UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PETER J. TERVEER,

Plaintiff,

v.

Civil Action No. 12-1290 (CKK)

JAMES H. BILLINGTON, Librarian,
Librarian of Congress,

Defendant,

TENDERED BRIEF OF *AMICUS CURIAE* LAMBDA LEGAL DEFENSE & EDUCATION FUND, INC. IN SUPPORT OF PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S TITLE VII CLAIMS

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Founded forty years ago, Lambda Legal is the oldest and largest national legal organization whose mission is to safeguard and advance the civil rights of lesbians, gay men, bisexuals, transgender ("LGBT") people and those with HIV through impact litigation, education and policy work. Lambda Legal is acutely interested in workplace fairness issues, as each year, workplace discrimination calls are at or near the top of the categories of calls we receive.

When cases have affected the conditions and rights of LGBT workers, Lambda Legal frequently has been counsel of record or *amicus curiae* in federal cases addressing the scope of Title VII's coverage. *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75 (1998) (*amicus*); *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011) (brought under 42 U.S.C. § 1983 but decided on principles applicable to Title VII) (counsel); *Kastl v. Maricopa County Cmty. College Dist.*, 325 Fed. Appx. 492 (9th Cir. 2009) (*amicus*); *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215 (10th Cir. 2007) (*amicus*); *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104, 2006 U.S. App. LEXIS 9307 (9th Cir. 2006) (en banc) (counsel); *Dorr v. First Kentucky Nat'l Corp.*, 796 F.2d 179 (6th Cir. 1986) (counsel); *Lopez v. River Oaks Imaging & Diagnostic Group, Inc.*, 542 F. Supp. 2d 653 (S.D. Tex. 2008) (counsel); *Mitchell v. Axcan Scandipharm, Inc.*, Civil Action No. 05-243, 2006 U.S. Dist. LEXIS 6521 (W.D. Pa., Feb. 17, 2006) (*amicus*). Both in letters to each house of Congress, and in comments to the EEOC, Lambda Legal has explained the failure of some courts to protect the rights of LGBT employees from discrimination based on sex or religion due to misapplying law regarding Title VII's coverage.

INTRODUCTION

Because his workplace penalizes only men for attraction to men, plaintiff Peter J. TerVeer alleges discrimination "because of . . . sex." Attempts to negate that truth by injecting other criteria (*e.g.*, other motives or factors, or legislative or policy goals) are flatly contrary to Supreme Court and D.C. Circuit authority, which tolerate no qualifications or limitations to this principle.[1] Contrary suggestions and holdings from other circuits are contrary to Title VII law, as is Billington's argument that there is a sexual orientation exception to the rule, or subset of conditions, traits, behaviors, characteristics, etc., whereby punishing only members of one sex who exhibit the action or attribute is permissible. Title VII's coverage is apparent if controlling precedent is followed; coverage is also dictated by the universal recognition of coverage for discrimination against an employee because of his or her interracial relationships. Title VII's language treats race and sex the same, as does the Supreme Court in setting standards for liability. With interracial relationships and same-sex relationships, the discrimination is always "because of" the race or the sex of the employee; the inherent additional consideration of the sex of the other party to the relationship should be as irrelevant in the same-sex context as it has been in the interracial context for decades now.

[1] *Amicus* does realize that there is an "extremely narrow" BFOQ exception to Title VII's protections for sex, religion, and national origin that is not invoked by the Library and is not at issue here. *See* 42 U.S.C. 2000e-2(e); *Dothard v. Rawlinson*, 433 U.S. 321, 334 (1977) ("the bfoq exception was in fact meant to be an extremely narrow exception to the general prohibition of discrimination on the basis of sex."). For ease of reading, *amicus* incorporates this acknowledgement throughout the brief and qualifies its assertions herein accordingly without the need to repeat this qualification throughout.

ARGUMENT

I. PER THE CONTROLLING LAW IN THIS CIRCUIT, THE QUESTION OF TITLE VII'S COVERAGE HERE IS REDUCED TO WHETHER THE HARASSMENT ALLEGED BY TERVEER AFTER HIS EMPLOYER FOUND OUT THAT HE DATES MEN, OCCURRED "BECAUSE OF TERVEER'S SEX, MALE."

Whether Title VII's sex discrimination provision applies turns on whether the alleged mistreatment would have occurred if the employee had been of another gender. It does encompass any such instance of differential treatment because of sex; but the inquiry does not encompass whether others suffered discrimination, nor policy/legislative goals nor the possible existence of other motives – those concerns are not relevant.

A. The Title VII Sex Discrimination Coverage Inquiry Turns on One Question: Whether TerVeer's Attraction to Men Would Have Been a Concern if TerVeer Were a Woman.

This District and this Circuit were the first to recognize that sexual harassment is covered by Title VII. *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir.1977); *Williams v. Saxbe*, 413 F. Supp. 654 (D.D.C. 1976).[2] This Circuit was also the first to recognize a Title VII sex discrimination claim based on a hostile work environment without pecuniary loss by the employee, and the first to declare, albeit in dicta, that same-sex sexual harassment is proscribed by Title VII. *Bundy v. Jackson*, 641 F.2d 934 (D. C. Cir. 1981); *see also id*. at 942 n.7, citing *Barnes*, 561 F.2d at 990 n.55. These milestones share two things in common: the Supreme Court's agreement, see *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75 (1998) and *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986), and an unwavering focus on the question: "would the complaining employee have suffered the harassment [or adverse action] had he or she been of a different gender?"

[2] *See Tomkins v. Public Service Electric & Gas Co.*, 422 F. Supp. 553, 556 (D.N.J. 1976) (noting that, of the first five cases deciding whether Title VII covers sexual harassment, *Williams v. Saxbe* stood alone as the only court holding in the affirmative).

Bundy v. Jackson, 641 F.2d 934, 942 n.7 (D. C. Cir. 1981) citing *Barnes*, 561 F.2d at 990 n.55. If the answer is no, the employee has a claim and remedy under Title VII, period. The courts of this circuit have rejected any attempt to water down this standard by ruling some discrimination "because of . . . sex" actionable and other such instances permissible. "[T]he language of the statute is non-exclusive, creating a broad rule of workplace equality. Title VII makes discrimination at the workplace on the basis of gender illegal, period." *Williams v. District of Columbia*, 916 F. Supp. 1, 9 (D.D.C. 1996) (citation omitted); *see also Barnes*, 561 F.2d at 994 ("The statute in explicit terms proscribes discrimination 'because of . . . sex,' with only narrowly defined exceptions completely foreign to the situation emerging here." (footnote omitted)).

While few courts have used the *Oncale/Barnes* approach to determine whether Title VII's sex discrimination ban covers sexual orientation, there is some support. *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212, 1223 (D. Or. 2002) ("One way (but certainly not the only means) of satisfying this ["because of . . . sex"] requirement is to inquire whether the harasser would have acted the same if the gender of the victim had been different. [*Oncale*, 523 U.S.] at 80-81. A jury could find that Cagle would not have acted as she (allegedly) did if Plaintiff were a man dating a woman, instead of a woman dating a woman. If that is so, then Plaintiff was discriminated against because of her gender.") (footnote omitted); *Foray v. Bell Atlantic*, 56 F. Supp. 2d 327, 329 (S.D.N.Y. 1999) (approvingly citing the judicial and academic support for the proposition that discrimination because of sex can occur when a man in a different-sex domestic partnership is denied benefits available to couples in same-sex domestic partnerships, but holding that the unavailability of marriage to same-sex couples at that time rendered same-sex domestic partners not similarly situated).

B. The Coverage Inquiry Focuses Only on the Individual and Does Not Require, for Example, a Woman Claiming Sex Discrimination to Show That Other Women Were Mistreated or that No Men Were.

Under Title VII, sex discrimination can be the appropriate legal designation to apply to mistreatment of lesbians, even in what is generally a very good workplace for women. The Supreme Court held that an employer violated Title VII in asking women to pay more in pension contributions, even though the request was based on "unquestionably true" actuarial data regarding women's longer lifespans. *City of Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702 (1978). The reason why the fair treatment of women as a group does not satisfy Title VII is the same reason that the uniqueness of a harassment incident will not exonerate an employer: The statute makes it unlawful "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." *Id*. at 708, quoting 42 U. S. C. § 2000e-2 (a)(1) (emphasis added by Court).

> The statute's focus on the individual is unambiguous. It precludes treatment of individuals as simply components of a racial, religious, sexual, or national class. . . . That proposition is of critical importance in this case because there is no assurance that any individual woman working for the Department will actually fit the generalization on which the Department's policy is based.

Manhart, 435 U.S. at 708. "The protections afforded by Title VII against sex discrimination are extended to the individual, and 'a single instance of discrimination may form the basis of a private suit.'" *Barnes*, 561 F.2d at 993 (citation omitted) and at 993-94 nn.75-80 (citing cases in which "a cause of action was recognized although it did not appear that any other individual of the same gender or race had been mistreated by the employer.").

C. The Coverage Inquiry Does Not Encompass Policy or Legislative Goals But Simply Applies the Words of the Statute.

In rejecting the argument that some mistreatment "because of . . . sex" might be outside Title VII's reach, the D.C. Circuit and Supreme Court also rejected the notion that there is a second step to the inquiry that asks whether allowing the particular claim would serve the legislative goals that spurred the passage of Title VII. In its first thirty-four years, the "sex" provision of Title VII was the subject of a spirited debate among the courts, with one side -- including, most notably, the courts of this circuit -- holding that coverage turned only on the question of whether, but for the sex of the employee, the mistreatment would have occurred, and the other side believing that Title VII's sex provision was passed to ensure women would have equal opportunity in the workplace, and thus foreswearing any mechanical application of the "because of . . . sex" inquiry that yielded a result not in service of that goal. While sexual harassment, in its predominant male-on-female form, posed no conflict between these two competing interpretative approaches, male-on-male sexual harassment did.

