Case No. 98-16924

**UNITED STATES COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

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MEDINA RENE,
Plaintiff-Appellant,

v.

MGM GRAND HOTEL, INC.,
Defendant-Appellee.

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Appeal from Judgment of the U.S.D.C., District of Nevada
The Honorable Philip M. Pro, Judge
U.S.D.C. Case No. 97-364 DMP (RLH))

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# BRIEF OF AMICUS CURIAE BAY AREA LAWYERS FOR INDIVIDUAL FREEDOM IN SUPPORT OF APPELLANT MEDINA RENE'S APPEAL SEEKING REVERSAL OF THE DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT

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REHEARING EN BANC GRANTED JULY 2, 2001

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *Amicus Curiae* Bay Area Lawyers for Individual Freedom states that it is a California nonprofit mutual benefit corporation. BALIF has no parent corporation and issues no stock, public or private.

## STATEMENT OF INTEREST

BALIF is a minority bar association of over 500 lesbian, gay, bisexual and transgender members of the San Francisco Bay Area legal community. Founded in 1980, BALIF promotes the professional interests of its members and the legal interests of the gay, lesbian, bisexual and transgender community at large. As part of that mission, BALIF actively participates in public policy debates concerning the rights of lesbians, gay men, bisexuals and transgender persons. BALIF frequently appears as *amicus curiae* in cases where it can provide perspective and argument that will inform a court's decision on a matter of broad public importance, such as this case.

## CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to F.R.A.P. 29(d) and 9th Cir. R. 32-1, the attached amicus brief is proportionately spaced, has a typeface of 14 points or more and contains 7000 words or less.

Date: August 30

Shawn D. Parrish

## I. INTRODUCTION

The facts of this case are enough to make anyone who reads them shudder. Medina Rene worked at a large casino and hotel in Las Vegas, Nevada. Rene was subjected on an almost daily basis to crude and demeaning sexual harassment. As he tried to do his job, the other men, including his supervisor, whistled at him, blew kisses at him, and called him names such as "sweetheart." They forced him to look at pictures of naked men, and laughed while they did it. They grabbed his crotch and shoved objects in his anus. Rene was robbed of his essential human dignity even as he tried to earn money to pay his taxes and put a roof over his head and food in his mouth. The reason for this treatment is that his co-workers and supervisor did not think Rene acted like a man should act. Rene, a man, was sexually attracted to other men.

The question before this court is narrow. Is this country's basic civil rights statute, whose sweeping prohibitions are intended to strike at all forms of disparate treatment by employers on the basis of sex, broad enough to protect workers subjected to firings, demotions and sexual harassment because they are sexually attracted to people of the same sex, and therefore do not conform to gender stereotypes? The text of the statute and controlling precedents establish that the answer to this question is clearly yes.

The Civil Rights Act of 1964, or Title VII, prohibits employment

discrimination "because of . . . sex." The United States Supreme Court has ruled that Title VII prohibits an employer from discriminating against workers who do not conform with gender stereotypes, such as denying promotions to women who are perceived as "macho."

Discrimination against gay men and women is discrimination "because of . . . sex" for two reasons. First, any employment decision that takes into account an employee's sexual orientation must take into account that employee's gender. A person who is attracted to women may or may not be a gay person; the answer to this question depends on whether the person is a woman or a man. Second, the law is clear that employment discrimination based on gender stereotypes is illegal. Homosexuality violates a deeply entrenched gender stereotype that men should be sexually attracted to women, and women should be attracted to men. Consequently, employment discrimination based on sexual orientation is a form of gender-stereotyping discrimination.

This court should rule that Title VII prohibits employment discrimination against gay people and should reverse the judgment of the district court.

## II. ARGUMENT

### A. Title VII Bans Employment Discrimination Based On Sexual Orientation Because Such Conduct Is Discrimination "Because of . . . Sex."

#### 1. *A Person's Sexual Orientation Depends On His Or Her Gender.*

The district court and the earlier circuit court panel erred in holding that sexual harassment based on a person's sexual orientation cannot be discrimination "because of [that person's] sex," as required by Title VII. It can be.

Title VII states that "it shall be an unlawful employment practice for an employer . . . 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. § 20003-2(a)(1).

