No. 18-30136

In the United States Court of Appeals for the Fifth Circuit

BONNIE O'DANIEL,
Plaintiff-Appellant,

versus

INDUSTRIAL SERVICE SOLUTIONS; PLANT-N-POWER SERVICES, INCORPORATED; TEX SIMONEAUX, JR; AND CINDY HUBER,
Defendants-Appellees.

On Appeal from the United States District Court for the Middle District of Louisiana, Case No. 3:17-cv-00190-RLB
The Honorable Richard L. Bourgeois, Jr., Magistrate Judge

BRIEF *AMICUS CURIAE* OF AMERICAN CIVIL LIBERTIES UNION FOUNDATION, INC.; AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF LOUISIANA, INC.; GLBTQ LEGAL ADVOCATES & DEFENDERS, INC.; LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.; AND NATIONAL CENTER FOR LESBIAN RIGHTS—In Support of Neither Appellant nor Appellees and Filed with Consent of All Parties

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SUPPLEMENTAL STATEMENT OF INTERESTED PERSONS

Pursuant to Fifth Circuit Rule 29.2, Amici Curiae provides this Supplemental Statement to disclose those with an interest in this brief.

The Amici Curiae:

American Civil Liberties Union Foundation, Inc. ("ACLU") is a 501(c)(3) not-for-profit corporation incorporated under the laws of the State of New York with its principal place of business in New York City, New York. The ACLU is a nongovernmental corporate entity that has no parent corporation(s). As a 501(c)(3) organization, the ACLU does not have shareholders or issue stock and, thus, is not a nongovernmental corporate entity in which a publicly held corporation owns 10% or more of its stock.

American Civil Liberties Union Foundation of Louisiana, Inc. ("ACLU-LA") is a 501(c)(3) not-for-profit corporation incorporated under the laws of the State of Louisiana with its principal place of business in New Orleans, LA. ACLU-LA is a nongovernmental corporate entity that has no parent corporation(s). As a 501(c)(3) organization, ACLU-LA does not have shareholders or issue stock and, thus, is not a nongovernmental corporate entity in which a publicly held corporation owns 10% or more of its stock.

GLBTQ Legal Advocates & Defenders, Inc. ("GLAD") is a 501(c)(3) not-for-profit corporation incorporated under the laws of the Commonwealth of Massachusetts with its principal place of business in Boston, Massachusetts. GLAD is a nongovernmental corporate entity that has no parent corporation(s). As a 501(c)(3) organization, GLAD does not have shareholders or issue stock and, thus, is not a nongovernmental corporate entity in which a publicly held corporation owns 10% or more of its stock.

Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal") is a 501(c)(3) not-for-profit corporation incorporated under the laws of the State of New York with its principal place of business in New York City, New York. Lambda Legal is a nongovernmental corporate entity that has no parent corporation(s). As a 501(c)(3) organization, Lambda Legal does not have shareholders or issue stock and, thus, is not a nongovernmental corporate entity in which a publicly held corporation owns 10% or more of its stock.

The National Center for Lesbian Rights ("NCLR") is a 501(c)(3) not-for-profit corporation incorporated under the laws of the state of California with its principal place of business in San Francisco, California. NCLR is a nongovernmental corporate entity that has no parent corporation(s). As a 501(c)(3) organization, NCLR does not have shareholders or issue stock and, thus, is not a nongovernmental corporate entity in which a publicly held corporation owns 10% or more of its stock.

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STATEMENT OF INTEREST AND AUTHORITY

This brief is filed with the consent of the parties.[1]

The **American Civil Liberties Union** (ACLU) is a nationwide, nonprofit, nonpartisan organization with over 1.6 million members dedicated to defending the principles embodied in the Constitution and our nation's civil rights laws. The **American Civil Liberties Union Foundation of Louisiana** is one of the ACLU's statewide affiliates with over 7,500 members. The ACLU and the ACLU Foundation of Louisiana have long fought to ensure that lesbian, gay, bisexual, and transgender people are treated equally and fairly under law, having served as counsel in cases including *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (holding that Constitution guarantees the fundamental right to marry to same-sex couples), *United States v. Windsor*, 570 U.S. 744 (2013) (holding that federal government cannot discriminate against married same-sex couples for purpose of determining federal benefits and protections);

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

Alford v. Moulder, No. 3:16-cv-350-CWR-LRA, 2016 WL 3449911 (S.D. Miss. June 20, 2016) (challenging Mississippi's anti-LGBT law, HB 1523); *McMillen v. Itawamba Cty. Sch. Dist.*, 702 F. Supp. 2d 699 (N.D. Miss. 2010) (granting plaintiff's motion for preliminary injunction allowing her to attend prom with same-sex date and wearing a tuxedo).