As recognized by this court and others, the philosophical standard-bearer among the pre-*Oncale* cases holding that Title VII excludes claims for same-sex sexual harassment is *Goluszek v. Smith*, 697 F. Supp. 1452 (N.D. Ill. 1988).[3] There, the court held that, even though a "wooden application of" the statutory words "because of such individual's . . . sex" would lead to recognizing same-sex sexual harassment claims, the court "chooses instead to adopt a reading of Title VII consistent with the underlying concerns of Congress" in passing the law and reject such a claim because Congress sought to eradicate gender power imbalances in the workplace and no such circumstance was presented in that case." *Id*. at 1456 ("Goluszek was a male in a male-

[3] *Williams v. District of Columbia*, 916 F. Supp. 1, 8 (D.D.C. 1996) (courts that "have found that same-sex sexual harassment is beyond the reach of Title VII . . . all rely, directly or indirectly, upon the reasoning of *Goluszek*.").

dominated environment. . . . Goluszek may have been harassed 'because' he is a male, but that harassment was not of a kind which created an anti-male environment in the workplace."). *Oncale* could hardly have been more emphatic in rejecting *Goluszek*'s approach in its unanimous ruling to the contrary in the context of an *all-male* (not merely male-dominated) workplace. 523 U.S. at 77-79.[4] The Court unanimously directed courts simply to follow the words in the statute, irrespective of any divergence between that result and the assumed mindset of the members of the 88th Congress. *See Id.* at 79 ("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.").

It appears that the earliest courts to endorse coverage for sexual harassment and same-sex sexual harassment were sensitive to predictions that they were engaging in judicial expansion of the statute that could flood the courts with intractable litigation. *See Barnes*, 561 F.2d at 994 n.81; *Wrightson v. Pizza Hut of Am.*, 99 F.3d 138, 144 (4th Cir. 1996) (disapproved of in *Oncale* only insofar as *Wrightson* held same-sex sexual harassment actionable only if committed by gay supervisors). But as both *Barnes* and *Wrightson* politely pointed out, the alternative path to fewer lawsuits masquerades as judicial modesty and restraint but is actually an abdication of the judicial responsibility to apply the words of the statute as written, and let Congress rectify any unintended consequences. *See Barnes*, 561 F.2d at 994 (any such difficulty caused by reading the

[4] This important aspect of *Oncale* has been acknowledged by both the D.C. Circuit and the Ninth Circuit. *Davis v. Coastal Int'l Sec., Inc.*, 275 F.3d 1119, 1124 (D.C. Cir. 2002); *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1066 (9th Cir. 2002) (*en banc*) ("Oncale's employer, Sundowner, never employed women on any of its drilling rigs.").

statute literally to recognize that a discrimination claim is covered "is treatable by measures other than disregard of the legislative will . . . . 'Congress has made the choice, and it is not for us to disturb it.'") (quoting *Chandler v. Rodebush*, 425 U.S. 840, 864 (1976) (citation omitted); *Wrightson*, 99 F.3d at 144 (acknowledging the "reticence" to "recognize a cause of action under Title VII" that "will result in a significant increase in litigation" but holding, "Ultimately, however, our role as courts is limited to faithfully interpreting the statutes enacted by the Congress and signed into law by the President. And where Congress has unmistakably provided a cause of action, as it has through the plain language of Title VII, we are without authority in the guise of interpretation to deny that such exists, whatever the practical consequences.")

D. The Coverage Inquiry Does Not Encompass Whether Other Motivations Existed for the Discrimination; If Sex Was a Motivating Factor, Title VII Is Violated.

The fact that antigay actions or harassment may have other motivating factors besides sex does not provide immunity from liability. 42 U.S.C. § 2000e-2(m) (providing generally that Title VII is violated if a covered trait "was a motivating factor for any employment practice, even though other factors also motivated the practice."). *Barnes* rejected the employer's argument, which other courts had accepted, that Ms. Barnes lost a job opportunity not because she was a woman, but because she refused to engage in a sexual affair with her supervisor." *See, e.g., Tomkins v. Public Service Electric & Gas Co.*, 422 F. Supp. 553, 556 (D.N.J. 1976) ("While sexual desire animated the parties, or at least one of them, the gender of each is incidental to the claim of abuse."). *Barnes* noted that, during debate on Title VII's sex provision, an amendment was rejected that would have restricted coverage "to discrimination based solely on gender." 561 F.2d at 991 and n.58, citing 110 Cong.Rec. 2728, 13825 (1964). *Barnes* viewed the amendment's defeat as validating a "because of . .. sex" inquiry (as opposed to "solely because

of sex"), and held for appellant Barnes, because "gender cannot be eliminated from the formulation which appellant advocates, and that formulation advances a prima facie case of sex discrimination within the purview of Title VII." 561 F.2d at 990.[5] Of course, *Barnes*' resort to legislative history is no longer necessary - the negative implication the court deduced has become statutory law, with the addition of 42 U.S.C. § 2000e-2(m) in 1991.

E. The Coverage Inquiry Does Encompass Any Act, Aspect, or Attribute of the Individual; An Employer Is Not Free to Penalize Only One Gender for Any Trait, Behavior, Condition, Etc.

In *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), the Court ruled that Ann Hopkins suffered discrimination "because of . . . sex" when her quest for partnership was denied, and evidence surfaced that decision makers viewed her as "macho," aggressive, and in other ways not regarded as stereotypically feminine. "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." *Id. at* 251.

Both the EEOC and at least two courts have recognized that Title VII proscribes mistreatment experienced by an employee in an intimate relationship deemed contrary to societal norms for the employee's gender. *Castello v. Postmaster General*, Request No. 0520110649, 2011 EEOPUB LEXIS 3966, December 20, 2011 (sex discrimination could proceed, citing allegation that harasser of lesbian employee "was motivated by the sexual stereotype that having relationships with men is an essential part of being a woman"); *Veretto v. Postmaster General*, Request No. 0120110873, 2011 EEOPUB LEXIS 1973, July 1, 2011 (sex discrimination could

[5] Presumably, the carefully chosen wording "the formulation which appellant advocates" suggests that, while an employer can demonstrate the factual fallacy of an employee's account of discrimination, mere recharacterization of the employer's action to steer the focus away from a trait protected by Title VII will not suffice. Thus, the attempt by one court to justify sexual orientation discrimination based on the equal toll it takes on gay men and lesbians is unavailing. *See* Sec. II.B.2, *infra*.

proceed, citing allegation that harasser of gay man "was motivated by the sexual stereotype that marrying a woman is an essential part of being a man, and became enraged when Complainant did not adhere to this stereotype");[6] *Heller* at 1224 ("a jury could find that [executive chef] Cagle repeatedly harassed (and ultimately discharged) [line cook] Heller because Heller did not conform to Cagle's stereotype of how a woman ought to behave. Heller is attracted to and dates other women, whereas Cagle believes that a woman should be attracted to and date only men."); *Centola v. Potter*, 183 F. Supp. 2d 403, 409 (D. Mass. 2002) (Title VII's ban on sex stereotyping discrimination covers when "an employer acts upon stereotypes about sexual roles in making employment decisions."); *see also Partners Healthcare Sys. v. Sullivan*, 497 F. Supp. 2d 29, 38-39 (D. Mass 2007) (limiting domestic partner benefits to same-sex couples has an adverse "impact on similarly situated people on the basis of the sex of the person with whom they choose to associate."); *see also id.* ("[This] theory of associational sex discrimination could be seen as an argument for extending this reasoning [of *Price Waterhouse*] to support the conclusion that sexual orientation discrimination is really sex discrimination, in that such discrimination targets an employee's failure to comply with pre-conceived gender stereotypes, including the stereotypes regarding sexual associational preferences.") (but ultimately ruling against different-sex domestic partners based on construing First Circuit precedent to forbid Title VII claims based on sexual orientation discrimination).

Other courts have rejected this approach, focusing on specific behaviors or traits at issue in *Price Waterhouse* and distinguishing those from the gender-nonconforming behavior of one who is attracted to his or her own gender. For instance, in *Dillon v. Frank*, No. 90-2290, 1992

[6] It is well established that EEOC interpretations of Title VII are entitled to great deference. *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971). The *Barnes* court deemed even a decision by the EEOC's predecessor that reflected a change in position from the commission's previous views "powerful support" for the court's same conclusion. 561 F.2d at 989 n.47.

U.S. App. LEXIS 766 (Jan. 15, 1992), the court seized on language in *Price Waterhouse* noting the "intolerable and impermissible Catch-22" in the stereotyping in that case, specifically that a desirable trait in partners (aggressiveness) was one that was unacceptable in a woman. *Id.* at *28, quoting 490 U.S. at 251. *Dillon* exonerated the employer's gender-based different treatment of Dillon, because "Dillon's supposed activities or characteristics simply had no relevance to the workplace, and did not place him in a 'Catch-22.'" 1992 U.S. App. LEXIS 766 at **28-29; *see also Oiler v. Winn-Dixie La., Inc.*, 2002 U.S. Dist. LEXIS 17417, 26-28 (E.D. La. Sept. 16, 2002) (among the reasons for dismissing claims of truck driver who cross-dressed off the job was his failure to allege that "he exhibited traits normally valued in a female employee, but disparaged in a male employee."). *Dillon* thus improperly excuses any discrimination because of sex that is based on factors unrelated to career success. *See* Theodore A. Schroeder, *Fables of the Deconstruction: The Practical Failures of Gay and Lesbian Theory In the Realm of Employment Discrimination* ("Fables"), 6 Am. U. J. Gender Soc. Pol'y & L. 333, 352 (1998) (*Dillon*'s "reliance on the Catch-22 reasoning is puzzling. . . . Although the *Hopkins* court mentioned the Catch-22, it was not the basis of its decision; rather, it was the belief that requiring conformance with sex stereotypes is inconsistent with Title VII.") (footnote omitted).

