SACK, *Circuit Judge*, concurring in the judgment, and in parts I (Jurisdiction), II.A (The Scope of Title VII), II:B.3 (Associational Discrimination), and II:C (Subsequent Legislative Developments) of the opinion for the Court.

We decide this appeal in the context of something of a revolution[1] in American law respecting gender and sex. It appears to reflect, *inter alia*, many Americans' evolving regard for and social acceptance of gay and lesbian persons. We are now called upon to address questions dealing directly with sex, sexual behavior, and sexual taboos, a discussion fraught with moral, religious, political, psychological, and other highly charged issues. For those reasons (among others), I think it is in the best interests of us all to tread carefully; to say no more than we must; to decide no more than is necessary to resolve this appeal. This is not for fear of offending, but for fear of the possible consequences of being mistaken in one unnecessary aspect or another of our decision.

In my view, the law of this Circuit governing what is referred to in the majority opinion as "associational discrimination" – discrimination against a person because of his or her association with another – is unsettled. What was

[1] Welcomed by some, denounced by others, to be sure.

embraced by this Court in *Simonton v. Runyon*, 232 F.3d 33 (2d Cir. 2000) (holding, by implication, that associational discrimination on the basis of sex is not cognizable under Title VII), seems to have both been overtaken by, and to be inconsistent with, our later panel decision in *Holcomb v. Iona College*, 521 F.3d 130 (2d Cir. 2008) (holding directly that associational discrimination on account of race is unlawful under Title VII).[2] Choosing between the two approaches, as I think we must, I agree with the majority that *Holcomb* is right and that *Simonton* is therefore wrong.[3] It is principally on that basis that I concur in the judgment of the Court.

My declination to join other parts of the majority opinion does not signal my disagreement with them. Rather, inasmuch as, in my view, this appeal can

---

[2] I find it hard to interpret the law to prohibit associational race discrimination but not associational sex discrimination. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 243 n.9 (1989) (plurality opinion) ("[T]he statute on its face treats each of the enumerated categories exactly the same."). If it weren't for *Simonton*, therefore, I would think *Holcomb* stands for the proposition that "where an employee is subjected to adverse action because an employer disapproves of [a same-sex] association, the employee suffers discrimination because of the employee's *own* [sex]." *Holcomb*, 521 F.3d at 139 (emphasis in original).

[3] *Holcomb* modified this Circuit's understanding of Title VII, and represents an "intervening development in the law" that justifies reconsideration of our prior precedent. *See Crown Coat Front Co. v. United States*, 363 F.2d 407, 414 (2d Cir. 1966) (Friendly, J., concurring) (quoting *Miss. River Fuel Corp. v. United States*, 314 F.2d 953, 958 (Ct. Cl. 1963) (Davis, J., concurring)), *rev'd*, 386 U.S. 503 (1967).

be decided on the simpler and less fraught theory of associational discrimination, I think it best to stop there without then considering other possible bases for our judgment.