010) (even though IFP's [sic] litigant's *pro se* complaint failed to state basis for federal jurisdiction and failed to state a claim, and she failed to seek leave to amend her complaint, nevertheless she should have been afforded an opportunity to amend deficiencies prior to dismissal, where no undue time had elapsed, no undue prejudice could be shown, and the record revealed some potential claim-resuscitation). Nor has she shown exceptional

circumstances to warrant the appointment of counsel, so her motion to that end is **DENIED**.[9] Doc. 2.

SO REPORTED AND RECOMMENDED, this 9th day of September, 2015.

s/ G.R. Smith
UNITED STATES MAGISTRATE JUDGE
SOUTHERN DISTRICT OF GEORGIA

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[9] Congress passed 28 U.S.C. § 1915(e)(1), which basically authorizes a judge to "pressure an attorney to work for free." *Williams v. Grant*, 639 F. Supp. 2d 1377, 1381 (S.D. Ga. 2009) (noting the "professional compulsion" lurking behind a judge's 28 U.S.C. § 1915(e)(1) request); *Nixon v. United Parcel Serv.*, 2013 WL 1364107 at *2 n. 3 (M.D. Ga. Apr. 3, 2013). Even at that, a judge may do so "only in exceptional circumstances." *Heinisch v. Bernardini*, ___ F. Supp. 3d. ___, 2015 WL 159058 at *1 (S.D. Ga. Jan. 12, 2015) (quoting *Bass v. Perrin*, 170 F.3d 1312, 1320 (11th Cir. 1999)). Evans has not only failed to state a claim here, but there may also be some knock-out punches that otherwise drain her case of any vitality (her claims may be untimely, if not defective merely because she failed to raise them before the EEOC, *see supra* notes 3, 4 & 5).

APPENDIX D

[DATE FILED: 7/06/2017]

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 15-15234-BB

JAMEKA K. EVANS,

Plaintiff-Appellant,

versus

GEORGIA REGIONAL HOSPITAL, CHARLES MOSS, LISA CLARK, JAMEKIA POWERS,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Georgia

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

BEFORE: WILLIAM PRYOR and ROSENBAUM, Circuit Judges and MARTINEZ*, District Judge.

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* Honorable Jose E. Martinez, United States District Judge for the Southern District of Florida, sitting by designation.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ William H. Pryor
UNITED STATES CIRCUIT JUDGE

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