In *Vickers*, the court observed that "all homosexuals, by definition, fail to conform to traditional gender norms in their sexual practices." *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 764 (6th Cir. 2006). While some might have thought that quote could appear only in an opinion favorable to Christopher Vickers, it appeared in the paragraph stating that *Price Waterhouse* could not be read to support a result -- coverage of sexual orientation discrimination in Title VII -- that had been rejected repeatedly by circuit courts.[7] The *Vickers* court's solution was to hold

[7] *Vickers* is thus one of many courts that, in effect, judicially engrafts an exclusion onto Title VII

that a claim based on sex stereotyping is viable only if based on "characteristics that were readily demonstrable in the workplace." 453 F.3d at 763; *see also id*. (Vickers alleged no discrimination based on "behavior observed at work or affecting his job performance" and "made no argument that his appearance or mannerisms on the job" was the source of discrimination); *see also id*. (sex discrimination claim viable only if "gender non-conformance is demonstrable through the plaintiff's appearance or behavior.").

The *Vickers* court's distinction of *Price Waterhouse* is as flawless factually as it is flawed legally. While the "observable in the workplace" tag nicely fits the traits held against Ann Hopkins but not those held against Christopher Vickers, Title VII does not tolerate any categorization of traits and behaviors for which differential treatment because of sex will be immunized. *See Baker v. Astrue*, Appeal No. 0120110008, 2013 EEOPUB LEXIS 735 (January 11, 2013) ("Title VII's prohibition on the basis of sex includes discrimination on the basis of 'gender,' . . . . [which] includes discrimination because an individual fails to conform to gender-based expectations, stereotypical or otherwise.") (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)). And given the universal recognition of Title VII protection for being in an interracial marriage and for religious worship activities, the carve-outs in *Vickers* and *Dillon* for off-the-job traits or traits unrelated to career success are unlikely to survive thoughtful analysis by future courts. *Vickers* and *Dillon* ignore that "sex stereotyping" is just one manifestation of discrimination "because of . . . sex":

> In saying that gender played a motivating part in an employment decision, we mean that, if we asked the employer at the moment of the decision what its reasons were and if we received a truthful response, one of those reasons would be that the applicant or employee was a woman. *In the specific context of sex stereotyping*, an employer who acts

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that exempts any mistreatment that is based on the employee's sexual orientation. *See* Sec. IV.B., *infra*.

> 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.

Price Waterhouse, 490 U.S. at 250 (emphasis supplied); *see also Macy v. Dep't of Justice*, EEOC Appeal No. 0120120821 (April 20, 2012) ("[E]vidence of gender stereotyping is simply one means of proving sex discrimination. . . . As the *Price Waterhouse* Court noted, while 'stereotyped remarks can certainly' [] evidence [sex discrimination], the central question is always whether the 'employer actually relied on [the employee's] gender in making its decision.'") (quoting *Price Waterhouse*, 489 U.S. at 251). Outside the specific context of sex stereotyping, firing all women who play golf left-handed or all men who have ever visited Peru would be discrimination "because of . . . sex," even though neither trait is stereotypical, manifested on the job, or tied in any way to career success. Thus, to the extent that Billington argues that TerVeer has to allege discrimination based on his "behavior, demeanor, or appearance," *see* MTD at 19,, as opposed to discriminatory treatment based on his attraction to men that would not have occurred had he been a woman, Billington is not correct. As the *Barnes* court observed, "It would be pointless to speculate as to whether Congress envisioned the particular type of activity" at issue, 561 F.2d at 994, be it sexually harassing activity, or discrimination because of one's interracial friendships on the job or one's religious worship or same-sex relationship off the job. "Congress chose neither to enumerate specific discriminatory practices, nor to elucidate *in extenso* the parameter of such nefarious activities. Rather, it pursued the path of wisdom by being unconstrictive, knowing that constant change is the order of our day and that the seemingly reasonable practices of the present can easily become the injustices of the morrow. *Id*. (quoting *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957

(1972).); *Bundy v. Jackson*, 641 F.2d 934, 944 (D. C. Cir. 1981).[8] In short, any differential treatment because of sex is proscribed. *Schwenk v. Hartford*, 204 F.3d 1187, 1201-02 (9th Cir. 2000) ("Discrimination because one fails to act in the way expected of a man or woman is forbidden under Title VII"); *Shepherd v. Slater Steels Corp*., 168 F.3d 998 (7th Cir. 1999) ("So long as the plaintiff demonstrates in some manner that he would not have been treated in the same way had he been a woman, he has proven sex discrimination.").

The approach in *Vickers* suffers from another major flaw: it has no basis whatsoever in Title VII law, and indeed is refuted repeatedly, including in a Sixth Circuit decision three years later. In *Barrett v. Whirlpool Corp.,* 556 F.3d 502 (6th Cir. 2009) the employer argued that "only a significant association--one that extends outside of the workplace--can give rise to an associational Title VII violation against a white employee." *Id.* at 512-13. The court rejected the argument, holding that a weaker relationship may affect the ability to prove that discrimination based thereon did occur, but does not change the nature of the racial discrimination alleged. *Id*. at 513. Notably, the court stated, "The absence of a relationship outside of work should not immunize the conduct of harassers who target an employee because she associates with African-American co-workers." *Id*. Very true. One reasonably can wonder why the absence of a workplace manifestation of an intimate relationship should immunize the conduct of harassers who target an employee because her life partner is a woman.

[8] Interestingly, the emphasis in *Bundy* and *Rogers* on the deliberate choice made by Congress in its undifferentiated proscription of actions taken "because of . . . sex" supports the end result in *Oncale*, albeit under a very different judicial philosophy regarding the relevance of legislative intent. At the end of the day, whether one thinks that the "because of . . . sex" inquiry was enacted because Congress deemed every such action objectionable, or because it deemed any attempt to exonerate some such actions unwise, unworkable, or unattainable; or some other reason altogether, the law is settled that applicability of Title VII's sex provision turns on whether the same mistreatment would have occurred had the plaintiff's sex been different.

II. IMMUNIZING SEXUAL ORIENTATION DISCRIMINATION CANNOT BE SQUARED WITH THE CONSENSUS THAT DISCRIMINATION BECAUSE OF INTERRACIAL RELATIONSHIPS VIOLATES TITLE VII.

It is impossible to reconcile the unanimous view of the courts and the EEOC for decades that discrimination based on an employee's interracial marriage or interracial friendships is "manifestly" or "irrefutab[ly]" race discrimination proscribed by Title VII, with an argument that discrimination based on one's same-sex intimate relationships is not sex discrimination. *See Gresham v. Waffle House, Inc.*, 586 F. Supp. 1442, 1445 (N.D. Ga. 1984) (citation omitted). The same principles of construction apply to determining what constitutes discrimination "because of race" and "because of . . . sex," and thus should dictate the same treatment of relationships involving the enumerated traits in Title VII.

A. Courts and the EEOC Are Essentially Unanimous in Viewing Title VII As Covering Discrimination Based on an Employee's Interracial Relationships.

The EEOC has consistently held that an employer who takes adverse action against an employee or a potential employee because of interracial association violates Title VII. *See* Decision No. 71-909, 3 F.E.P 269 (1970) (Title VII applied to a white employee's claim that he was discharged because of associations with African-American employees); Decision No. 71-1902, 1973 EEOC Dec. (CCH) para. 6281 (April 29, 1971) (charging party's interracial dating was a factor in discharging her and thus presented a Title VII claim); Decision No. 76-23, 1983 EEOC Dec. (CCH) para. 6615 (Aug. 25, 1975) (Title VII claim alleged where job applicant not hired due to his white sister's relationship with an African-American); Decision No. 79-03, 1983 EEOC Dec. (CCH) para. 6734 (Oct. 6, 1978) (while evidence did not support the allegation, it was recognized that an interracial relationship could be the basis for a Title VII claim). The

courts to consider the question unanimously agree.[9] *Floyd v. Amite County Sch. Dist.*, 581 F.3d 244, 250 (5th Cir. 2009); *Holcomb v. Iona College*, 521 F.3d 130, 138-39 (2d Cir. 2008); *Deffenbaugh-Williams v. Wal-Mart Stores*, 156 F.3d 581, 588-89 (5th Cir. 1998); *Stacks v. Southwestern Bell Yellow Pages, Inc.*, 27 F.3d 1316, 1327 n.6 (8th Cir. 1994); *Parr v. Woodmen of the World Life Ins. Co*., 791 F.2d 888, 891-92 (11th Cir. 1986); *Sperling v. United States*, 515 F.2d 465, 484 (3d Cir. 1975), *cert. denied*, 426 U.S. 919 (1976); *Chacon v. Ochs*, 780 F. Supp. 680 (C.D. Cal. 1991); *Whitney v. Greater N.Y. Corp. of Seventh Day Adventists*, 401 F. Supp. 1363, 1366 (S.D.N.Y. 1975); *Gresham v. Waffle House, Inc*., 586 F. Supp. 1442, 1445 (N.D. Ga. 1984); *Holiday v. Belle's Restaurant*, 409 F. Supp. 904 (W.D. Pa. 1976); *see also McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1118 (9th Cir. 2004) (in black employee's Title VII action, trial court incorrectly ignored evidence of a white co-worker's harassment because of his support for black employees because "Title VII has . . . been held to protect against adverse employment actions taken because of the employee's close association with black friends or coworkers") (citation omitted);Victoria Schwartz, *Title VII: A Shift From Sex to Relationships*, 35 Harvard Journal of Law & Gender 209, 246 (Jan. 2012) ("In the past thirty years, every case to consider a relational discrimination claim in the context of race has held that Title VII applies to such claims."). Indeed, the courts holding that Title VII's race provision is implicated by mistreatment because of one's interracial relationship are often dismissive of the notion that one could contend otherwise. *See Holcomb*, 521 F.3d at 138 ("The reason is simple: where an

[9] The three known cases to reject this view are all in districts in the Eleventh Circuit and all decided before the Eleventh Circuit in *Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 891-92 (11th Cir. 1986), ruled that Title VII does cover discrimination based on interracial relationships. *See* Schwartz, supra, nn.40-46, nn.61-68 and accompanying text (discussing *Ripp v. Dobbs Houses, Inc.*, 366 F. Supp. 205 (N.D. Ala. 1973), *Adams v. Governor's Committee on Postsecondary Educ*., No. C80-624A, 1981 WL 27101, at 1 (N.D. Ga. Sept. 3, 1981), and *Parr v. United Family Life Insurance Co.*, C-83-26-6, 1983 WL 1774 (N.D. Ga. June 15, 1983).

employee is subjected to adverse action because an employer disapproves of interracial association, the employee suffers discrimination because of the employee's own race."); *Gresham*, 586 F. Supp. at 1445 ("the logic . . . is irrefutable. Clearly, . . . but for their being white, the plaintiffs in these cases would not have been discriminated against. This Court cannot imagine what more need be alleged to bring such plaintiffs within the plain meaning of Title VII's proscription of discrimination against an individual 'because of such individual's race.'"); *Whitney*, 401 F. Supp. at 1366 ("Manifestly," if the firing was because "the defendant disapproved of a social relationship between a white woman and a black man, the plaintiff's race was as much a factor in the decision to fire her as that of her friend.").

