# 16-3592-cv

## United States Court of Appeals
**For the Second Circuit**

FREDERICK M. CARGIAN,

*Plaintiff-Appellant,*

*v.*

BREITLING USA, INC.,

*Defendant- Appellee.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

**PLAINTIFF-APPELLANT'S PETITION FOR HEARING EN BANC**

JAMES D. ESSEKS
RIA TABACCO MAR
LENORA M. LAPIDUS
GILLIAN L. THOMAS
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 18th Floor
New York, New York 10004
(212) 549-2500

ERIN BETH HARRIST
CHRISTOPHER DUNN
NEW YORK CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 19th Floor
New York, New York 10004
(212) 607-3300

JANICE GOODMAN
LAW OFFICE OF JANICE GOODMAN
61 Jane Street, Suite 11D
New York, New York 10014
(212) 869-1940

*Attorneys for Plaintiff-Appellant Frederick M. Cargian*

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## STATEMENT OF THE ISSUE MERITING EN BANC CONSIDERATION

Plaintiff-Appellant Frederick M. Cargian moves this Court for initial hearing en banc pursuant to Rule 35 of the Federal Rules of Appellate Procedure ("FRAP"). The single issue to be addressed is whether this Court should reconsider and reverse its prior decisions and hold that Title VII's proscription against discrimination "because of sex" encompasses discrimination because of sexual orientation. *See* 42 U.S.C. §2000e-2(a).[1]

The issue raised is one of exceptional importance. This is clear from the fact that confusion among the district courts throughout the Second Circuit is so great that courts have labeled this Court's current standard as "unworkable" and "untenable," and have sent four cases (including this one) raising this same issue to the Court just this year.[2] The importance of the issue is also clear from the fact that both the en banc Seventh Circuit and the U.S. Equal Employment Opportunity Commission ("EEOC") have reversed precedent to now hold that discrimination based on sexual orientation constitutes sex discrimination under Title VII. *See Hively v. Ivy Tech Cmty. Coll. of Ind.*, No. 15-1720, 2017 WL 1230393 (7th Cir.

[1] While initial hearing en banc is unusual, it is warranted in cases involving questions of exceptional importance. *See, e.g., Int'l Refugee Assistance Proj. v. Trump*, No. 17-1351 (4th Cir. Apr. 10, 2017) (order granting initial hearing en banc).

[2] *Zarda v. Altitude Express, Inc.*, No. 15-3775; *Anonymous v. Omnicom Grp., Inc.*, No. 16-748; *Magnusson v. Cty. of Suffolk*, No. 16-1876.

Apr. 4, 2017) (en banc); *Baldwin v. Foxx*, EEOC No. 0120133080, 2015 WL 4397641 (EEOC July 15, 2015).

Additionally, consideration by the full Court is necessary because the present circuit law conflicts with Supreme Court precedent adopting an expansive application of Title VII, including *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), and its progeny, and it is inconsistent with this Court's decisions in *Holcomb v. Iona College*, 521 F.3d 130 (2d Cir. 2008), and *Back v. Hastings on Hudson Union Free School District*, 365 F.3d 107 (2d Cir. 2004).

In a pair of decisions from 2000 and 2005, this Court excluded lesbian, gay, and bisexual people from Title VII's promise of equal employment opportunity. *Simonton v. Runyon*, 232 F.3d 33 (2d Cir. 2000); *Dawson v. Bumble & Bumble*, 398 F.3d 211 (2d Cir. 2005). At that time, both the EEOC and every circuit to have considered the question reached the same conclusion.

The legal landscape has significantly changed over the past seventeen years. Gay people now have the freedom to marry, to serve in the military as equals, and to form intimate relationships free from state intrusion. Moreover, a growing number of courts and agencies, including the en banc Seventh Circuit and the full EEOC, now recognize that sexual orientation discrimination is a form of sex discrimination, and others have called into question the validity of decisions to the contrary. *See, e.g.*, *Boutillier v. Hartford Pub. Sch.*, No. 3:13-cv-01303-WWE,

2016 WL 6818348 (D. Conn. Nov. 21, 2016); *Christiansen v. Omnicom Grp., Inc.*, 167 F. Supp. 3d 598, 620 (S.D.N.Y. 2016), *rev'd sub nom. Anonymous v. Omnicom Grp., Inc.*, No. 16-748, 2017 WL 1130183 (2d Cir. Mar. 27, 2017) (per curiam); *Videckis v. Pepperdine Univ.*, 150 F. Supp. 3d 1151, 1159 (C.D. Cal. 2015) (collecting cases).

