NO. 18-1104

In the United States Court of Appeals for the Eighth Circuit

Mark Horton,

Plaintiff-Appellant,

v.

Midwest Geriatric Management, LLC,

Defendant-Appellee.

On Appeal from the United States District Court
for the Eastern District of Missouri
Case No. 4:17-cv-02324-JCH

BRIEF OF AMICUS CURIAE COLUMBIA LAW SCHOOL SEXUALITY AND GENDER LAW CLINIC IN SUPPORT OF PLAINTIFF-APPELLANT

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Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Amicus Curiae Columbia Law School Sexuality and Gender Law Clinic states that it has no parent corporation and that no publicly held company holds more than 10% of its stock.

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Statement of Interest

Amicus curiae Columbia Law School Sexuality and Gender Law Clinic is a law-school based clinic that works on cutting-edge sexuality and gender law issues and provides vital assistance to lawyers and organizations throughout the country and the world that advocate for the equality and safety of women and lesbians, gay men, bisexuals, and transgender individuals. For more than a decade, the Clinic has regularly submitted amicus briefs on these matters to federal appellate courts and other courts throughout the United States.

This case presents a critical question about the scope of Title VII's prohibition against sex discrimination that is being litigated in courts across the country. Accordingly, amicus offers the following analysis, which complements but does not duplicate the parties' briefing, to assist the Court in addressing this question as informed by amicus's expertise related to discrimination based on sex and sexual orientation.

Plaintiff-Appellant Mark Horton consented to the filing of this brief. Defendant-Appellee Midwest Geriatric Management, LLC did not consent to the filing of this brief. The Columbia Law School

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Sexuality and Gender Law Clinic has therefore moved the Court for leave to file this brief amicus curiae.[1]

[1] No party's counsel authored this brief in whole or in part. No party or its counsel contributed money that was intended to fund the preparation or submission of this brief. No person—other than the amicus curiae, its employees, or its counsel—contributed money that was intended to fund the preparation or submission of this brief.

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Summary of Argument

A fundamental question in deciding this case is whether the issue presented—whether discrimination based on an employee's sexual orientation constitutes sex discrimination within the meaning of Title VII—is an issue of first impression in this Court. This fundamental question will turn on whether this Court views its eight-word statement in *Williamson v. A.G. Edwards & Sons, Inc.*—"Title VII does not prohibit discrimination against homosexuals"—as a precedential holding or as dicta. 876 F.2d 69, 70 (8th Cir. 1989). The former would mean that only an en banc panel of this Court could issue an opinion allowing Mr. Horton's sex discrimination claim to proceed past the pleadings, whereas the latter would recognize that a three-judge panel of this Court is free to join the Second and Seventh Circuits in concluding that Title VII prohibits employment discrimination on the basis of sexual orientation.

As case law and scholarly analysis discussed here demonstrate, even while there is debate about how broadly, or narrowly, to conceptualize what constitutes a precedential holding, a precise analysis of those eight words in *Williamson* requires the conclusion that they are mere dicta and do not hinder this Court from providing Mr. Horton the relief he seeks.

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Argument

I. Analytic precision will aid in distinguishing binding precedent from dicta, as this case requires.

Courts have long recognized that they are not bound by mere dicta. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 379 (1994) (Scalia, J.) ("It is to the holdings of our cases, rather than their dicta, that we must attend . . . ."); *Passmore v. Astrue*, 533 F.3d 658, 661 (8th Cir. 2008) ("[W]e need not follow dicta.").

Although it is black-letter law that dicta are not binding, courts have acknowledged that distinguishing between dicta and holdings in practice often is not a straightforward task, and there are few clear rules to guide the analysis. *See, e.g.*, *Soza v. Hill*, 542 F.3d 1060, 1074 n.28 (5th Cir. 2008) (expressing uncertainty as to whether a particular principle was essential to the holding or mere dicta); *Valente v. Univ. of Dayton*, No. 3:08-cv-225, 2009 U.S. Dist. LEXIS 108352, at *9 n.6 (S.D. Ohio Nov. 19, 2009) ("Of course, grasping the distinction between holding and dictum in any particular case is notoriously difficult."); *see also State v. Baby*, 946 A.2d 463, 496-99 (Md. Ct. App. 2008) (Raker, J., dissenting) (explaining that "the distinction between holding and *dicta* is not easily discerned"); Richard A. Posner, *The Federal Courts: Crisis and Reform* 252-53 (1985) ("[R]emarkably – considering how fundamental the distinction is to a system of decision by precedent – the distinction [between holding

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and dicta] is fuzzy not only at the level of application but also at the conceptual level.").

Courts, including this circuit, have also endorsed the view that they are bound to follow portions of an opinion that were necessary to the result, but not parts that were unnecessary. *See, e.g.*, *Seminole Tribe v. Florida*, 517 U.S. 44, 67 (1996) ("When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound."); *John Morrell & Co. v. Local Union 304A of United Food & Commercial Workers*, 913 F.2d 544, 550 (8th Cir. 1990) (concluding that language from a prior opinion was not binding because it "was not essential to the judgment"). But differentiating between those statements that are necessary to the result and those that are not can be challenging.