The principle has been held to apply to discrimination based on categories other than race in Title VII, and also for discrimination claims under similar statutes. *Reiter v. Center Consol. School Dist.*, 618 F. Supp. 1458, 1460 (D. Colo. 1985) (recognizing Title VII's coverage of "discrimination in employment based on [Reiter's] 'close association with the Spanish citizens of the district.'"). Additionally, most circuits have allowed claims to proceed under 42 U.S.C. 1981 when a white person alleges discrimination because of his association with a black person. *Patrick v. Miller*, 953 F.2d 1240, 1250 (10th Cir. 1992) (citing cases); *Chandler v. Fast Lane*, 868 F. Supp. 1138, 1143 (E.D. Ark. 1994) (citing cases).

While the D.C. Circuit has not reached the issue formally, this Court has assumed the validity of these holdings. *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008) rejected the position that "Title VII only prohibits discrimination against men because they are men, and discrimination against women," *see id.* at 307, by noting that "[d]iscrimination because of race has never been limited only to discrimination for being one race or another. Instead, courts have recognized that Title VII's prohibition against race discrimination protects employees from being

discriminated against because of an interracial marriage, or . . . friendships . . .” *Id*. at n.8, citing *McGinest, supra*; *see also Kelley v. Billington*, 370 F. Supp. 2d 151, 160 (D.D.C. 2005) (“incident of racial harassment” occurred when a photograph of an interracial couple was left in the work mailbox of a woman in an interracial marriage but holding the incident not to actionable as, *inter alia*, neither severe or pervasive).

Amicus recognizes that TerVeer does not allege that he is married to another man. Therefore, it could be argued that this case is more akin to claims of interracial association with fiancees, boyfriends/girlfriends, close friends, and the like. But as several astute courts have recognized, to the extent a claim of discrimination based on interracial friendships resonates less compellingly, it is due to skepticism that an employer would act in such fashion, but does not indicate that such discrimination, if true, would be permissible under Title VII. *Barrett*, *supra*, 556 F.3d at 513; *Drake v. 3M*, 134 F.3d 878, 884 (7th Cir. 1998); *Young v. St. James Mgmt., LLC*, 749 F. Supp. 2d 281, 292 (E.D. Pa. 2010) (employee’s “claim is logically consistent with the principles of Title VII in that if he were Caucasian, his son would be Caucasian, and his employers would not have had an issue with the son’s relationship.”).

B. Under Title VII’s Language and Precedent, Discrimination Based on Same-Sex Relationships and Discrimination Based on Interracial Relationships Both Should Be Proscribed.

Amicus is unaware of any serious argument why the consensus that Title VII bans discrimination founded on interracial relationships would not apply with equal force to discrimination because of one’s same-sex relationship.

1. As a general matter, the same principles apply in defining the scope of proscribed discrimination for each of Title VII's enumerated characteristics, especially with respect to race and sex.

As a starting point, the "statute on its face treats each of the enumerated categories exactly the same." *Price Waterhouse*, 490 U.S. at 243 n.9 (justifying reliance on statements of legislative intent regarding the treatment of race in the workplace as authoritative regarding the appropriate treatment of sex). Additionally, the Supreme Court has held repeatedly that, absent a good reason otherwise, the standards concerning actionable conduct should be harmonized among the categories enumerated in Title VII. "Courts of Appeals in sexual harassment cases have properly drawn on standards developed in cases involving racial harassment. [citations] . . . Although racial and sexual harassment will often take different forms, and standards may not be entirely interchangeable, we think there is good sense in seeking generally to harmonize the standards of what amounts to actionable harassment." *Faragher v. City of Boca Raton*, 524 U.S. 775, 787 n.1 (1998) (citations omitted); *accord Wright-Simmons v. City of Oklahoma City*, 155 F.3d 1264, 1270 (10th Cir 1998); *see also AMTRAK v. Morgan*, 536 U.S. 101, 116 n.10 (2002) ("Hostile work environment claims based on racial harassment are reviewed under the same standard as those based on sexual harassment."); *see also Oncale*, 523 U.S. at 78 (deciding as a threshold matter that a man can discriminate against a man, citing "the related context of racial discrimination in the workplace [where] this Court has rejected any conclusive presumption that an employer will not discriminate against members of his own race."); *Meritor*, 477 U.S. at 66 (citing racial harassment hostile work environment holdings as authority for construing Title VII to cover sexual harassment even without pecuniary loss to the employee).

2. Of the very few courts to have considered the analogy between same-sex relationships and interracial relationships, none sheds light on the inquiry under law binding on this Court.

While a few cases support the relational discrimination claim here without acknowledging the parallel to interracial relationships, see sec. I.A., *supra*, the few cases that do acknowledge the comparison are not particularly illuminating, as they either are contrary to law, rely on nonbinding and unpersuasive law, or acknowledge the theoretical basis for similar treatment but do not reach the question.

Still today, the leading case rejecting the interracial relationship analogy, and before 2007 seemingly the only case to consider the question is *DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327, 329-32 (9th Cir. 1979), *overruled on other grounds, Nichols v. Azteca Rest. Enters*., 256 F.3d 864, 875 (9th Cir. 2001). *DeSantis* is actually the judicially consolidated appeal of three separate cases brought by gay and lesbian employees of two different employers. The court recited five arguments by the plaintiffs; the two most germane to the analysis here were (a) a male who prefers males as sexual partners was treated more harshly than a female with the same preference; thus sex discrimination occurs; and (b) the EEOC's position that Title VII covers discrimination occurring because of "the race of the employee's friends" supports coverage of discrimination occurring because of "the sex of the employee's sexual partner." *Id*. at 331. The court rejected the first argument by saying "that whether dealing with men or women the employer is using the same criterion: it will not hire or promote a person who prefers sexual partners of the same sex. Thus this policy does not involve different decisional criteria for the sexes." *Id.* The court rejected the second argument because it was "not alleged that [the employers] have policies of discriminating against employees because of the gender of their

friends," and that "sexual partners" were a "certain type of relationship" that the court had just held "is not protected by Title VII." *Id*.

Leaving aside unnecessary broader criticism of the decision, *DeSantis* clearly is contrary to controlling law governing the resolution of this case. The court declined to ask the relevant question proffered by the employees -- would a female have been mistreated for attraction to males the way a male employee was? -- in favor of immunizing the discrimination because both male and female employees suffered it. That exact scenario had been discussed in *Barnes*, and the D.C. Circuit correctly posited the answer that both the man and the woman discriminated against "because of . . . sex" have a claim, not that the simultaneous manifestation of both forms of discrimination exonerates the employer completely. *Barnes*, 561 F.2d at 990 n.55; s*ee also Bundy*, 641 F.2d at 942 n.7. As both the D.C. Circuit and the U.S. Supreme Court have emphasized, rights under Title VII belongs to the individual, and the violation that occurs when one suffers mistreatment because of his or her sex is vitiated by neither the absence of mistreatment of other members of one's sex, nor the existence of mistreatment of the other sex. *See Barnes*, 561 F.2d at 993-94; *Manhart*, 435 U.S. at 708.

Of course, the student of constitutional law will recognize the *DeSantis* exoneration of the equal mistreatment of lesbian and gay male employees as an analogue of the "equal application" argument advanced by Virginia in support of its anti-miscegenation law. *See Loving v. Virginia*, 388 U.S. 1, 8 (1967) (Virginia argued that, so long as whites and blacks were punished equally for intermarriage, no constitutional violation obtains). The Court unanimously rejected that argument on two bases; first, that irrespective of any animus, the Virginia anti-miscegenation laws are still "statutes containing racial classifications" of the individuals involved, which presumptively are repugnant to the law; and secondly, the statutes in question

are in fact racially discriminatory in their attempt to preserve supposed white supremacy, as demonstrated by their applicability only to marriages involving whites. *Id*. at 8-9. The first holding suffices to dispose of the legitimacy of *DeSantis*'s holding; racial limits on romantic relationships are classifications of the individuals involved because of race. Thus, returning to the argument the employees made in *DeSantis*, equal application of punishment does not erase the fact of a classification of people because of sex in order to ascertain that they should be punished.

DeSantis also contravenes controlling law in its rejection of the applicability of EEOC decisions establishing Title VII coverage of discrimination based on interracial friendships. Years prior to *DeSantis,* the EEOC already had issued a decision establishing coverage for discrimination based on intimate interracial dating relationships. Decision No. 71-1902, 1973 EEOC Dec. (CCH) para. 6281 (April 29, 1971) (charging party's interracial dating was a factor in discharging her and thus presented a Title VII claim). Moreover, any attempt to distinguish among the relationships would have to explain why one species of discrimination would be "because of the individual's race" while another would not be, and the distinction in the level of depth or intimacy in various relationships fails to establish any distinction in the nature of the discrimination by the person objecting to such relationships. *See* Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 Calif. L. Rev. 3, 160-161 (Jan 1995) (the *DeSantis* "court's response to this analogizing disregarded the reasoning of precedent, and was as strained and superficial as the rest of its opinion. . . . This distinction--presumably between 'friends' on the one hand and 'certain relationships . . . with certain friends' on the other--seems

slippery, and is incogruent with the statute's anti-discrimination principles because it serves to license rather than to limit bigotry.").