Through strategic litigation, public policy advocacy, and education, **GLBTQ Legal Advocates & Defenders, Inc.** (GLAD) works in New England and nationally to create a just society free of discrimination based on gender identity and expression, HIV status, and sexual orientation. GLAD has litigated widely in both state and federal courts in all areas of the law in order to protect and advance the rights of lesbians, gay men, bisexuals, transgender individuals, and people living with HIV and AIDS. GLAD has an enduring interest in ensuring that employees receive full and complete redress for violation of their civil rights in the workplace.

Formed in 1973, **Lambda Legal Defense and Education Fund, Inc.** (Lambda Legal) is the nation's oldest and largest legal organization committed to achieving full recognition of the civil rights of lesbian, gay,

bisexual, and transgender ("LGBT") people and everyone living with HIV through impact litigation, education, and public policy work. Of special relevance here, Lambda Legal successfully represented the plaintiff-appellant in *Hively v. Ivy Tech Community College,* 853 F.3d 339 (7th Cir. 2017) (en banc), in which the Seventh Circuit held "that discrimination on the basis of sexual orientation is a form of sex discrimination." *Id.* at 339. It also presented part of the successful oral and written argument as amicus curiae in *Zarda v. Altitude Express*, 883 F.3d 100 (2d Cir. 2018) (en banc), which agreed with *Hively* that Title VII covers sexual orientation discrimination. Lambda Legal was also counsel for the plaintiff-appellant in *Evans v. Georgia Reg'l Hosp.*, 850 F.3d 1248 (11th Cir. 2017), *cert. denied,* 138 S. Ct, 557 (2017). Lambda Legal also has served as *amicus curiae* in many other employment discrimination cases involving the rights of LGBT people, including presenting oral argument to the Second Circuit sitting *en banc* on the same coverage question. *See*, *e.g.*, *Rene v. MGM Grand Hotel*, 305 F.3d 1061 (9th Cir. 2002) (en banc); *EEOC v. Scott Med. Health Ctr., P.C.*, 217 F. Supp. 3d 834 (W.D. Pa. 2016); *Hall v. BNSF Ry. Co.*, No. C13-2160, 2014 WL 4719007 (W.D.

Wash. Sept. 22, 2014); *TerVeer v. Billington*, 34 F.Supp.3d 100 (D.D.C. 2014).

The **National Center for Lesbian Rights** ("NCLR") is a national non-profit legal organization dedicated to protecting and advancing the civil rights of lesbian, gay, bisexual, and transgender people and their families through litigation, public policy advocacy, and public education. Since its founding in 1977, NCLR has played a leading role in securing fair and equal treatment for LGBT people and their families in cases across the country involving constitutional and civil rights. NCLR has a particular interest in promoting equal opportunity for LGBT people in the workplace through legislation, policy, and litigation, and represents LGBT people in employment and other cases in courts throughout the country.

SUMMARY OF ARGUMENT

This brief is quite limited in its scope. Amici express no opinion regarding O'Daniel's state law claims. Also, O'Daniel asserts error in the District Court's denial of leave to amend and its acceptance for filing of only the complaints she submitted pro se. While those complaints do not

support a reasonable belief that the employer's disciplinary actions treated O'Daniel differently because of her sexual orientation, amici express no ultimate opinion about the resolution of the leave to amend issue.[2]

Amici's concern is with the portion of the District Court opinion that held that it was unreasonable to believe in spring 2016 that Title VII covers sexual orientation discrimination. The District Court cited *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979) and the decision of the Eleventh Circuit in *Evans v. Georgia Reg'l Hosp.*, 850 F.3d 1248, 1256 (11th Cir. 2017) holding *Blum* to be "binding precedent." *O'Daniel v.*

[2] As organizations with considerable expertise in transgender legal issues, amici do note that, while employer discipline is always subject to judicial scrutiny to ensure federal law is respected, an employer has reason to be concerned when the head of its Human Resources Department publicly opposes the use of women's facilities by transgender women. The EEOC has held that Title VII can be violated by forbidding an employee from using the bathroom that accords with the employee's gender identity. *Lusardi v. McHugh*, Appeal No. 0120133395, 2015 EEOPUB LEXIS 896 (April 1, 2015) (holding that it was "direct evidence of discrimination on the basis of sex" where an employee's "transgender status was the motivation for [the employer's] decision to prevent" the employee from using the bathroom" that women who aren't transgender use). Also, under Title IX's similar sex discrimination provision, the Sixth Circuit and Seventh Circuit have upheld injunctions requiring that transgender students be allowed to use the bathroom that accords with their gender identity. *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1048-49 (7th Cir. 2017); *Dodds v. United States Department of Education*, 845 F.3d 217 (6th Cir. 2016).