The courts have made clear that "discrimination because of . . . sex" means *gender* discrimination. Title VII "evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment." *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 64, 106 S.Ct. 2399, 2404, 91 L.Ed.2d 49 (1986) (citations and internal quotation marks omitted). In other words, "[t]he critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." *Harris v. Forklift Systems, Inc.*, 510

U.S. 17, 25, 114 S.Ct. 367, 372, 126 L.Ed.2d 295 (1993) (Ginsburg, J., concurring).

Discrimination against homosexuals (or against heterosexuals) is a form of gender discrimination. Whether a person is gay or straight is determined by his or her gender. A man is gay because he is (a) a man who (b) sexually desires other men. Similarly, a woman is gay if she is (a) a woman who (b) sexually desires other women. Consequently, a discriminatory employment action, such as sexual harassment, that is directed to an employee because of the fact he or she is gay necessarily includes taking account of that employee's gender.

Several commentators have noted the interrelatedness of sexual orientation and gender as applied to Title VII. "The discharge of a male employee because he has a male lover is an action that would not be taken against a similarly situated female employee. Similarly, if an employer fires a female employee for making a sexual advance to another female workers, but does not take any action against a male employee who makes a sexual advance to that same female employee, the sex discrimination is obvious." S. Marcosson, Harassment on the Basis of Sexual Orientation: A Claim of Sex Discrimination Under Title VII, 81 Geo. L.J. 1, 3-4 (1992).

In its specific application to this case, if Mr. Rene's tormentors sexually harassed him because he was gay, then by definition they were harassing him

because he was a man who sexually desired other men. If, as the district court and the earlier circuit court panel concluded, their motivation in carrying out their despicable deeds was Mr. Rene's homosexuality, then the inescapable logical conclusion is that they would not have sexually harassed Mr. Rene had he been a woman with the same sexual desires for men.[1] If Mr. Rene had been a woman, then he would have been heterosexual and would not have been singled out.

Previous courts have misconstrued the essentially gender-based nature of homosexuality by defining it in a gender-neutral way. In the formulation of these courts, people of either sex can be gay. Consequently, these courts have reasoned, an employment decision based on sexual orientation does not single out either sex. One of the leading cases that have adopted this view is the Ninth Circuit's decision in *DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327 (9th Cir. 1979), which was at least partly overruled recently.[2] *DeSantis* involved three consolidated cases with plaintiffs alleging employment discrimination based on sexual orientation and sexual stereotyping. The court rejected the argument that employer's policies that discriminated against gay people constituted sex discrimination, stating that ". . . we note that whether dealing with men or women the employer is using the same

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1 As discussed below, it is possible they were motivated by other reasons, such as their perception that Rene failed to conform to gender stereotypes.

2 *See Nichols v. Azteca Restaurant Enterprises, Inc. (Sanchez)*, 256 F.3d 864, 874-75 (9th Cir. 2001).

criterion: it will not hire or promote a person who prefers sexual partners of the same sex." *Id.* at 331.

But merely to speak this formulation is to reveal its flaw. Every gay person, whether a man or a woman, can only be homosexual in reference to his or her own gender. As the court noted, to be a homosexual is to be a person "who prefers sexual partners of the same sex." *Id.* at 331. Thus, sexual orientation discrimination is a form of sex discrimination because any distinction made by an employer on this ground necessarily takes into account the sex of the affected employee.

2. *The Rule that Prohibits Employment Discrimination on the Basis of Gender-Stereotyping Also Prohibits Sexual Orientation Discrimination.*

A number of cases have held that employment discrimination based on gender stereotypes is illegal under Title VII. These cases compel the conclusion that sexual orientation discrimination is also prohibited under Title VII. The reasoning of these cases establishes that it is not proper to avoid Title VII's prohibition against sex discrimination by redefining essentially sex-based discriminatory conduct in gender-neutral terms. And the holdings in these cases – that it is illegal to discriminate on the basis of gender stereotypes – apply equally to homosexuality because homosexual conduct violates gender stereotypes.

The leading case which established gender stereotyping violates Title VII is

*Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989). In *Price Waterhouse*, the U.S. Supreme Court held that a female employee who was denied partnership based in part on the partnership's perception she acted too masculine stated a claim under Title VII. In her partnership review, the partners described Hopkins as "macho," said she "overcompensated for being a woman," and suggested she should "walk more femininely, wear make-up, have her hair styled, and wear jewelry." *Id.*, 490 U.S. at 235, 109 S.Ct at 1782. The Court ruled held that gender stereotyping was equivalent to disparate treatment of men and women and thus constituted sex discrimination:

> In the specific context of 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. . . . As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for "'in 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.*, 490 U.S. at 250-251, 109 S.Ct at 1790-91, *quoting Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702, 707, n. 13, 98 S.Ct. 1370, 1375, n. 13, 55 L.Ed.2d 657 (1978), *quoting Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971).