Moreover, this Court's curious carve-out that seemingly allows gay people to bring sex discrimination claims only when they are framed as a particular form of sex stereotyping has forced the district courts – and appellate ones reviewing them – to engage in mental acrobatics to decide whether any particular claim of sex-based stereotyping can be separated from sexual orientation. This exercise has led to a hodge-podge of decisions that are difficult to apply and fail to provide notice to employers and employees as to what the law requires.

Cargian's case provides an ideal vehicle for the en banc Court to consider this important legal question. Cargian's sex discrimination claim turns on whether sexual orientation discrimination is actionable sex discrimination in this circuit. It is brought before the Court with a full summary judgment record with no subsidiary issues or procedural impediments, and judicial economy will be served by bypassing a three-judge panel, which could not rule on the central legal issue in Cargian's case. Cargian submits that this is "the appropriate occasion . . . to revisit the central legal issue confronted in *Simonton* and *Dawson*." *Anonymous v.*

*Omnicom Grp., Inc.*, No. 16-748, 2017 WL 1130183, at *4 (Katzmann, C.J., concurring).

## STATEMENT OF THE CASE

Plaintiff-Appellant Frederick M. Cargian, a gay man, was a star salesman for Defendant-Appellee Breitling USA, Inc., a luxury watch brand, for twenty years. Hired in 1990, by 2010 he was consistently the highest producer, earning him the top base salary and bonuses. In 2010, however, Tierry Prissert became Breitling's President, and Cargian's star fell precipitously. Over the next three years, Prissert – who openly fostered a "boys' club" environment at Breitling that demeaned the "girls" – relegated Cargian, because of his sexual orientation, to the same invisibility of the female sales representatives: Prissert excluded Cargian from work-related meetings and social gatherings, including high-profile marketing events that Cargian had attended in the past, and, on one business trip, assigned Cargian to share a hotel room with a female colleague – the ultimate statement that Cargian, simply by virtue of being gay, was perceived by the boss and decision maker to be less than a real man. Prissert also manifested his hostility toward Cargian by continually and exponentially raising Cargian's sales goals far in excess of any of his comparators – a move calculated to assure Cargian's failure – as well as by manufacturing disciplinary warnings against him. In December 2012, Prissert demoted Cargian, significantly decreasing his compensation, and

promoted an unqualified heterosexual man with no prior sales experience. In 2013, Prissert fired Cargian and replaced him with the same, poor-performing unqualified heterosexual male who conformed to his concept of a "real" man.

Declaring itself bound by *Simonton*, the district court ignored all evidence demonstrating disparate treatment based on sexual orientation and analyzed the claim solely as a sex stereotyping claim. SPA-6. The district court concluded that, although Cargian offered evidence that he was treated as one of the "girls," his sex stereotyping claim was foreclosed by *Dawson*, which the court understood to require proof of some visible manifestation of nonconforming "behavior" or "appearance" on the part of the plaintiff. SPA-7, -8. Finding no such evidence of nonconforming "behavior" or "appearance," such as an effeminate demeanor, the district court reasoned that Cargian's sex discrimination claim must fail and granted Breitling's motion for summary judgment. SPA-7, -8.[3]

Cargian appealed, arguing that Title VII's sex provision protects him as a gay man and that this Court's decisions to the contrary should be overruled. ECF No. 37. After Cargian filed his opening brief, a three-judge panel concluded in a

[3] Cargian submits that the evidence he cited to the district court in opposition to summary judgment met the standard set forth in *Walsh v. New York City Housing Authority*, 828 F.3d 70 (2d Cir. 2016), to establish a genuine issue of material fact warranting trial on his claim for sex discrimination. Therefore, should this Court overrule *Simonton*, Cargian's case should be returned to the district court for trial. For a full explication of the facts, see Plaintiff-Appellant's opening brief, ECF No. 37 at 4-18.

separate case that it was powerless to overrule those decisions without consideration by the full Court. *See Anonymous*, 2017 WL 1130183.