The other case squarely addressing the analogy of same-sex and interracial relationships for Title VII coverage purposes is *Partners Healthcare Sys. v. Sullivan*, 497 F.Supp.2d 29 (D. Mass. 2007) (*Partners I*), later proceeding at 497 F. Supp.2d 42 (D. Mass. 2007) (*Partners II*), which rejected Title VII's applicability to a male employee's discrimination claim based on his employer's offering employee benefits to unmarried same-sex domestic partners but not unmarried different-sex domestic partners.[10] After expressing agreement with the logic of the sex-stereotyping theory proffered, the court ultimately held that the First Circuit's supposedly sweeping rejection of Title VII coverage of sexual orientation claims prevented reliance on a sex-stereotyping theory, the interracial relationship analogy, and an EEOC decision recognizing coverage for discrimination based on gender of one's friends outside the workplace. *Partners I*, 497 F. Supp.2d. at 39.[11]

[10] The procedural posture of *Partners* is somewhat complicated, as it was an action brought by the employer to enjoin state administrative proceedings to enforce Massachusetts' nondiscrimination law covering sexual orientation. An injunction could be justified under ERISA preemption principles, which would apply unless the state law was equivalent in scope to a federal law such as Title VII. The court ruled that the result sought under state law – that the employer discriminated by failing to offer benefits to a different-sex domestic partner – was not attainable under Title VII, and thus ERISA preemption applied, and the injunction should issue.

[11] In *Partners II*, the court explained that it adopted *Vickers*' limitation on sex stereotypes to "characteristics that were readily demonstrable in the workplace" only as "necessary to resolve the tension created between *Price Waterhouse*" and *Higgins*' supposed "holding" that sexual orientation discrimination is not covered by Title VII, specifically noting its lack of "authority to modify" either "controlling precedent." *Partners II*, 497 F. Supp. 2d at 44 n.3, citing *Higgins v. New Balance Ath. Shoe, Inc.*, 194 F.3d 252 (1st Cir. 1999). Of course, *Higgins* is not binding on this Court, and the *Partners* court's observation of its tension with *Price Waterhouse* demonstrates why it is not persuasive authority, either. For a discussion of why *Higgins* is not the "holding" that the Partners court deemed it to be, see Section III.C., *infra*.

Another plaintiff tried an associational sex discrimination claim when he was fired for complaining about sexual harassment of his girlfriend. *Stezzi v. Aramark Sports, LLC*, 2009 U.S. Dist. LEXIS 66565, 13-16 (E.D. Pa. July 30, 2009). The court noted both the vast authority supporting Title VII's coverage for discrimination occurring because of an employee's relationships with persons of a different race, and the dearth of cases even considering the identically framed inquiry concerning relationships with persons of the same sex, contrasted with persons of a different race. *Id*. at **13-15 (citing *Partners* as the only such case called to the court's attention by either party). The *Stezzi* court rejected that theory's applicability because the alleged discrimination was based on the plaintiff's having a relationship not with just any woman, but with the one woman who had filed a harassment claim against the employer. *Id*. at *16.[12]

Also, while not reaching the question due to inadequate briefing, the *Heller* court acknowledged that its holding that discrimination against a lesbian for romantic interests and conduct that would be lauded in a male employee, should apply with equal force to the

[12] Whether a given instance of mistreatment is because of sex and other factors, or more appropriately deemed "class of one" discrimination turns on a careful review of the facts. *Cf. Glenn v. Brumby*, 632 F. Supp. 2d 1308, 1313 (N.D. Ga. 2009) (a public employer's "action based on characteristics unique solely to" the employee constitutes a "class of one" claim, while "discrimination based on [an employee's] . . . failure to conform to sex stereotypes" presents a "classic equal protection claim[] . . . based on [the employee's] membership in [the] identifiable . . . group of individuals who fail to conform to sex stereotypes.") (citing N. Pacifica, LLC v. City of Pacifica, 526 F.3d 478, 486 (9th Cir. 2008)). Of course, a sexual harasser cannot refute the "because of . . . sex" categorization of his or her actions with even a convincing showing of *other* indispensable factors to the attraction, but that is different. Rocco Stezzi claimed that the employer fired him because he supported his girlfriend Carmela Risica's sexual harassment claim, but such improper retaliation presumably would have been visited on the supporting paramour of the sexual harassment target, irrespective of the paramour's gender. Indeed, the *Stezzi* court did permit the retaliation claim to proceed, see 2009 U.S. Dist. LEXIS 66565 at **17-22, seemingly correctly, given the later unanimous recognition, in an unrelated Supreme Court case, of a retaliation claim by the fiancee of a harassment target. *See Thompson v. North American Stainless, L.P.*, 131 S. Ct. 863 (2011).

interracial component of the plaintiff's lesbian relationship, observing that it "might be argued that the animus resulted in part from Heller's race, *i.e.*, that [the supervisor] would not have acted as she did had Heller been of the same race as her lover." *Heller*, 195 F. Supp. 2d at 1229.

Based on logic, the statutory parallelism, and Supreme Court authority applying the same standards to assess race and sex discrimination under Title VII, the analogy to discrimination based on interracial relationships should hold, and the consensus that such discrimination is forbidden by Title VII should apply with equal force to discrimination based on one's intimate same-sex relationships.

III. DECISIONS FROM OTHER CIRCUITS ARE NOT CONTROLLING AND NOT PERSUASIVE BECAUSE THEY REJECT ARGUMENTS FOR COVERAGE NOT MADE HERE AND/OR THEY CONFLICT WITH CONTROLLING LAW IN THIS CIRCUIT.

Sections I and II of this brief include cases, pro and con, that addressed the arguments for coverage advanced in this case, that those who discriminate against an employee because of a same-sex relationship are necessarily discriminating against the employee "because of such individual's . . . sex," and that Title VII covers discrimination based on an employee's failure to conform to the gender stereotype of a socially acceptable relationship with a member of a different sex. Most of the leading cases rejecting coverage do not consider the argument for coverage framed in this way, and thus should not inform the Court's analysis, especially given that their end result is to immunize some discrimination because of sex. Other cases discussed in this section, in defiance of *Oncale* and other Supreme Court authority, rely on presumed Congressional intent from 1964, as well as amendments to Title VII that have not passed – rather than just applying the words of the statute that Congress did pass. And other holdings are not even holdings at all, or rely on dicta without analysis from other cases as authoritative holdings.

In short, none of the authority from other circuits need give the Court pause as to the correct result in this circuit. *See generally Raney v. District of Columbia*, 892 F. Supp. 283, 296 (D.D.C. 1995) (even before *Oncale* sided with this circuit, rejecting authority from other jurisdictions that would immunize some mistreatment because of sex, specifically same-sex sexual harassment, because "the law is different in this circuit." citing *Barnes, supra*.).

A. In Many Cases Rejecting Coverage of Sexual Orientation Discrimination, the Employee's Primary or Only Argument Was for a Broader Interpretation of the Word "Sex" in Title VII.

Many courts adjudicating Title VII claims brought by lesbian and gay employees focus primarily or exclusively on a plaintiff's argument for an expansive interpretation of "sex" in Title VII, typically to add sexual practices, sexual affinities, and/or sexual orientation. The courts uniformly have declined such invitations. "'Congress intended the term "sex" to mean "biological male or biological female," and not one's sexuality or sexual orientation.'" *King v. Super Serv., Inc.*, 68 Fed. Appx. 659, 662 (6th Cir. 2003); (quoting *Spearman v. Ford Motor Co.*, 231 F.3d 1080, 1084 (7th Cir. 2000); *accord Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc.*, 224 F.3d 701, 704 (7th Cir. 2000); *see also Dillon v. Frank, supra*No. 90-2290, 1992 U.S. App. LEXIS 766 at *11 (Jan. 15, 1992) (rejecting plaintiff's argument that "asks us to define 'because of sex' to mean 'because of anything relating to being male or female, sexual roles, or to sexual behavior.'"); *DeCintio v. Westchester County Med. Ctr.*, 807 F.2d 304, 306 (2d Cir. 1986) ("sex" must "refer to membership in a class delineated by gender, rather than sexual activity or sexual affiliations."); *Mims v. Carrier Corp.*, 88 F. Supp. 2d 706, 714 (E.D. Tex. 2000) ("There is no arguable legal basis for contending that perceived sexual preference merits protection merely because it concerns sex. The clear meaning of 'sex' under Title VII is not 'intercourse,' but 'gender' . . ."). Since TerVeer's arguments don't require contravening these

cases, they are not on point. *Amicus* mentions them for the guidance of the Court, because the decisions are often depicted as foreclosing any argument that Title VII covers sexual orientation discrimination as opposed to rejecting one such argument, thus leaving open a different argument for coverage that the court did not consider. *See generally N.L.R.B. v. Hotel and Restaurant Employees and Bartenders' Union Local 531*, 623 F.2d 61, 68 (9th Cir. 1980) (if a court "did not consider that question, . . . the case cannot be used as authority for that proposition.").

The aforementioned holdings pose no problem theoretically to plaintiffs claiming sexual orientation discrimination -- who do not need a broader definition of "sex," but merely faithful application of the test that allows their claim once it is recognized, for example here, as mistreatment based on an attraction to men that was deemed problematic only because the plaintiff is a man.[13] *See* Schwartz, *supra*, 35 Harv. J.L. & Gender at 248 ("One benefit of this relational interpretation argument, as opposed to previous attempts to apply Title VII to sexual orientation, is that courts need not reinterpret 'sex' to mean anything other than gender. In fact, a gender-based interpretation is at the core of the argument.").[14] A comparison of two Second

[13] *Smith v. Salem*, 378 F.3d 566, 573 (6th Cir. 2004) describes *Price Waterhouse* as "establish[ing] that Title VII's reference to 'sex' encompasses both the biological differences between men and women, and gender discrimination, that is, discrimination based on a failure to conform to stereotypical gender norms." Few could argue with *Smith v. Salem*'s characterization of *Price Waterhouse* in terms of its real world consequences. See also Plaintiff's Brief in Opposition to Motion to Dismiss, at 32 (noting that Title VII generally covers discrimination based on failure to conform to societal notions of masculinity or femininity). But no revisiting or expanding of the term "sex" in Title VII was necessary in *Price Waterhouse*, or in *Smith v. Salem*. Ann Hopkins losing out on partnership because of a tough-nosed, business-like approach, and Jimmie Smith's harassment because of "feminine mannerisms and appearance" simply would not have happened had they not been a woman, and a man, respectively. *Smith v. Salem*, 378 F.3d at 572.