Indus. Serv. Sols., No. CV 17-190-RLB, 2018 WL 265585, at *7 (M.D. La. Jan. 2, 2018). In *Blum*, this Court stated, "Discharge for homosexuality is not prohibited by Title VII" and cited *Smith v. Liberty Mutual Insurance Co.*, 569 F.2d 325, 327 (5th Cir. 1978) to support its Title VII holding (hereinafter "the *Blum* statement"). *See Blum*, 597 F.2d at 938.

> Then the court, without any supporting citation, held:
>
> > It is unreasonable for Plaintiff to believe that discrimination based on her status as a married, heterosexual female constitutes discrimination on the basis of her sex. It is similarly unreasonable for Plaintiff to believe that [opposition to] discrimination based on sexual orientation constitutes protected activity.

O'Daniel, 2018 WL 265585, at *7. The District Court's ruling is very problematic in the complete absence of any rationale or supporting authority on the relevant question—not whether the belief that Title VII covers sexual orientation discrimination is wrong—but whether it was an unreasonable belief in the spring of 2016, eight months before *Evans* was decided. There is no acknowledgement of contrary authority from other jurisdictions or from the EEOC. There is no recognition that many district court judges bound by the *Blum* statement did not recognize it as

precedential. For these reasons, and the other reasons presented herein, this Court should not affirm the District Court's ruling regarding the unreasonableness of O'Daniel's legal belief.

ARGUMENT

I. TITLE VII'S ENFORCEMENT SCHEME IS SERVED WELL BY THE OBJECTIVE REASONABLE LEGAL BELIEF STANDARD.

The Supreme Court has explained repeatedly the policy reasons supporting a broad interpretation of anti-retaliation provisions. The Court acknowledged in *Crawford v. Metro. Gov't*, 555 U.S. 271 (2009) that, if an employee who speaks up about discrimination can "be penalized with no remedy, prudent employees would have a good reason to keep quiet about Title VII offenses" against themselves or against others. *Id*. at 279. "This is no imaginary horrible given the documented indications that '[f]ear of retaliation is the leading reason why people stay silent instead of voicing their concerns about bias and discrimination.'" *Id*. (*quoting* Deborah L. Brake, *Retaliation*, 90 Minn. L. Rev. 18, 20 (2005)). Thus, an unduly restrictive concept of "protected activity" will not merely visit injustice upon the protesting employee who learns post

hoc that his good deed will not go unpunished, but will also undermine the entire anti-discrimination enforcement effort by chilling future prospective opponents of discrimination:

> Title VII depends for its enforcement upon the cooperation of employees who are willing to file complaints and act as witnesses. "Plainly, effective enforcement could thus only be expected if employees felt free to approach officials with their grievances." [citation omitted] Interpreting the antiretaliation provision to provide broad protection from retaliation helps ensure the cooperation upon which accomplishment of the Act's primary objective depends.

Burlington N. & S. F. R. Co. v. White, 548 U.S. 53, 67 (2006); *id.* at 64 ("a limited construction would fail to fully achieve the antiretaliation provision's 'primary purpose,' namely, '[m]aintaining unfettered access to statutory remedial mechanisms.'") (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997)); *NLRB v. Scrivener*, 405 U.S. 117, 121-122 (1972) (purpose of the antiretaliation provision is to ensure that employees are "completely free from coercion against reporting" unlawful practices).