## ARGUMENT

### I. INITIAL HEARING EN BANC IS WARRANTED.

Hearing en banc may be ordered either when "the proceeding involves one or more questions of exceptional importance," FRAP 35(b)(1)(B), or when the decision of a three-judge panel "conflicts with a decision of the United States Supreme Court or the court to which the petition is addressed," FRAP 35(b)(1)(A). Both standards are met in this case. Taken together, they weigh strongly in favor of granting the petition for hearing en banc.

#### A. The scope of Title VII's protections for lesbian, gay, and bisexual people presents a question of exceptional importance.

##### 1. A growing number of decisions now recognize sexual orientation discrimination as a form of sex discrimination.

This circuit's precedent is increasingly out of step with the clear trend in the federal courts, which is to recognize that Title VII's prohibition on sex discrimination encompasses discrimination against lesbian, gay, and bisexual people. While gay people have achieved some measure of formal legal equality in the past decade and now stand on equal footing with heterosexual Americans in many areas, federal anti-discrimination law in employment has lagged behind based solely on the premise that sexual orientation is not related to sex.

A growing number of decisions, including most importantly the en banc Seventh Circuit, now recognize the absurdity of that conclusion. In *Hively*, the en banc Seventh Circuit took a "fresh look" at its precedent that, like this Court's decisions in *Simonton* and *Dawson*, precluded an employee from proving sex discrimination where it was based on his or her sexual orientation. 2017 WL 1230393, at *1. On review by the full court, the Seventh Circuit concluded "that discrimination on the basis of sexual orientation is a form of sex discrimination." *Id.* It did so for three reasons. First, the Seventh Circuit held that sexual orientation discrimination is sex discrimination because it literally treats a woman who forms intimate relationships with a woman worse than a man who forms such relationships with a woman. *Id.* at *5; *see also* Br. of *Amicus Curiae* EEOC in Support of Plaintiff/Appellant and Reversal, ECF No. 54 ("EEOC Br.") at 10-12. Second, the court held that sexual orientation discrimination is a form of sex stereotyping – prohibited under the Supreme Court's decision in *Price Waterhouse* – because the plaintiff's same-sex attraction was "the ultimate case of failure to conform to the female stereotype." *Hively*, 2017 WL 1230393, at *5; EEOC Br. at 5-10. Finally, the Seventh Circuit held that sexual orientation discrimination is also a form of associational discrimination based on sex.[4] *Hively*, 2017 WL

[4] The Seventh Circuit also swept away its previous reliance on the fact that Congress has not, to date, amended Title VII to add the words "sexual orientation." *Id.* at *3-4. This Court, too, should reconsider *Simonton*'s deference to subsequent

1230393, at *7; EEOC Br. at 12-15. Ironically, the *Hively* Court relied, in part, on this Court's decision in *Holcomb v. Iona College*, 521 F.3d 130 (2d Cir. 2008), to support its conclusion. *Hively*, 2017 WL 1230393, at *7; *see also Boutillier*, 2016 WL 6818348, at *9; *Baldwin*, 2015 WL 4397641, at *6.

Chief Judge Katzmann similarly suggests that the time has come for this court to take a fresh look at the issue of overruling *Simonton* based on the three theories endorsed in *Hively* and propounded by the plaintiff-appellant in *Anonymous*. *Anonymous*, 2017 WL 1130183, at *6-8 (Katzmann, C.J., concurring).

**2. Application of *Simonton* and *Dawson* has resulted in inconsistent and incoherent district court decisions requiring resolution by the full Court.**

The tension between the expansive interpretation of Title VII's sex provision set forth by the Supreme Court and by this Court in *Holcomb*, on the one hand, and the cramped interpretations exemplified in *Simonton* and *Dawson*, on the other, has proved utterly "unworkable" in the district courts. *Anonymous*, 2017 WL 1130183, at *7 (Katzmann, C.J., concurring). Most significantly, it has resulted in a jurisprudence that is incoherent at best and absurd at worst.

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legislative history, which the Supreme Court has warned "deserve[s] little weight in the interpretive process." *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994); *see generally* Br. of *Amici Curiae* 128 Members of Congress, *Anonymous v. Omnicom Grp., Inc.*, ECF No. 46, No. 16-748 (2d Cir. June 28, 2016).