This sometimes difficult distinction between dicta and holdings has been the subject of considerable scholarly debate. One legal scholar describes the distinction between dicta and holdings as "famously elusive." Peter J. Smith, *The Marshall Court and the Originalist's Dilemma*, 90 Minn. L. Rev. 612, 637 (2006); *accord* Michael C. Dorf, *Dicta and Article III*, 142 U. Pa. L. Rev. 1997, 2003 (1994) ("[N]o universal agreement exists as to how to measure the scope of judicial holdings. Consequently, neither is there agreement as to how to distinguish between holdings and dicta.").

Despite the difficulty of separating dicta from holdings in practice, however, "our system of stare decisis relies on determinate

holdings." Judith M. Stinson, *Teaching the Holding/Dictum Distinction*, 19 Perspectives: Teaching Legal Research & Writing 192, 192 (2011). As Professor Stinson points out, injustice can result when courts rely on dicta, and the problem is compounded when an appellate court erroneously relies on dicta because the error becomes binding on lower courts. *Id.*

Another reason federal courts must carefully attend to the distinction between dicta and holdings is rooted in Article III's case or controversy requirement. Because federal jurisdiction requires the existence of an ongoing case or controversy, courts lack power to render opinions "advising what the law would be upon a hypothetical state of facts." *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975). To the extent that a court's statements in dicta address legal issues or factual scenarios outside of the case or controversy presented, the court lacks authority to render a binding opinion as to those issues. Judith M. Stinson, *Why Dicta Becomes Holding and Why It Matters*, 76 Brook. L. Rev. 219, 228 (2010).

II. Treating earlier dicta as binding would unduly restrict courts' capacity to decide newly presented questions.

In addition to creating injustices and running afoul of the case or controversy requirement, treating dicta from a federal court of appeals as binding precedent would unnecessarily tie that appellate court's hands in future cases. This reduces the court's flexibility to respond to changes in the law and society through its future rulings.

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This reduced flexibility can be particularly damaging for civil rights plaintiffs like Mr. Horton, who appropriately seek to have their pending sex discrimination claims heard rather than foreclosed by dicta characterizing the state of the law nearly thirty years ago. As Professor Stinson warns, "Because it is substantially more difficult to overrule a case than to decide a case of first impression (and impossible for a lower court to do so), an unfair and insurmountable burden has been imposed by characterizing dicta as binding precedent." Stinson, *Why Dicta Becomes Holding*, *supra*, 76 Brook. L. Rev. at 229-30.

When Mr. Williamson brought his *race discrimination* case in the late 1980s, the legal and social landscape that shaped his experience as a gay person was profoundly different than that experienced by many gay people living in the United States today. It was likely for this reason that Mr. Williamson sought relief only from race discrimination after he was terminated from his job. Indeed, when this Court affirmed the dismissal of Mr. Williamson's race discrimination claims in 1989, the prevailing judicial commentary on gay rights was from the U.S. Supreme Court, which had deemed it "at best, facetious" that a gay man could seek constitutional protection against arrest for consensual sexual intimacy in his home. *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986), *overruled by Lawrence v. Texas,* 539 U.S. 558 (2003).

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Had Mr. Williamson brought suit today, he would be seeking relief within a substantially transformed body of law. In a series of landmark decisions reflecting a substantial evolution in judicial analysis as well as public opinion about the rights of gay Americans, the Supreme Court has struck down a state constitutional measure that uniquely burdened gay people, rejected anti-sodomy laws as unconstitutional, invalidated the Defense of Marriage Act, and recognized the constitutional right of same-sex couples to marry. *See Romer v. Evans*, 517 U.S. 620 (1996); *Lawrence v. Texas,* 539 U.S. 558 (2003); *United States v. Windsor*, 570 U.S. 744 (2013); *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

Federal courts' understandings of sex discrimination prohibited by Title VII have also substantially evolved over time. Nearly contemporaneously with this Court's *Williamson* decision, the Supreme Court recognized in *Price Waterhouse Cooper v. Hopkins*, 490 U.S. 228 (1989), that employment discrimination based on sex stereotypes constitutes unlawful sex discrimination, and stressed that Title VII prohibits "the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." *Id*. at 250. In *Oncale v. Sundowner Offshore Services*, 523 U.S. 75 (1998), in an opinion authored by Justice Scalia, the Supreme Court unanimously held that same-sex harassment is sex discrimination under Title VII. Justice Scalia reasoned, while same-sex harassment was "assuredly not the principal evil Congress was concerned about when it

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enacted Title VII . . . 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." *Id*. at 79-80.

Relying upon *Price Waterhouse* and *Oncale*, as well as a number of federal appellate court decisions, the U.S. Equal Employment Opportunity Commission ("EEOC") has made it clear that it "interprets and enforces Title VII's prohibition of sex discrimination as forbidding any employment discrimination based on gender identity or sexual orientation." EEOC, *What You Should Know About EEOC and the Enforcement of Protections for LGBT Workers*, available at https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm (last visited March 14, 2018).