This Court also has recognized the salutary purpose of the "objectively reasonable" legal belief standard in ensuring that employees

can oppose discrimination without fear of adverse consequences. In *Payne v. McLemore's Wholesale & Retail Stores*, 654 F.2d 1130 (5th Cir. Unit A Sept. 1981), cert. denied, 455 U.S. 1000 (1982), this Court adopted the standard that protected activity occurs when an employee has "a reasonable belief that the employer was engaged in unlawful employment practices" and opposes that conduct. *Id*. at 1140. Allowing anti-retaliation protections when an employee is legally incorrect about violations of Title VII is as deemed necessary "[t]o effectuate the policies of Title VII and to avoid the chilling effect that would otherwise arise" if employers could retaliate with impunity against employees who made legal mistakes. *Id*. This Court emphatically reaffirmed the "reasonable belief" standard just two years ago. *EEOC v. Rite Way Serv., Inc.*, 819 F.3d 235, 242 (5th Cir. 2016) ("The statute, case law, and interest in uniformity and ease of application support applying the 'reasonable belief' standard to retaliation cases involving both proactive and reactive opposition.").[3]

[3] Amici recognize that O'Daniel challenges the very applicability of the objectively reasonable belief standard, contending that she is exempt from that

Applying the proper "objectively reasonable" belief standard reveals that O'Daniel should satisfy this element. Especially persuasive are the rulings in favor of retaliation claims by employees who complained of sexual orientation discrimination in cases brought in the Second and Ninth Circuits, which at the time had established case law holding that Title VII did not cover sexual orientation discrimination. *Dawson v. Entek Int'l*, 630 F.3d 928, 936-37 (9th Cir. 2011); *Martin v. N.Y. State Dep't of Corr. Servs.*, 224 F. Supp. 2d 434, 448 (N.D.N.Y 2002).

The *Martin* court refused to classify as unreasonable the employee's belief about Title VII's applicability simply because the employee, a non-lawyer, was not aware of long-standing, contrary Second Circuit

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requirement because her alleged protected activity fell in the participation category, not the opposition category. Amici note that binding precedent of this court forecloses that argument, where, as here, the challenged employer action (her termination) preceded the filing of an EEOC charge. *EEOC v. Rite Way Serv., Inc.*, 819 F.3d 235, 240 (5th Cir. 2016); *Byers v. Dallas Morning News, Inc.*, 209 F.3d 419, 428 (5th Cir.2000) (calling the participation clause "irrelevant" when no formal EEOC charge had been filed at the time of the alleged retaliatory discharge, even though the employee had complained internally of alleged race discrimination). However, should this issue come up for en banc review via a petition from O'Daniel or other litigant, amici reserve the right to argue in favor of a broad interpretation of protected activity and anti-retaliation protections that serve the goals of enforcing the nation's antidiscrimination protections.

precedent. 224 F. Supp. 2d at 448 (citing the absence of legal support for "imput[ing] to non-lawyers" such knowledge). Also informing the reasonable belief analysis is *Larry v. N. Mississippi Med. Ctr.*, 940 F. Supp. 960, 964 (N.D. Miss. 1996), *aff'd on other grounds, Larry v. Grice*, 156 F.3d 181 (5th Cir. 1998). There, as here, the binding nature of Fifth Circuit precedent was less than clear at the time of the employee's protected activity. *See Id.* at 963. There, as here, many courts had taken a contrary position to the Fifth Circuit's position, prompting the court to hold, "With the differences of opinion noted supra among federal courts over whether same-gender claims are actionable under Title VII, the court can confidently hold that at least an issue of fact exists as to whether Larry reasonably believed the behavior about which she complained was unlawful." *Id.* at 964.

II. GIVEN THE STRENGTH OF THE PRO-COVERAGE ARGUMENTS, O'DANIEL'S LEGAL BELIEF WAS REASONABLE.

Over the past five years, courts have been presented with more persuasive arguments why Title VII covers sexual orientation discrimination. The arguments advanced recently have stressed that

discrimination against lesbians, gay men, and bisexuals meets the tests established by the Supreme Court for what constitutes discrimination "because of such individual's . . . sex" under Title VII. By contrast, courts in the past often focused on the words that are not in the statute ("sexual orientation") and forgot about the word that is in the statute—sex—and how the Supreme Court has interpreted Title VII to prohibit differential treatment of women and men for the same thing.

Specifically, the arguments presented are: (1) Sexual orientation discrimination is basic differential treatment of the two sexes for the same thing (i.e, treating a lesbian worse than a heterosexual man, for the same thing: her romantic attraction to women); (2) sexual orientation discrimination inherently involves discrimination (in the lesbian context) against a woman for not conforming to the sex-based stereotype, assumption, or expectation that women should be attracted to men; and (3) if it is universally regarded as race discrimination to mistreat someone for being in an interracial relationship, it must be sex discrimination to mistreat an employee for being in a same-sex relationship. *See Christiansen v. Omnicom, Inc.*, 852 F.3d 195, 202 (2d

Cir. 2007) (Katzmann, C.J., concurring). Notably, these arguments generally were not advanced until recently. *See Id*. Indeed, some arguments might not have been tenable when same-sex relationships were not treated equally under the law, and indeed were criminalized in many states.