Read together, *Simonton* and *Dawson* imposed two significant limitations on gay and bisexual employees who experience discrimination because of their sexual orientation. First, in *Simonton*, this Court held that Title VII does not prohibit discrimination based on sexual orientation, 232 F.3d at 36, and that a gay plaintiff can plead a sex stereotyping claim only if he alleges that he "behaved in a stereotypically feminine manner and that the harassment he endured was, in fact, based on his non-conformity with gender norms instead of his sexual orientation," *id.* at 38. Second, in *Dawson*, this Court further limited sex stereotyping claims to those premised on an employee's "behavior" or "appearance." 398 F.3d at 221.

The difficulty of categorizing offensive conduct as involving sex, sexual orientation, both, or neither has led district courts in this circuit to describe this Court's jurisprudence as both impractical and "untenable." *Boutillier*, 2016 WL 6818348, at *11. "The lesson imparted by the body of Title VII litigation concerning sexual orientation discrimination and sexual stereotyping seems to be that no coherent line can be drawn between these two sorts of claims." *Christiansen*, 167 F. Supp. 3d at 620; *see also Hively*, 2017 WL 1230393, at *2, *8 (observing that attempting to parse the two kinds of claims led to "a confused hodge-podge of cases" with "bizarre," "confusing and contradictory results" (internal quotation marks omitted)).

A friend-of-the-court brief to this Court identified at least three categories of conflicting district court decisions in the Second Circuit applying *Simonton* and *Dawson*: (1) decisions concluding that sexual orientation-related speech or behavior can never constitute evidence of sex discrimination, *e.g.*, *Morales v. ATP Health & Beauty Care, Inc.*, No. 3:06CV01430 (AWT), 2008 WL 3845294, at *8 (D. Conn. Aug. 18, 2008); (2) decisions concluding that sexual orientation-related speech or behavior can *sometimes* constitute evidence of sex discrimination, *e.g.*, *Boutillier v. Hartford Pub. Sch.*, No. 3:13CV1303 WWE, 2014 WL 4794527, at *2 (D. Conn. Sept. 25, 2014); and (3) decisions concluding that sexual orientation-related speech or behavior can *sometimes* constitute evidence of sex discrimination, but *only* if the plaintiff is not gay or bisexual, *e.g.*, *Estate of D.B. ex rel. Briggs v. Thousand Islands Cent. Sch. Dist.*, No. 7:15-CV-0484 (GTS/ATB), 2016 WL 945350, at *9 (N.D.N.Y. Mar. 14, 2016). For an in-depth discussion of these decisions, see the excellent brief submitted by *Amicus Curiae* Nat'l Ctr. for Lesbian Rights, in *Anonymous v. Omnicom Grp., Inc.*, ECF No. 44, No. 16-748 (2d Cir. June 28, 2016).

The district court's observation in *Christiansen* is particularly apt because that court's attempt at "coherent" line drawing was recently reversed in a per curiam opinion by this Court. In concluding that the plaintiff's complaint fell on the actionable side of the sex-stereotyping line drawn in *Simonton* and *Dawson*,

this Court acknowledged "some confusion in our Circuit about the relationship between gender stereotyping and sexual orientation discrimination claims" but did little to clear up that confusion. *Anonymous*, 2017 WL 1130183, at *3. Instead, the opinion merely reiterated the notion that a gay man can proceed under *Price Waterhouse* based on allegations that he was insufficiently masculine and then observed that the plaintiff in the case at bar had done so. *Id.* at *4. The panel's decision was based solely on the pleadings and did not address what evidence would be required at summary judgment or trial. The per curiam decision left for another day, and yet another case, whether to "revisit the central legal issue confronted in *Simonton* and *Dawson*." *Id.* at *4 (Katzmann, C.J., concurring).

Cases such as *Christiansen* and *Magnusson* will have to be appealed, one by one, for determination by this court. *See Fabian v Hosp. of Cent. Conn.*, 172 F. Supp. 3d 509, 524 n.8 (D. Conn. 2016) (noting that "courts and juries have to sort out the difference on a case by case basis"). Resolution of the question now is warranted, not only to conserve judicial resources, but also to provide guidance and clarity to district courts, employers, and employees as to what Title VII requires.