[14] Another recently scholarly piece calls out the peculiarity of gay and lesbian employees losing Title VII cases given the judicial focus on an opposite sex comparator. Cary Franklin, *Inventing the "Traditional Concept" of Sex Discrimination*, 125 Harv. L. Rev. 1307 (2012). While critical of the restrictive effect of the comparator requirement, espoused most prominently in the

Circuit cases reflects an unfortunate tendency in cases involving gay or lesbian employees to focus on what Title VII does not cover, instead of what it does. In both *DeCintio*, *supra*, and *Simonton v. Runyon*, 232 F.3d 33 (2d Cir. 2000), the court rejected broader statutory definitions of "sex." *DeCintio*, 807 F.2d at 306 ("sex" did not include "sexual activity or sexual affiliations"); *Simonton*, 232 F.3d at 35 ("sex" did not include sexual orientation). However, *DeCintio*, after holding that "sex" meant gender, proceeded to the proper, definitive inquiry and explained why no gender-based discrimination had occurred – because all males and females who were not the boss's paramour received the same treatment of being ignored for a promotion. 807 F.2d at 308. By contrast, *Simonton* paid lip service to the passage from *Oncale* asking "whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed," and simply stated *ipse dixit* that "Simonton has alleged that he was discriminated against not because he was a man, but because of his sexual orientation." *Simonton*, 232 F.3d at 36, quoting *Oncale*, 523 U.S. at 80. *Simonton* ignored the fact that a male plaintiff's description of harassment as based on sexual orientation provides the requisite allegation that he endured discrimination because he is the same sex as his romantic interests, and that women who share the same romantic interest in men are not being subject to "disadvantageous terms or conditions of employment."[15] Like *Simonton*,

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superseded *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976) pregnancy case, Professor Franklin notes that, assuming that restrictive baseline, it is "difficult to explain" why courts "uniformly rejected Title VII claims by sexual minorities in this period, even though these plaintiffs seemed to satisfy the test courts had established, in the context of pregnancy and elsewhere, for proving discrimination" in their arguments that "an employer discriminates 'because of sex' when it punishes male but not female employees who date men." 125 Harv. L. Rev. at 1374-75.

[15] Even without the informative characterizations, it strains credulity to imagine that women employees, upon its becoming known of their attraction to men, would have endured "repeated[] assault[s] with such comments as 'go fuck yourself, fag,' 'suck my dick,' and 'so you like it up the ass?'" as well as seeing pornographic pictures, male dolls, and Playgirl magazines in their

most of the above-cited cases simply deemed the plaintiff's allegations or evidence as supporting the existence of sexual orientation discrimination and thus of no aid to the plaintiff, never asking the question demanded by *Oncale*, *viz*., would the mistreatment, concededly based on the plaintiff's attraction to males, have occurred but for the gender of the employee? *E.g. Spearman*, 231 F.3d at 1085 ("The record also shows that Spearman's co-workers maligned him because of his apparent homosexuality, and not because of his sex."); *but see Dillon*, 1992 U.S. App. LEXIS 766 at **27 (acknowledging the relevant inquiry as framed by *Barnes* and *Bundy* and focusing on the absence of a contention "that a woman known to engage in the disfavored sexual practices would have escaped abuse," specifically citing a case where a woman was mistreated for the same sexual conduct.").[16]

B. Many of the Cases On Which Billington Relies Improperly Cite Congressional Intent to Support Their Limited View of Title VII's Coverage.

Defendant Billington does not directly advance his previous position before this District, rejected by the *Schroer* court, that Title VII's coverage is informed by Congressional inaction on amendments that would explicitly add the terms "sexual orientation" and "gender identity." *See Schroer v. Billington*, 577 F. Supp. 2d 293, 308 (D.D.C. 2008). But many of his string-cite of cases from other circuits employ that discredited crutch repeatedly to prop up their holdings. *Oncale* held that the words of the sex discrimination provision in Title VII are dispositive of its scope. 523 U.S. at 79 ("[I]t is ultimately the provisions of our laws rather than the principal

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work spaces, cars, and home mailboxes, respectively. *See Id.* at 35. At a minimum, one can question whether dismissal of the complaint without leave to amend was the correct course.

[16] *Amicus* is not arguing that *Dillon* was correct in affirming the dismissal with prejudice of plaintiff's claim because of his failure to allege specifically that a woman would not have been punished for the same attraction to men. Instead, *amicus* simply notes that the *Dillon* court, unlike most of the other courts, at least acknowledged the relevant inquiry.

concerns of our legislators by which we are governed."). One can be reasonably sure that Justice Scalia and a unanimous Court, in dismissing the relevance of the motivations of the 88th Congress that passed Title VII, were not inviting courts deciding coverage issues to shift their focus to what later sessions of Congress did not enact into statutory law.

Indeed, the *Schroer* court and many Supreme Court cases warn against the folly of relying on Congressional inaction as an interpretative tool. "As the Supreme Court has explained, '[S]ubsequent legislative history is a hazardous basis for inferring the intent of an earlier Congress. It is a particularly dangerous ground on which to rest an interpretation of a prior statute when it concerns, as it does here, a proposal that does not become law.'" *Schroer v. Billington*, 577 F. Supp. 2d 293, 308 (D.D.C. 2008), quoting *Pension Ben Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) (internal citations and quotation marks omitted); *accord Zuber v. Allen*, 396 U.S. 168, 185 n.21 (1969) ("'It is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law.'") (quoting *Girouard v. United States*, 328 U.S. 61, 69 (1946)); *United States v. Price*, 361 U.S. 304, 310-311 (1960) ("nonaction by Congress affords the most dubious foundation for drawing positive inferences."); *Chisholm v. FCC*, 538 F.2d 349, 361 (D.C. Cir. 1976) ("attributing legal significance to Congressional inaction is a dangerous business.").[17]

"Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change." *Pension Ben Guar. Corp.*, 496 U.S. at 650. Or, as the

[17] Exceptions to the general principle of discounting congressional inaction may apply when "the area is one of traditional year-by-year supervision, like tax, where watchdog committees are considering and revising the statutory scheme." *Chisholm v. FCC*, 538 F.2d 349, 361 n.26 (D.C. Cir. 1976) quoting *Zuber*, 396 U.S. at 185 n.21.

Schroer court posited regarding a Title VII coverage issue that had not been the source of a definitive interpretation by the Supreme Court, "another reasonable interpretation of that legislative non-history is that some Members of Congress believe . . . that the statute requires, not amendment, but only correct interpretation." 577 F. Supp. 2d at 308.[18] Many other factors could explain congressional inaction other than contentment with current judicial interpretations. "The verdict of quiescent years cannot be invoked to baptize a statutory gloss that is otherwise impermissible. . . . This Court has many times reconsidered statutory constructions that have been passively abided by Congress. Congressional inaction frequently betokens unawareness, preoccupation, or paralysis.. . . . Even less deference is due silence in the wake of unsuccessful attempts to eliminate an offending interpretation by amendment." *Zuber*, 396 U.S. at 185 n.21.

Despite these admonitions, there is considerable reliance on Congressional inaction in most of the post-*Oncale* cases that Billington cites as the "uniform[]" holding regarding Title VII's inapplicability to sexual orientation discrimination claims. *See* MTD at 17; *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 261 (3d Cir. 2001) ("Congress has repeatedly rejected legislation that would have extended Title VII to cover sexual orientation."); *Rene v. MGM Grand Hotel, Inc.*, 243 F.3d 1206, 1209 (9th Cir. 2001) ("Title VII has not been amended to

[18] Another reason that various circuit courts' reliance on Congressional inaction is misplaced is, respectfully, that Congress may choose not to correct a misinterpretation until the Supreme Court has ruled. Indeed, it was not until after *Price Waterhouse* that Congress answered the question of whether an employer, who has impermissibly considered an enumerated trait, can avoid liability by showing that it would have taken the same action regardless -- and if so, what showing must the employer make. Notably, Congress waited for years while the circuit courts offered answers that conflicted with Congress's eventual resolution of the matter. It was not until the Supreme Court also allowed employers to avoid liability that Congress enacted 42 U.S.C. 2000e-2(m), clarifying that a violation occurs whenever an enumerated trait is a "motivating factor" in the action, irrespective of whether other factors contributed. Only the Eighth Circuit had been applying the law consistently with Congress's eventual resolution. *See Walsdorf v. Board of Commn'rs*, 857 F.2d 1047, 1052 (5th Cir. 1988) (setting forth the approaches to employer liability by various circuits); *Hopkins*, 825 F.2d at 470 n.8 (same).

prohibit discrimination based on sexual orientation . . . We are therefore bound to follow this construction of Title VII [set forth in *DeSantis*].");[19] *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000) ("Although congressional inaction subsequent to the enactment of a statute is not always a helpful guide, Congress's refusal to expand the reach of Title VII is strong evidence of congressional intent in the face of consistent judicial decisions refusing to interpret "sex" to include sexual orientation."); *Medina v. Income Support Div.*, 413 F.3d 1131, 1135 (10th Cir. 2005) (quoting the aforementioned passages from *Bibby* and *Simonton*). These courts' heavy reliance on congressional inaction greatly undermines their persuasive value.