A sea change has occurred. Two federal circuits have gone en banc to overrule multiple precedents and find in favor of coverage. *Hively v. Ivy Tech. Comm. Coll*., 853 F.3d 339 (7th Cir. 2017) (en banc); *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018) (en banc). In *Hively*, eight of eleven judges ruled in favor of coverage; in *Zarda*, ten of the thirteen judges did. Meaning that three-quarters of the federal appellate judges with the power to accept the coverage arguments did so, adopting the same legal belief that O'Daniel claims before this Court. This alone should render this legal belief unquestionably reasonable.

Also relevant to the general reasonableness of the legal belief is the position of the EEOC, the primary federal agency charged with interpreting and enforcing Title VII. In *Baldwin v. Foxx*, Appeal No. 0120133080, 2015 WL 4397641 (EEOC July 15, 2015) the EEOC, agreed

with all three coverage theories and held unequivocally that sexual orientation discrimination is "necessarily" sex discrimination under Title VII. *Id.* at *5.[4] The EEOC also has publicized its coverage position,[5] leading to the filing of thousands of sexual orientation discrimination charges between fiscal year 2013 and the first half of fiscal year 2015. *Evans v. Georgia Regional Hosp.*, No. 15-15234, Brief of the U.S. Equal Employment Opportunity Commission as Amicus Curiae in Support of Appellant and in Favor of Reversal, 2016 WL 1295321 **26-29. Notably, this information was in a brief the EEOC filed in the *Evans* case – setting

[4] Indeed, some have argued that *Baldwin* is due *Chevron* deference, as an agency adjudication rendered pursuant to a specific grant of Congressional authority, which if true would supersede Blum's contrary statutory interpretation under *Nat'l Cable & Telecomms. Assn. v. Brand X Internet Servs.*, 545 U.S. 967 (2005). *See* Tessa M. Register, *The Case for Deferring to the EEOC's Interpretations in Macy and Foxx to Classify LGBT Discrimination As Sex Discrimination Under Title VII*, 102 Iowa L. Rev. 1397 (2017); Brief of Amicus Curiae Lambda Legal, *Christiansen v. Omnicom, Inc.*, 2d Cir No. 16-748, 2016 WL 3551466 (June 28, 2016).

[5] EEOC Publication, "Gender Stereotyping: Preventing Employment Discrimination of Lesbian, Gay, Bisexual or Transgender Workers," available at http://www.eeoc.gov/eeoc/publications/brochure-gender_stereotyping.cfm (rev. Aug. 2013); EEOC Management Directive, "Processing Complaints of Discrimination by Lesbian, Gay, Bisexual, and Transgender (LGBT) Employees," available at http://www.eeoc.gov/federal/directives/lgbt_complaint_processing.cfm; EEOC Publication, "What You Should Know about EEOC and the Enforcement Protections for LGBT Workers," available at http://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm

forth not only its coverage position but also its position that opposition to sexual orientation discrimination must constitute protected activity in retaliation cases, irrespective of whether a given court agrees on the coverage question for discrimination cases. *See Id*.

Many district courts also had endorsed one or more of the coverage arguments prior to the time of O'Daniel's termination, most notably *Winstead v. Lafayette County Board of County Comm'rs*, 197 F.Supp.3d 1334 (N.D. Fla. 2016) and *Isaacs v. Felder Servs.*, 143 F.Supp.3d 1190 (M.D. Ala. 2015). These two courts, bound by pre-split rulings such as *Blum*, issued opinions unequivocally declaring sexual orientation discrimination violative of Title VII. The *Evans* decision that abrogated these rulings did not occur until March 2017, over eight months after O'Daniel was terminated. The thoughtful opinions of these two respected jurists should render reasonable at least a pre-*Evans* belief of any employee in the former Fifth Circuit that Title VII covers sexual orientation discrimination. Moreover, many courts around the country already had agreed with O'Daniel's legal belief before O'Daniel was terminated. V*ideckis v. Pepperdine University*, 150 F.Supp.3d 1151 (C.D.