This court recently followed *Price Waterhouse* in ruling that Title VII prohibits employment discrimination on the basis of gender stereotyping against males as well. In *Nichols v. Azteca Restaurant Enterprises, Inc. (Sanchez)*, 256 F.3d 864 (9th Cir. 2001), a sexual harassment case, this court held that a male restaurant employee who was sexually harassed because of the perception he was effeminate stated a Title VII claim. Sanchez was a host and food server at one of Azteca's restaurants. He was subjected to a barrage of verbal taunts, insults and name-calling by his co-workers and supervisor. He was repeatedly referred to as a "she," told he was a "f****** female whore" and taunted because he carried his serving tray "like a woman." Significantly, one of the epithets directed at Sanchez was "faggot," a derogatory synonym for a gay man. This court held that the "*Price Waterhouse* [decision] sets a rule that bars discrimination on the basis of sex stereotypes" and ruled that the verbal taunts directed at Sanchez constituted sex discrimination. *Nichols, supra,* 256 F.3d at 874-75.

The reasoning of these cases illustrates why it is wrong, as the *DeSantis* court did, to defend sex discrimination by defining such conduct in a gender-neutral way. It is certainly possible to describe the sexual stereotyping conduct at issue in *Price Waterhouse* in a gender-neutral way: one could say that the employer was enforcing a policy of requiring its employees to behave in conformity with traditional notions of how people of their gender should act.

Stated this way, sexual stereotyping could be defended as gender-neutral because it equally impacts male and female employees. Both men and women alike are expected to behave in conformity with traditional notions of how persons of their gender should act.

The *DeSantis* decision makes the same mistake by saying that employment policies or employer conduct that is directed to sexual orientation does not violate Title VII because such discrimination applies equally to male and female homosexuals.[3] But such a formulation ignores the fact that homosexuality violates a deeply entrenched gender stereotype that men should be sexually attracted to women, and women should be attracted to men. A similar prejudice operated to Hopkins' detriment in *Price Waterhouse*, where she ran up against her employer's expectations that she should act less aggressive and wear jewelry and make-up.

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[3] *DeSantis* involved allegations of sexual orientation and gender stereotyping discrimination. This court recently recognized that the portion of the DeSantis decision involving gender discrimination was wrongly decided: "*Price Waterhouse* sets a rule that bars discrimination on the basis of sex stereotypes. That rule squarely applies to preclude the harassment here. The only potential difficulty arises out of a now faint shadow cast by our decision in [*DeSantis*]. *DeSantis* holds that discrimination based on a stereotype that a man "should have a virile rather than an effeminate appearance" does not fall within Title VII's purview. This holding, however, predates and conflicts with the Supreme Court's decision in *Price Waterhouse*. And, in this direct conflict, *DeSantis* must lose. To the extent it conflicts with *Price Waterhouse*, as we hold it does, *DeSantis* is no longer good law. Under *Price Waterhouse*, Sanchez must prevail." *Nichols*, 256 F.3d at 874-75.

*Price Waterhouse* and *Nichols* show that courts must look at the underlying reality of an employer's policies or conduct to see if they are in fact gender-based. Under the reasoning of the *DeSantis* case, the *Price Waterhouse* and *Nichols* decisions would have come out the other way. But it is now clear that such policies are illegal under Title VII.[4]

3. *The Oncale Decision Did Not Hold or Even Imply that Sexual Orientation Discrimination Is Not Actionable Under Title VII.*

Two of the three judges on the panel that issued the initial decision in this case relied on the Supreme Court's decision in *Oncale v. Sundowner Offshore Services* to support their conclusion that sexual orientation discrimination is not actionable under Title VII. This was error. If anything, *Oncale* removed a potential obstacle to Mr. Rene's case. The *Oncale* decision merely held that in sexual harassment cases, the fact that the harasser is of the same sex as the victim does not preclude a Title VII action. Nothing about this holding, or the opinion's language, indicates that discrimination targeting gay people is permitted under Title VII. *Oncale* is relevant to this case only in that it clarifies that the sexual harassment that occurred – the sexual assaults on Mr. Rene by his male co-workers – can be actionable under Title VII provided that such actions were taken "because of . . . sex." As previously shown, discrimination based on sexual orientation is

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[4] An exception to the rule prohibiting gender stereotyping exists for reasonable regulations that require male and female employees to conform to

indeed sex discrimination.

*Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998) involved male-on-male sexual harassment aboard an offshore oil rig. Oncale alleged that his male co-workers sexually assaulted him and threatened him with rape. The district court and the Fifth Circuit both held that Oncale had no cause of action under Title VII because he was a male and his harassers were male. *Id.*, 523 U.S. at 77, 118 S.Ct at 1001. The Supreme Court reversed, ruling that "Title VII's prohibition of discrimination "because of . . . sex" protects men as well as women . . . If our precedents leave any doubt on the question, we hold today that nothing in Title VII necessarily bars a claim "because of . . . sex" merely because the plaintiff and the defendant (or the person charged with acting on behalf of the defendant) are of the same sex." *Id.*, 523 U.S. at 78-79, 118 S.Ct at 1001-02.

In explaining its decision, the Supreme Court provided examples of how a court or jury could infer that the harassment was motivated by the plaintiff's sex.

> Courts and juries have found the inference of discrimination easy to draw in most male-female sexual harassment situations, because the challenged conduct typically involves explicit or implicit proposals of sexual activity; it is reasonable to assume those proposals would not have been made to someone of the same sex. The same chain of inference would be available to a

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different dress and grooming standards. *See Nichols*, 256 F.3d at 875, n.7.

> plaintiff alleging same-sex harassment, if there were credible evidence that the harasser was homosexual. But harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex. A trier of fact might reasonably find such discrimination, for example, if a female victim is harassed in such sex- specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace. A same-sex harassment plaintiff may also, of course, offer direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace. Whatever evidentiary route the plaintiff chooses to follow, he or she must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted "discrimina[tion] ... because of ... sex." *Id.*, 523 U.S. at 80-81, 118 S.Ct. at 1002.

The earlier panel in this case ruled that Mr. Rene's case failed because he did not follow one of the specifically prescribed "evidentiary routes" in this passage. But it was clearly not the Supreme Court's intention that this list should be construed as an exhaustive list. The Supreme Court specifically referred to these means of proof as "examples" and left open the possibility of other viable means when it stated that "whatever evidentiary route" the plaintiff chooses, the plaintiff must establish the discrimination was sex-based.

The question before this court is whether discrimination on the basis of an employee's sexual orientation is "discrimination . . . because of . . . sex." *Oncale* did not decide or even address this issue. *Oncale's* relevance to this case is that it

cleared away misapprehensions in some lower courts about whether same-sex sexual harassment such as Mr. Rene encountered can be actionable at all.

4. *The Fact that Congress May Not Have Intended to Ban Sexual Orientation Discrimination Under Title VII Does Not Overcome the Statute's Prohibition On All Sex Discrimination In Employment, Including Sexual Orientation Discrimination.*

This court's principal consideration in construing Title VII is the text of the statute. The text plainly bans sex discrimination in employment, and subsequent precedent has confirmed that the statute covers sex discrimination in all forms. It would be improper to fashion an exception to this total ban for sexual orientation on the basis that Congress did not discuss homosexuality or because congressional leaders at the time probably would not have favored legal protections for gay people.

Title VII was enacted in 1964 at the height of the struggle for racial equality in this country. The statutory history shows Congress was preoccupied with race at this time. The prohibition against sex discrimination was an afterthought. *See Price Waterhouse*, 490 U.S. at 243-44, 109 S.Ct at 1787. Indeed, as the Supreme Court has noted, Title VII's prohibition against sex discrimination was added in an attempt to defeat the bill. *Id.*, n.9, *citing* C. & B. Whalen, The Longest Debate: A Legislative History of the 1964 Civil Rights Act 115-117 (1985). But this record has not prevented the federal courts from fully enforcing the ban on sex

discrimination and "strik[ing] at the entire spectrum of disparate treatment of men and women in employment." *Meritor Savings Bank, supra,* 477 U.S. at 64, 106 S.Ct. at 2404.