### B. *Simonton* and *Dawson* conflict with Supreme Court precedent.

This Court's conclusion that "Title VII does not proscribe discrimination because of sexual orientation," *Simonton*, 232 F.3d at 36, cannot be squared with

the Supreme Court's expansive interpretation of Title VII's sex provision. While its landmark decision in *Price Waterhouse*, where the Court concluded that denying promotion to a woman because she was insufficiently feminine was discrimination "because of sex," may offer the most explicit repudiation of sex stereotypes, it is one of many. Indeed, nearly forty years ago, the Supreme Court recognized that "'in forbidding employers to discriminate against individuals because of their sex, Congress intended [Title VII] to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.'" *L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978). Thus, to fulfill the broad purposes of Title VII, the Supreme Court has extended the law's sex provision to prohibit many forms of discrimination and to protect people of diverse identities. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998) (same-sex harassment); *United Auto Workers of Am. v. Johnson Controls, Inc.*, 499 U.S. 187 (1991) (women of reproductive capacity); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986) (sexual harassment); *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 543-44 (1971) (per curiam) (mothers of young children); *see also Back*, 365 F.3d at 120 (mothers); *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194 (5th Cir. 1971) (married women).

The same principles lead to the conclusion that sexual orientation discrimination, too, is an impermissible form of discrimination "because of sex."

As Justice Scalia observed, "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." *Oncale*, 523 U.S. at 79.

This Court's conclusion that "the term 'sex' in Title VII refers only to membership in a class delineated by gender," 232 F.3d at 36, flies in the face of *Manhart*'s mandate to banish sex-based considerations, in whatever form. While acknowledging that gay people were protected under the theory of sex stereotyping, *Simonton* and *Dawson* have been interpreted to hold that a gay plaintiff can plead such a case only if he alleges that he "behaved in a stereotypically feminine manner and that the harassment he endured was, in fact, based on his non-conformity with gender norms instead of his sexual orientation." *Id.* at 38. Nothing in *Price Waterhouse* limited sex stereotyping claims to only those cases where there is overt explicit evidence of the individual's failure to conform to stereotypical dress or mannerism. *Baldwin*, 2015 WL 4397641, at *7-8.

Moreover, such an analysis conflicts with this Court's recognition that employers may not refuse to hire women with children based on the sex-based stereotype that mothers "would not show the same level of commitment" to the workplace as women without children. *Back*, 365 F.3d at 120; *see also Sobel v.*

*Yeshiva Univ.*, 839 F.2d 18, 33 (2d Cir. 1988) (employers may not refuse to hire a woman because she is the sole wage-earner in her household). Acknowledging the diversity of stereotypes that may seep into the workplace, the *Back* Court suggested that the test to determine whether a particular belief amounts to a sex-based stereotype under *Price Waterhouse* should not be unduly formal. 365 F.3d at 120.

The flexible approach to sex stereotyping this Court endorsed in *Back* stands in stark contrast to the rigid exclusion of sex stereotyping claims involving lesbian, gay, and bisexual employees adopted in *Simonton* and reinforced in *Dawson*. Indeed, *Dawson*'s mandate that the plaintiff prove that the defendant discriminated based on his or her gender nonconforming behavior or appearance and not other forms of gender nonconformity, including sexual orientation, "is logically untenable." *Anonymous*, 2017 WL 1130183, at *7 (Katzmann, C.J., concurring). Indeed, "negative views of sexual orientation are often, if not always, rooted in the idea that men should be exclusively attracted to women and women should be exclusively attracted to men – as clear a gender stereotype as any." *Id.*; *see also Hively*, 2017 WL 1230393, at *8.

Finally, *Simonton* cannot be reconciled with this Court's decision in *Holcomb*, which recognized that Title VII prohibits discrimination based on an employee's interracial marriage or friendship – i.e., the race of the person with

whom he or she associates. So, too, does Title VII prohibit discrimination based on an employee's same-sex marriage or attraction – i.e., the sex of the person with whom he or she associates. *Boutillier*, 2016 WL 6818348, at *9.

## II. THIS IS AN APPROPRIATE CASE TO DECIDE WHETHER SEXUAL ORIENTATION DISCRIMINATION IS DISCRIMINATION "BECAUSE OF SEX."