Cal. 2015) (applying Title IX but analogizing to Title VII); *TerVeer v. Billington*, 34 F. Supp. 3d 100 (D.D.C. 2014); *Hall v. BNSF Ry. Co.*, No. C13-2160 RSM, 2014 WL 4719007 (W.D. Wash. Sept. 22, 2014): *Koren v. Ohio Bell Tel. Co.*, 894 F. Supp. 2d 1032 (N.D. Ohio 2012); *Heller v. Edgewater Country Club*, 195 F. Supp. 2d 1212 (D. Ore. 2002); *Centola v. Potter*, 183 F. Supp. 2d 403 (D. Mass. 2002).

III. IN SPRING 2016, O'DANIEL REASONABLY COULD HAVE BELIEVED THAT THE *BLUM* STATEMENT POSED NO OBSTACLE TO TITLE VII'S COVERAGE OF SEXUAL ORIENTATION DISCRIMINATION.

From a national perspective, the belief that Title VII covers sexual orientation discrimination was clearly reasonable. And O'Daniel reasonably could have believed that the *Blum* statement did not alter that premise. She could reasonably have believed, as many judges bound by *Blum* did, that it was not a binding holding on the coverage question. She also could have believed that any holding had been abrogated by subsequent rulings of the Supreme Court and this Court. Also, she could have believed, as has been proven true elsewhere, that the mere

articulation of the proper coverage arguments could lead to a change in the law and overruling of precedent.

A. O'Daniel Reasonably Could Have Believed What Many Judges Believed: that the Blum Statement Was Not a Holding.

Given the strong legal arguments that Title VII covers sexual orientation discrimination, every post-*Blum* case that failed to treat *Blum* as controlling authority on the coverage point, lent support to the reasonableness of O'Daniel's legal belief, even those that disagreed with O'Daniel's coverage position. By failing to deem *Blum* as controlling authority against coverage, these decisions left the impression that the coverage issue was an open question in the Fifth and Eleventh Circuits.

For example, the court in *Mowery v. Escambia County Utilities Auth.*, No. 3:04CV382-RS-EMT, 2006 WL 327965 (N.D. Fla., Feb. 10, 2006), came down emphatically against Title VII coverage of sexual orientation discrimination, but clearly stated that "The United States Supreme Court has not directly addressed this question, nor has the

Eleventh Circuit."[6] 2006 WL 327965 at *8. The court in *Anderson v. Napolitano*, No. 09–60744–CIV, 2010 WL 431898 (S.D. Fla. Feb. 8, 2010) ruled "[t]he law is clear that Title VII does not prohibit discrimination based on sexual orientation," but cited as support only the Second Circuit decision in *Simonton* (now overruled). 2010 WL 431898 at *4. And notably, while the Eleventh Circuit's decision in *Evans* was not available to O'Daniel in the spring of 2016, the district court decision was, and there, the judge adopted the magistrate's recommendation in total, including his recognition that "the Eleventh Circuit has not addressed this issue, . . .[whether] Title VII . . . was [or was] not intended to cover discrimination against homosexuals." *Evans v. Georgia Reg'l Hosp.*, No. CV415-103, 2015 WL 5316694, at *2 (S.D. Ga. Sept. 10, 2015), *report and recommendation adopted*, No. CV415-103, 2015 WL 6555440 (S.D. Ga. Oct. 29, 2015), *aff'd in part, vacated in part*, *remanded*, 850 F.3d 1248 (11th Cir. 2017).

[6] It should absolutely go without saying that every circuit and district court judge within the Eleventh Circuit, as well as almost any lawyer who has practiced in those courts, recognizes the binding effect of every decision of the Fifth Circuit rendered prior to the split that created the Eleventh Circuit, as reflected in the 20,000 or so case citations to *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981).

The treatment of *Blum* is similar in the district courts of this circuit. In *Polly v. Houston Lighting & Power Co.*, 825 F. Supp. 135, 137 n.2 (S.D. Tex. 1993), the court cited only cases from other circuits declaring Title VII inapplicable to sexual orientation claims. In *Williams v. Waffle House*, No. CIV.A. 10-357-ME, 2010 WL 4512819, at *3 n.6 (M.D. La. Nov. 2, 2010), the court listed *Blum* far down a list of relevant precedents in support of its anti-coverage holding, behind even a district court decision from another circuit.[7]

In short, a reasonable employee in spring 2016 trying to ascertain whether this Court had weighed in definitively on the coverage question, would have found ample authority that it had not.