[19] Billington includes three questionable citations in his string-cite. It is unclear why Billington cites the superseded panel decision in *Rene*, which affirmed judgment against the plaintiff, instead of the *en banc* decision, which reversed judgment against the plaintiff. Judge Hug relied on Congress's failure to amend Title VII after *DeSantis* in both his superseded opinion for the panel and his dissent from the *en banc* decision. *See Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1075 (9th Cir. 2002) (*en banc*) (Hug, J., dissenting); *see also id.* at 1076 ("Over the years since the passage of Title VII, numerous bills have been introduced to include sexual orientation as a protected classification. None has passed."). Similarly curious is Billington's cite to the initial opinion by Judge Robertson in the *Schroer* litigation, which expressed skepticism regarding the plaintiff's sex stereotyping claim, as compared to the subsequent decisions, in which the court resolved those questions and entered judgment in Schroer's favor. 577 F. Supp. 2d at 305-06 ("Ultimately, I do not think that it matters for purposes of Title VII liability whether the Library withdrew its offer of employment because it perceived Schroer to be an insufficiently masculine man, an insufficiently feminine woman, or an inherently gender-nonconforming transsexual. . . . While I would therefore conclude that Schroer is entitled to judgment based on a *Price Waterhouse*-type claim for sex stereotyping, I also conclude that she is entitled to judgment based on the language of the statute itself.").

While the cites to the *Rene* panel decision and initial *Schroer* opinion are curious, the cite to the Fifth Circuit decision in *Smith v. Liberty Mutual* is baffling. That case's holding, rejecting Title VII's coverage of discrimination because applicant "was thought to have those attributes more generally characteristic of females and epitomized in the descriptive 'effeminate,'" suffers from two minor problems – not supporting the cited proposition regarding sexual orientation discrimination and being the definition of "no longer good law" after *Price Waterhouse*. *See* MTD at 17, citing *Smith v. Liberty Mut. Ins. Co.*, 569 F.2d 325, 327 (5th Cir. 1978).

C. Many Cases Cited as Authoritatively Excluding Sexual Orientation from Title VII's Scope Are Not Even Holdings.

Many of the cases cited in courts throughout the country as establishing that Title VII does not cover sexual orientation discrimination, are not in fact holdings at all. For example, the Fourth Circuit's statement about non-coverage in *Wrightson* was an aside in rejecting the defendant's characterization of the plaintiff's claim, as alleging not harassment because of sex, but instead because of his heterosexual orientation. The court stated that "while it is true Title VII does not afford a cause of action for discrimination based upon sexual orientation, [citations] . . . Wrightson does not allege that he was discriminated against because he is heterosexual. . . . The unequivocal allegation that he was discriminated against 'because of his sex,' which, for purposes of Rule 12(b)(6) must be accepted as true, is alone sufficient to withstand Pizza Hut's motion to dismiss . . . " *Wrightson*, 99 F.3d at 143-44. Despite obviously being dicta, *Wrightson*'s statement regarding the limits of Title VII's coverage has been cited authoritatively for that proposition in many courts in at least four circuits other than the Fourth Circuit. *E.g.*, *Higgins v. New Balance Ath. Shoe*, 21 F. Supp. 2d 66, 74 (D. Me. 1998), *aff'd in relevant part*, 194 F.3d 252 (1st Cir. 1999); *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000); *Ernesto v. Rubin*, Civil Action No. 97-4683, 1999 U.S. Dist. LEXIS 21501 (D.N.J. Aug. 31, 1999); *Medina v. Income Support Div.*, 413 F.3d 1131, 1135 (10th Cir. 2005).

In *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69 (8th Cir. 1989), the plaintiff, a black gay man, claimed his employer "discharged him on the basis of his race" because "similarly situated white homosexual employees, working in the same department at Edwards, were not harassed or terminated as he had been." *Id*. at 70. Appealing summary judgment, he complained that the district court misunderstood his case to be about sexual orientation discrimination. The opinion of the Eighth Circuit, after saying that "Title VII does not prohibit

discrimination against homosexuals," actually held on plaintiff's lone claim of race discrimination (brought under both Title VII and 42 U.S.C. § 1981) – that "he failed to allege facts sufficient to establish that other similarly situated white employees were treated differently. He did not claim that the other white, alleged homosexuals behaved as he did (openly discussed their sex lives while at work), but only compared his behavior in that regard to the behavior of" straight, white employees. *Id*. Despite not even being a case about sexual orientation discrimination, *Williamson* has been cited as authoritative support for Title VII's lack of coverage thereof by the First, Second, Third, and Sixth Circuits in *Higgins*, *Simonton*, *Bibby*, and *Dillon* (wherein it was the first case cited for proposition that "The circuits are unanimous in holding that Title VII does not proscribe discrimination based on sexual activities or orientation); by *Wrightson* in its own dictum on the subject, *see* 99 F.3d at 143-44, as well as by district courts in the Fourth, Fifth, Ninth, Tenth, and Eleventh circuits. *Hopkins v. Baltimore Gas & Elec. Co.*, 871 F. Supp. 822, 832 n.17 (D. Md. 1994), *aff'd*, 77 F.3d 745 (4th Cir. 1996); *Sarff v. Continental Express*, 894 F. Supp. 1076, 1082 (N.D. Tex. 1995) (citing *Williamson* as "affirming summary judgment for the Defendant on the basis that Title VII does not prohibit discrimination against homosexuals"); *Fowler v. Honeywell Int'l, Inc.*, No. CV-06-2285-PHX-SMM, 2008 U.S. Dist. LEXIS 29726 *9 (D. Ariz. Apr. 10, 2008); *Metzger v. Compass Group U.S.A.*, Inc., CIVIL ACTION No. 98-2386-GTV, 1999 U.S. Dist. LEXIS 14224 (D. Kan. Aug. 31, 1999); *Berry v. Bailey*, Case No. CV411-022, 2011 U.S. Dist. LEXIS 22260 *5 (S.D. Ga. Mar. 2, 2011). *See also* Schwartz, *supra*, 35 Harv. J.L. & Gender 209, 237-38 nn.210-219 and accompanying text (dismantling the authoritativeness of the passage regarding coverage of sexual orientation in *Hopkins v. Baltimore Gas & Electric Co.*, 77 F.3d 745, 751-52 (4th Cir. 1996)).

Also questionably cited as definitive authority on the subject is the First Circuit's decision in *Higgins v. New Balance Ath. Shoe, Inc.*, 194 F.3d 252 (1st Cir. 1999). As the first post-*Oncale* circuit court decision to address Title VII's coverage of sexual orientation, *Higgins* understandably would have been expected to be an influential and oft-cited case on that subject. And so it has been, despite the fact that the only two arguments Higgins made on appeal supporting sex discrimination coverage were held to be waived for failure to present them to the district court. *Id*. at 259. Thus, the court did not discuss in any significant detail the only two theories the plaintiff offered to reevaluate Title VII case law in light of *Oncale* and *Price Waterhouse*. *See Higgins*, 194 F.3d at 259-61; *see also Centola*, 183 F. Supp. 2d at 409 n.7 ("In both *Higgins* and *Simonton*, the Circuit Courts refused to consider arguments based upon a sexual stereotyping theory at the appellate level because the plaintiffs had not properly raised these arguments first with the trial courts below."). Nevertheless, the Second Circuit based its holding that Title VII excludes sexual orientation discrimination on *Higgins*' "reaffirmance" of that position "subsequent to . . . *Oncale*." *Simonton*, 232 F.3d at 35. A year later, the Third Circuit would cite both *Simonton* and *Higgins* (and *Williamson*) as support for its holding that sexual orientation is outside Title VII's scope. *Bibby*, 260 F.3d at 261.

In sum, while there are many aspects of the cited decisions that undermine their persuasive value before this Court, the fundamental problem remains their exoneration of a particular form of discrimination occurring because of the sex of an employee. That result is incompatible with *Oncale*, *Barnes*, and *Bundy*, *supra*.

IV. TITLE VII PROSCRIBES DISCRIMINATION BECAUSE OF AN EMPLOYEE'S RELIGIOUS BELIEFS, OR AN EMPLOYEE'S FAILURE TO CONFORM BEHAVIOR TO THE EMPLOYER'S RELIGIOUS BELIEFS; THERE IS NO SEXUAL ORIENTATION EXCEPTION TO EITHER PROSCRIPTION.

Title VII forbids an employer from mistreating an employee because of the employee's religious beliefs, or because the employee fails to comport himself or herself in conformity with the employer's religious beliefs. *Prowel v. Wise Business Forms, Inc*., 579 F.3d 285, 292 (3d Cir. 2009). TerVeer's allegations support either theory. *See* Complaint at ¶ 12 ("Mech was targeting TerVeer by imposing his conservative Catholic beliefs on TerVeer throughout the workday"); ¶ 66 ("Defendant did not approve of TerVeer's brand of Christianity.").[20] There is a remarkable dearth of authority directly on point, but *Erdmann v. Tranquility Inc.*, 155 F. Supp. 2d 1152 (N.D. Cal. 2001) correctly allowed a claim like TerVeer's, while *Prowel, supra*, improperly superimposed a requirement on Title VII's religious protections that the religious principle in question be unrelated to sexual orientation.

A. Coverage Under Title VII Is Satisfied By Allegations of Hostility to One's Religious Beliefs or Attempted Forced Religious Conformity with the Employer's Beliefs.

It is widely recognized that Title VII proscribes discrimination not only because an employee holds particular religious beliefs, but also "simply because he did not hold the same religious beliefs as his supervisors." *Shapolia v. Los Alamos Nat. Laboratory*, 992 F.2d 1033, 1037 (10th Cir. 1993); *Venters v. City of Delphi*, 123 F.3d 956, 972 (7th Cir. 1997) ("Venters need only show that her perceived religious shortcomings [her unwillingness to strive for

[20] TerVeer's allegation of forced religious conformity renders moot, at least for purposes of this motion, Billington's protestation that TerVeer has not alleged that any LOC employee had knowledge of his religious beliefs. *See* MTD at 16.

salvation as Ives understood it, for example] played a motivating role in her discharge.").[21] Under this standard, an employee who gets a divorce, has an extramarital affair, or simply fails to accept or adhere generally to the employer's religious precepts, could invoke Title VII if the employer fired him or her on that basis.[22] Thus, a lesbian or gay man fired solely for failing to comply with the employer's religious beliefs regarding homosexuality should be able to invoke Title VII, or so Brian Prowel understandably believed when he suffered harassment for failure to conform to his employer's religious beliefs.[23] *See Erdmann, supra*.