Chief Judge Katzmann called on the full court to reconsider *Simonton* and *Dawson* in an "appropriate case." *Anonymous*, 2017 WL 1130183, at *9 (Katzmann, C.J., concurring). This is that appropriate case because Cargian's sex discrimination claim turns on whether this Court reverses its decisions in *Simonton* and *Dawson*. Cargian's stereotyping claim is based on his boss's sex-stereotyped perception of him as a gay man. In discriminating against Cargian, Prissert did not rely on any "effeminate" behavior or appearance. Prissert knew Cargian was gay and for that reason alone perceived him to be not a man at all – so much so that Prissert assigned him to share a hotel room with a female employee. In other words, Cargian's sexual orientation was inconsistent with Prissert's idea of what a man is or should be. That is plainly sex stereotyping under *Price Waterhouse*. *See Hively*, 2017 WL 1230393, at *3.

Despite the straightforward logic of Cargian's theory, this Court's precedent in *Dawson* has led district courts – including the district court in this case – to limit gender nonconformity claims to only those reflecting visible nonconforming

"behavior" or "appearance." 398 F.3d at 221. Read together, *Simonton* and *Dawson* limit Cargian to a gender nonconformity claim based on effeminate behavior or appearance. This case thus presents an ideal vehicle to reconsider whether sexual orientation discrimination is based on sex and thus is prohibited by Title VII. Rather than defer that question again, the Court should take this case en banc to resolve it, as the EEOC recently urged. *See* Rule 28(j) Letter on Behalf of *Amicus* EEOC, ECF No. 74.

## III. JUDICIAL ECONOMY WARRANTS INITIAL HEARING EN BANC.

As discussed above, resolution of Cargian's sex discrimination claim requires this Court to revisit and overrule its decisions in *Simonton* and *Dawson*. But the panel assigned to hear this appeal cannot reconsider those decisions without invoking the en banc procedure, as two panels of this Court have noted in the last month. *Zarda v. Altitude Express*, No. 15-3775, slip op. at 7 (2d Cir. Apr. 18, 2017); *Anonymous*, 2017 WL 1130183, at *2. As a result, it would be a waste of judicial resources to require the panel to go through the empty exercise of hearing and deciding the case before considering a petition for hearing en banc.

Hearing this case en banc is warranted without further delay. Leaving this question unresolved causes harm to lesbian, gay, and bisexual employees throughout the Circuit, including the three other plaintiffs whose cases are also pending before this Court; forces district judges to decide cases without

meaningful guidance from this Court; and leaves employers and employees without the clarity that it is entirely reasonable for them to expect from the courts. Now is the time to correct the Court's decisions in *Simonton* and *Dawson* and hold that sexual orientation discrimination is discrimination because of sex.

## CONCLUSION

The Court should grant Plaintiff-Appellant's petition for hearing en banc.

Dated: April 19, 2017

Respectfully submitted,

*s/ Janice Goodman*
JANICE GOODMAN
LAW OFFICE OF JANICE GOODMAN
61 Jane Street, Suite 11D
New York, New York 10014
(212) 869-1940
jg@janicegoodmanlaw.com

JAMES D. ESSEKS
RIA TABACCO MAR
LENORA M. LAPIDUS
GILLIAN L. THOMAS
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 18th Floor
New York, New York 10004
(212) 549-2500
jesseks@aclu.org
rmar@aclu.org
llapidus@aclu.org
gthomas@aclu.org

ERIN BETH HARRIST
CHRISTOPHER DUNN
NEW YORK CIVIL LIBERTIES UNION

FOUNDATION
125 Broad Street, 19th Floor
New York, New York 10004
(212) 607-3300
eharrist@nyclu.org
cdunn@nyclu.org

*Attorneys for Plaintiff-Appellant*

## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 35(b)(2)(A) because it contains 3,898 words, excluding the parts of the brief exempted by FRAP 32(f).

2. This brief complies with the typeface requirements of FRAP 32(a)(5) and the type style requirements of FRAP 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman type style.

Dated: April 19, 2017

*s/ Janice Goodman*

JANICE GOODMAN
LAW OFFICE OF JANICE GOODMAN
61 Jane Street, Suite 11D
New York, New York 10014
(212) 869-1940
jg@janicegoodmanlaw.com

*Attorney for Plaintiff-Appellant*

## CERTIFICATE OF SERVICE

I hereby certify that on April 19, 2017, I electronically filed the foregoing Plaintiff-Appellant's Petition for Hearing En Banc with the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

*s/ Janice Goodman*
JANICE GOODMAN
LAW OFFICE OF JANICE GOODMAN
61 Jane Street, Suite 11D
New York, New York 10014
(212) 869-1940
jg@janicegoodmanlaw.com

*Attorney for Plaintiff-Appellant*