[7] The *Williams v. Waffle House* court supported its holding that "discrimination on the basis of his actual or perceived sexual preference/orientation, . . . is not a cognizable claim under either Title VII," with a footnote in which the court cited, in order: *Oiler v. Winn-Dixie Louisiana, Inc.*, 2002 WL 31098541 (E.D. La. 2002); *Mims v. Carrier Corp.*, 88 F.Supp.2d 706 (E.D. Tex. 2000); *Spearman v. Ford Motor Co.*, 231 F.3d 1080, 1084-85 (7th Cir. 2000); *Broadus v. State Farm Ins. Co.*, 2000 WL 1585257, at *4, n. 2 (W.D. Mo. 2000) ; *Bibby v. Philadelphia Coca Cola Bottling Co.*, 260 F.3d 257, 265 (3rd Cir. 2001); *Blum v. Gulf Oil Corp.*, 597 F.2d 936 (5th Cir. 1979); *Gaspard v. Our Lady of Lourdes Regional Med. Ctr., Inc.*, 2009 U.S. Dist. LEXIS 25412 (W.D. La. 2009); *Pritchett v. Sizeler Real Estate Mgmt. Co.*, 1995 WL 241855 (E.D. La. 1995).

B. O'Daniel Reasonably Could Have Believed That the *Blum* Statement Had Been Effectively Overruled or Would Be Once the Proper Arguments Were Before the Court.

Several legal developments after 1979 could have led a reasonable person to believe that the *Blum* statement was no longer good law. O'Daniel reasonably could have believed that *Blum* did not survive *Price Waterhouse*. The *Blum* Court offered precious little in support of the legal proposition that Title VII did not cover sexual orientation discrimination. But its only legal support for that proposition was somewhat compelling: having ruled definitively the year before that Title VII did not avail a man discriminated against because of his effeminacy, *see Smith v. Liberty Mut. Ins. Co.,* 569 F.2d 325 (5th Cir. 1978), Title VII surely offered no support to a man discriminated against because he is gay. *See Blum*, 597 F.2d at 938. But a decade later, the Supreme Court ruled the exact opposite way from what the *Smith* court had ruled. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989) ("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."); *see also id.* at 235 ("the *coup de grace*" in

Hopkins' discrimination case was her being advised that, in order to improve her chances for partnership, she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."). Surely a logical person could reasonably believe that the conclusion in the *Blum* statement was no longer legally valid. And given that one such logical person drawing that conclusion was United States Circuit Court Judge Robin Rosenbaum, the legal belief of O'Daniel was reasonable. *See Evans*, 850 F.3d at 1270 (Rosenbaum, J., dissenting) (precedent that "allows an employer to discriminate against a woman solely because she is a lesbian and doesn't fulfill the employer's version of what a woman should be" is in "'direct[] conflict[] with' *Price Waterhouse*'s holding"); *id.* ("Indeed, *Price Waterhouse* "eviscerate[s]" *Blum*'s holding no less than we found it did other courts' pre-*Price Waterhouse* holdings" in *Glenn v. Brumby*, 663 F.3d 1312, 1318 n.5 (2011)).[8]

[8] The reasonableness of O'Daniel's and Judge Rosenbaum's belief is underscored by the fact that even the courts that have ruled against Title VII coverage have not disputed the presence of gender stereotyping in sexual orientation discrimination. *E.g.*, *Gilbert v. Country Music Ass'n*, 432 Fed. Appx. 516, 520 (6th Cir. 2011) ("For all

O'Daniel also reasonably could have believed that the *Blum* statement was no longer good law after *Deffenbaugh*, which ruled that it is race discrimination to mistreat an employee because he or she is in an interracial relationship. *Deffenbaugh–Williams v. Wal–Mart Stores, Inc.*, 156 F.3d 581, 589 (5th Cir. 1998) ("[A] reasonable juror could find that [plaintiff] was discriminated against because of her race (white), if that discrimination was premised on the fact that she, a white person, had a relationship with a black person."), *opinion reinstated on reh'g sub nom. Williams v. Wal-Mart Stores, Inc.*, 182 F.3d 333 (5th Cir. 1999). The Supreme Court repeatedly has instructed lower courts, in interpreting Title VII, to treat race discrimination and sex discrimination similarly,