The *Prowel* court acknowledged that "Title VII seeks to protect employees not only from discrimination against them on the basis of their religious beliefs, but also from forced religious conformity." 579 F.3d at 292 (citing cases). However, the court held that where the employee can "identify just one" religious belief he did not live up to – "that a man should not lay with

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[21] *Accord Noyes v. Kelly Services*, 488 F.3d 1163, 1166, 1168-69 (9th Cir. 2007); *Panchoosingh v. General Labor Staffing Services, Inc*., No. 07-80818-CI, 2009 WL 961148, *6 (S.D. Fla. Apr. 8, 2009); *Tillery v. Asti, Inc*., 247 F. Supp. 2d 1051, 1062-63 (N.D. Ala. 2003), *aff'd without opinion*, 97 Fed. Appx. 906 (Table) (11th Cir. 2004) (unpublished); *Backus v. Mena Newspapers, Inc*.. 224 F. Supp. 2d 1228, 1233 (W.D. Ark. 2002); *Henegar v. Sears, Roebuck and Co*., 965 F. Supp. 833, 837 (N.D. W.Va. 1997); *Yancey v. National Center on Institutions and Alternatives*, 986 F. Supp. 945, 955 (D. Md. 1997); *Sarenpa v. Express Images Inc.*, Civ.04-1538(JRT/JSM), 2005 WL 3299455, *3 (D. Minn. Dec. 1, 2005); *Kaminsky v. Saint Louis University School of Medicine*, No. 4:05CV1112 CDP, 2006 WL 2376232, *5 (E.D. Mo. Aug. 16, 2006).

[22] *See Kaminsky*, 2006 WL 2376232 at *5 (getting a divorce); *Sarenpa v. Express Images Inc.*, 2005 WL 3299455 at *3 (extramarital affair); *Henegar*, 965 F. Supp. at 834 (living with a man while going through divorce proceedings against her husband); *Noyes*, 488 F.3d at 1166, 1168-69 (failure to live up generally to employer's religious beliefs); *Venters*, 123 F.3d at 972 (same).

[23] Among the evidence adduced by Prowel was that he "found anonymous prayer notes on his work machine on a daily basis" for months; "found messages indicating he was a sinner for the way he lived his life; . . . found a note stating: 'Rosebud will burn in hell'" the author using the nickname bestowed upon Prowel by his coworkers; and the testimony of a coworker who "brought religious pamphlets to work that stated 'the end is coming;' and 'have you come clean with your maker?'" that the coworker "did not approve of how Prowel lived his life." *Prowel*, 579 F.3d at 288.

another man," then no Title VII claim lies. *Id*. at 293. The court proffered only one reason to reject what otherwise it recognized as a theoretically sound claim of religious discrimination: an intent by Congress, manifested nowhere in the language of Title VII (or even, were it relevant, in the legislative record of its enactment), to foreclose all employment discrimination claims based on sexual orientation or gender identity. *Id*. ("Given Congress's repeated rejection of legislation that would have extended Title VII to cover sexual orientation, *see Bibby*, 260 F.3d at 261, we cannot accept Prowel's de facto invitation to hold that he was discriminated against 'because of religion' merely by virtue of his homosexuality.").[24] Reliance on what Congress sought out to cover and not cover is explicitly foreclosed by *Oncale*, and certainly the reliance on the *inaction* of Congress since 1964 is even less permitted in construing Title VII. *See* Sec. III.B., *supra*. More fundamentally, by amending Title VII in 1991 to establish a violation whenever an enumerated trait is a "motivating factor" in discrimination, even if other factors are present, Congress flatly rejected the *Prowel* approach of immunizing religious discrimination because sexual orientation bias also was present. 42 U.S.C. § 2000-e(m); "Recent Case: Employment Law - Title VII - Third Circuit Issues Split Decision in Case Involving Gay Man's Harassment Claims. - *Prowel v. Wise Business Forms, Inc.*, No. 07-3997, 2009 U.S. App. LEXIS 19350 (3d Cir. Aug. 28, 2009)," 123 Harv. L. Rev. 1027, 1033 (Feb. 2010) (criticizing the approach in *Prowel* and approving of the holding in *Erdmann*).

[24] This assumes the *Prowel* court did not intend to immunize a supervisor's *first* instance of compelled conformity with his religious beliefs with its belittling of Prowel because he "could identify just one" religious belief of his employer to which he did not conform. *See* 579 F.3d at 293.

B. Despite Its Error, *Prowel* Is Useful to This Court in Laying Bare the Actual Holding of Key Cases, *viz.*, the Judicial Engrafting Onto Title VII of an Exclusion for Sexual Orientation Akin To the Specific Statutory Exclusion in the Americans with Disabilities Act.

Despite its lack of persuasive force for the reasons stated in the previous section, *Prowel* is helpful to this Court in assessing the flawed approaches of other courts to interpreting Title VII. Just as Christopher Vickers' hopes surely would have soared if he had been read the passage from the Sixth Circuit's decision, "all homosexuals, by definition, fail to conform to traditional gender norms in their sexual practices," *see Vickers*, 453 F.3d at 754, so would Brian Prowel's upon learning that the Third Circuit both recognized that Title VII proscribes "forced religious conformity" and acknowledged that he had identified a specific religious belief of his employer to which he did not conform, *viz*., "man shall not lie with man.". *Prowel*, 579 F.3d at 292-93. Given that both courts went on to rule against the employee, the real holding of those cases becomes clear: a judicial engrafting of an exception onto Title VII that, irrespective of whether an otherwise valid claim may be stated for discrimination based on any enumerated category, most notably sex or religion, no such claim will be recognized to the extent that the employee was mistreated because of his or her homosexuality.[25] Indeed, the courts seem to have talked themselves into believing that a statutory exclusion of sexual orientation claims is written into Title VII and that courts must be vigilant to ensure that lesbian and gay employees not be allowed to circumvent this illusory exclusion by invoking their rights to be free from discrimination because of sex or religion. *See Vickers*, 453 F.3d at 764 ("In all likelihood, any discrimination based on sexual orientation would be actionable under a sex stereotyping theory if

[25] *See also* discussion of *Partners I* and *Partners II*, *supra*, in which the court candidly acknowledged that it was following *Vickers* in order to reconcile *Price Waterhouse* with what it deemed as the unequivocal exclusion of sexual orientation discrimination claims in the First Circuit under *Higgins*.

this claim is allowed to stand"); *Prowel*, 579 F.3d at 293 ("Given Congress's . . . [inaction], we cannot accept Prowel's *de facto* invitation to hold that he was discriminated against 'because of religion' merely by virtue of his homosexuality."); *Dillon*, 1992 U.S. App. LEXIS 766 at *22 (rejecting applicability of *Price Waterhouse*, stating that "Thus, Dillon cannot escape our holding, and those of other circuits" that sexual orientation is not covered by Title VII); *see also* MTD at 19 ("But plaintiff cannot avoid the flaws in his sex discrimination claim simply by recasting them as discrimination based on religion.").[26]

Of course, Congress in drafting an antidiscrimination statute fully appreciates how to enact an across-the-board exemption for certain employer conduct. This can be seen not only in Title VII's exemptions for certain actions, but notably in the exclusion from "disability" definitions in the Americans with Disabilities Act claims based on sexual orientation. *See* 42 U.S.C. § 12211(a) ("For purposes of the definition of 'disability' in section 3(2), [42 USCS § 12102(2)], homosexuality and bisexuality are not impairments and as such are not disabilities under this Act."). The absence of any such exclusion in Title VII is fatal to the purported *de jure* engrafting of such section by the *Prowel* and *Vickers* courts. *See Oncale*, 523 U.S. at 79-80.

To illustrate the error of these courts, consider a hypothetical where employer PQR Company issues a memorandum stating that the following employees were terminated for behavior unbecoming of "a PQR Lady": Agnes for driving a motorcycle to and from work, Beth for wearing pants and not wearing makeup or jewelry every day for six months, and Christine for having a relationship with another woman. The memorandum continues by announcing that the

[26] Indeed, these courts have adopted a results-oriented approach, which plaintiff and *amicus* do not seek. Making the inquiry shaped by *Oncale* and *Barnes*, that is, whether another gender would legally have been the subject of adverse treatment, leads to most lesbian and gay employees being able to state a claim for discrimination because of sex or religion, but not always, as, for example, when sex or religion is a bona fide occupational qualification for the position. *See* Fables, *supra*, 6 Am. U.J. Gender Soc. Pol'y & L. at 364-65.

following employees were terminated for "failing to live up to the sound Judeo-Christian principles upon which PQR Company was founded": David for never once having attended services at the First Avenue Baptist Church specifically recommended to him, Edward for his adulterous affair with a woman before his divorce became final, and Frank for his relationship with another man. If each employee sued under Title VII, which claims should be permitted to proceed? The correct answer is that each of these employees has a Title VII claim. Agnes, Beth, and Christine all have viable sex discrimination claims, and David, Edward, and Frank all have viable religious discrimination claims, based on the plain language of the statute, *Oncale*, and *Barnes* and its progeny. A contrary holding could be justified only if Congress included an exemption that "unlawful employment practices" or "discriminatory practices" did not include action taken because of homosexuality, and no such provision exists in either Title VII as passed in 1964, or as amended in 1972 to apply to federal workers. 42 U.S.C. § 2000e-2; 42 U.S.C. § 2000e-16. *Cf. Williams v. District of Columbia*, 916 F. Supp. 1, 9 (D.D.C. 1996) ("Title VII, as written, protects victims of sexual harassment who are harassed because of their sex. . . . Had Congress intended to insulate sexual harassers from liability so long as those sexual harassers selected their victims carefully, not only should Congress have spoken more clearly, it could have at least said something.").

CONCLUSION

TerVeer facially states perfectly legitimate claims of discrimination that he endured that would not have been visited on a female Library employee who shared his attraction to men, or any other Library employee who did not hold TerVeer's beliefs or who was happy to mold his practices and principles in conformity with management's religious beliefs. The only way to deny TerVeer a Title VII claim, short of congressional action, is to engraft a judicial exception to

Title VII's coverage, and such result conflicts with the governing precedent of the Supreme Court and the D.C. Circuit.

Dated: April 23, 2013

RESPECTFULLY SUBMITTED,

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