In fact, the Supreme Court has rejected similar attempts to use legislative history to preclude giving a full and fair meaning to the statute's prohibition on all forms of sex discrimination. The Supreme Court in *Oncale* rejected an argument that Congress was principally concerned with discrimination against women in enacting Title VII to hold that male-on-male sexual harassment could be actionable, despite the absence of any historical evidence that this was Congress' intent in passing Title VII.

> As some courts have observed, male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil 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. Title VII prohibits "discriminat [ion] ... because of ... sex" in the "terms" or "conditions" of employment. Our holding that this includes sexual harassment must extend to sexual harassment of any kind that meets the statutory requirements.

*Oncale, supra*, 523 U.S. at 79-80,118 S.Ct at 1003.

Certainly nothing in the language of Title VII indicates that sexual orientation discrimination cannot be a form of sex or gender discrimination.

*Amicus* asks this court to recognize this fact and fully enforce Title VII's ban on discrimination "because of . . . sex."

### B. At A Minimum, the District Court's Judgment Should Be Reversed to Allow This Case to Be Tried As a Gender Discrimination Case.

Even if discrimination based solely on a person's sexual orientation is not sex discrimination within the meaning of Title VII, this case should have been permitted to proceed to a jury. Traditional American notions of gay people usually attribute "womanly" or effeminate qualities to gay men, and "butch" or "masculine" traits to lesbians. Indeed, up until very recently, these stereotypes were the usual way of depicting gays and lesbians in literature, film and other media.

There is ample evidence on this record that would justify a jury in concluding that the harassment Rene suffered was motivated in part by the perception that Rene's homosexuality meant that he was effeminate and consequently failed to conform to his gender stereotype. As the earlier panel decision noted, Rene's coworkers referred to him as "sweetheart" and "muneca," the Spanish word for "doll." A finder of fact could reasonably conclude that these remarks were intended to convey that Rene's harassers thought he was womanly or effeminate. Harassment motivated by such perceptions would be actionable under the *Price Waterhouse* and *Nichols* decisions.

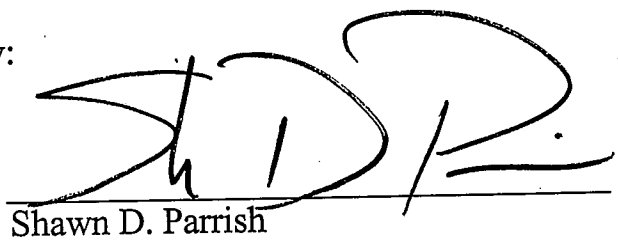
## III. CONCLUSION

*Amicus* is not requesting this court to make new law or engage in public policy formulation. The fundamental law and public policy determinations are already embodied in Title VII. It is illegal for employers to discriminate against employees "because of . . . sex."

Rather, it is the task of this court to fairly apply the law as written. This court must judge whether it is right to apply a law that bans sex discrimination in employment in all forms to a particular practice that unquestionably takes into account the sex of the affected employee. It is simply not possible to determine whether an employee is gay without taking into account his or her sex. Mr. Rene's co-workers were very much aware that he was a man, and they subjected him to their cruel treatment precisely because of this fact.

The judgment of the district court should be reversed. Mr. Rene's suit should proceed.

Dated: August 30, 2001

By: 

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Re: Medina Rene v. MGM Grand Hotel, Inc., (Case No. 98-16924)

# PROOF OF SERVICE

I, the undersigned, declare:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is One Market, Spear Street Tower, Thirty-Second Floor, San Francisco, CA 94105. On the date stated below, I served the within documents:

BRIEF OF AMICUS CURIAE BAY AREA LAWYERS FOR INDIVIDUAL FREEDOM IN SUPPORT OF APPELLANT MEDINA RENE'S APPEAL SEEKING REVERSAL OF THE DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT

☒ (By U.S. Mail) by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Francisco, California addressed as set forth below. I am readily familiar with the business practice at my place of business for collection and processing of correspondence for delivery by mail. Correspondence so collected and processed is deposited with United States Postal Service on the same day in the ordinary course of business. On the date stated below, said envelope was collected for the United States Postal Service following ordinary business practices.

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I declare under penalty of perjury under the laws of the United States of America that the above is true and correct.

Executed on August 30, 2001, at San Francisco, California.

Barbara J. Ward

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