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we know, Gilbert fits every male 'stereotype' save one—sexual orientation—and that does not suffice to obtain relief under Title VII."); *Vickers v. Fairfield Med. Ctr,* 453 F.3d 757, 764 (6th Cir. 2006) ("all homosexuals, by definition, fail to conform to traditional gender norms in their sexual practices"); *Dawson v. Bumble & Bumble*, 398 F.3d 211, 218 (2d Cir. 2005) ("[w]hen utilized by an avowedly homosexual plaintiff, however, gender stereotyping claims can easily present problems for an adjudicator. This is for the simple reason that '[s]tereotypical notions about how men and women should behave will often necessarily blur into ideas about heterosexuality and homosexuality.'") (citation omitted); *Kay v. Independence Blue Cross*, 142 F. App'x 48, 51 (3d Cir. 2005) ("The line between discrimination based upon gender stereotyping and that based upon sexual orientation is difficult to draw and in this case some of the complained of conduct arguably fits within both rubrics."). Of course, the Second Circuit recently put an emphatic end to the tension between *Dawson* and *Price Waterhouse* by overruling *Dawson*. *Zarda*, 883 F.3d at 132.

because the statute "on its face treats each of the enumerated categories exactly the same." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 243 n.9 (1989); *see also Faragher v. City of Boca Raton*, 524 U.S. 775, 787 n.1 (1998); *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 66 (1986); *City of L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 709 (1978); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 26 (1993) (Ginsburg, J., concurring) ("except in the rare case in which a bona fide occupational qualification is shown, . . . Title VII declares discriminatory practices based on race, gender, religion, or national origin equally unlawful."); *cf. Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 78 (1998) (rejecting attempt to exclude all same-sex harassment from Title VII's scope, noting that "we have rejected any conclusive presumption that an employer will not discriminate against members of his own race").

Thus, many courts have concluded that Title VII is violated by mistreatment of an employee because of the employee's relationship, if the couple's different races or same sex motivates the discrimination. *See Zarda*, 883 F.3d at 132-33 (Jacobs, J. concurring); *id.* at 136 (Sack, J., concurring); *Hively,* 853 F.3d at 347-48; *id.* at 359 (Flaum, J., concurring);

Boutillier v. Hartford Pub. Sch., 221 F. Supp. 3d 255, 268 (D. Conn. 2016); *Scott Med. Health Ctr., P.C.*, 217 F. Supp. 3d at 840, n.5; *Isaacs*, 143 F. Supp. 3d at 1193-94.[9]

It also would be reasonable to believe that *Blum* did not survive this Court's en banc ruling in *EEOC v. Boh Bros., Inc.*, 731 F.3d 444, 450 (5th Cir. 2013) (en banc). This Court affirmed a jury verdict of sex discrimination, when a male employee was ruthlessly harassed, including being called "queer" and "faggot" by a male co-worker who viewed his unashamed use of "Wet Ones" wipes instead of toilet paper, as "kind of gay," "feminine," and something women "should use but men should not." *See Id.* at 457-58. It would be reasonable to conclude after *Boh Brothers* that Title VII could be violated by pervasive slurs such as "queer" or "faggot," directed at a man who is dating men, if the harasser views that romantic interest as "kind of gay" conduct that women should engage in, but men should not.

[9] Curiously, despite the issue being briefed extensively, the *Evans* court never even addressed the glaring conflict between its reaffirmance of the *Blum* statement, and its holding that Title VII proscribes discrimination against employees in interracial relationships in *Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 891–92 (11th Cir.1986), upon which this Court relied in *Deffenbaugh*.

In sum, even concluding that the *Blum* statement was a holding when issued, a reasonable person could have believed in spring 2016, that it was no longer good law based on more recent rulings. Additionally, a reasonable person could have believed that, if the *Blum* statement had not been abrogated previously, it in fact was not the correct view of the law, and this Court could be convinced to so rule, as did the Second and Seventh Circuits, who reconsidered and overruled precedents a lot more recent and directly on-point than the *Blum* statement. *See Hamm v. Weyauwega Milk Prods.*, 332 F.3d 1058 (7th Cir. 2003); *Hamner v. St. Vincent Hosp. and Health Care Ctr., Inc.*, 224 F.3d 701 (7th Cir. 2000); *Spearman v. Ford Motor Co.*, 231 F.3d 1080 (7th Cir. 2000); *Simonton v. Runyon*, 232 F.3d 33 (2d Cir. 2000); *Dawson v. Bumble & Bumble*, 398 F.3d 211 (2d Cir. 2005).

CONCLUSION

There was ample support in spring 2016 for O'Daniel's belief that sexual orientation discrimination was proscribed by Title VII. This Court should not affirm the District Court's ruling that O'Daniel's legal belief was unreasonable.

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