An imprecise view of the *Williamson* sentence as a holding rather than dicta would foreclose this Court from recognizing these changes in the law as it decides the instant case. As Professor Kozel explains, the costs of an unduly overreaching view of what constitutes precedent are especially serious where the surrounding law has changed from the time the dicta was noted:

> When today's court is compelled to accept yesterday's unsound decision, society incurs a loss from the perpetuation of the incorrect rule. Rule-of-law costs can also arise from the conscious preservation of judicial gloss that misconstrues the underlying legal authority. Abiding by erroneous precedents can even

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> threaten democratic values by creating distance between judicial interpretations and the "collective judgments that our representatives have authoritatively expressed."

Randy J. Kozel, *The Scope of Precedent*, 113 Mich. L. Rev. 179, 207-08 (2014).

Treating dicta as holding not only reduces this Court's capacity to consider Title VII in light of developing law, but also reduces the flexibility of the federal district courts subordinate to this Court. Recognizing that the *Williamson* statement at issue here is dicta means that district courts in this Circuit can consider the line's persuasive worth (or lack thereof), but not be constrained to follow it. As Professors Klein and Devins explain,

> [t]he power of lower courts to interpret higher court rulings and, in doing so, demarcate the line that separates dictum from holding is a key constraint on the hierarchical relationship between higher and lower courts. Lower courts' willingness or reluctance to assert their own authority by challenging dicta fundamentally affects the ways in which higher and lower courts speak to each other and shape the law.

David Klein & Neal Devins, *Dicta, Schmicta*: *Theory Versus Practice in Lower Court Decision Making*, 54 Wm. & Mary L. Rev. 2021, 2026 (2013).

Because stare decisis prevents courts that are bound by previous holdings from responding to developments in the law, the

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careful distinction between dicta and precedent is essential to the work of the federal courts.

III. A three-judge panel of this Court is free to conclude that Mr. Horton has a cognizable sex-discrimination claim under Title VII because the *Williamson* sentence at issue is dicta.

This Court's decision in *Williamson* does not dictate the outcome of this case. In *Williamson*, this Court concluded that the plaintiff, who was both black and gay, had not established that he was treated differently from similarly situated white, gay employees and affirmed summary judgment in favor of the employer. *Williamson*, 876 F.2d at 70. In reaching that conclusion, this Court stated that "Title VII does not prohibit discrimination against homosexuals." *Id.* For the reasons below, however, the *Williamson* court's statement nearly thirty years ago that Title VII does not prohibit discrimination based on sexual orientation is dicta, and this Court is not bound by it.

The *Williamson* court's comment in 1989 that Title VII does not prohibit discrimination based on sexual orientation was unnecessary to the result in the case. Even if the court had said the opposite—that Title VII *does* prohibit discrimination based on sexual orientation—it would have reached the same result on the record before it.

Put simply, the question presented at the time was whether Mr. Williamson was subjected to discrimination based on race, and the

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Court decided that Mr. Williamson's race-discrimination claim failed because he presented no evidence that he was treated differently than similarly situated white employees. *Williamson*, 876 F.2d at 70. The court explained that to the extent Mr. Williamson alleged that straight, white employees behaved in the same manner as he had but were not terminated, those employees were not similarly situated because they were heterosexual. *Id.* And to the extent Mr. Williamson alleged that he was treated differently from white employees who were gay, the court concluded that Mr. Williamson's behavior was different from that of the white gay employees. *Id.* In short, this Court affirmed because Mr. Williamson's comparator evidence in support of his racial discrimination claim failed to create a jury issue. Consequently, whether Title VII prohibits discrimination based on sexual orientation was immaterial to the court's conclusion that Mr. Williamson's race discrimination claim failed.

In addition, the fact that Mr. Williamson pleaded only claims of race discrimination means there was no case or controversy as to whether Title VII prohibited sexual orientation discrimination in that case. *See Preiser*, 422 U.S. at 401. The Court therefore lacked jurisdiction to decide that issue, and its statement—an aside to the race discrimination issue presented to it—cannot be considered binding.

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Moreover, this Court's subsequent characterization as a holding of the *Williamson* court's passing statement in *Schmedding* that Title VII does not prohibit discrimination based on sexual orientation does not elevate the *Williamson* dicta to a holding. *See Schmedding v. Tnemec Co.*, 187 F.3d 862, 864 n.3 (8th Cir. 1999) ("In *Williamson*, a pre-*Oncale* case, we held that Title VII does not afford a cause of action for discrimination against homosexuals."). As Appellant points out, the *Schmedding* court's remark that *Williamson* predated *Oncale* was intended to cabin *Williamson*. The *Schmedding* opinion described the *Williamson* sentence as a holding without engaging in any analysis of whether the statement should be understood as a holding or dicta.

In the analogous context of whether or not a rule is considered to be jurisdictional in nature, the Supreme Court has warned against and corrected its previous "drive-by jurisdictional rulings," where the Court has offhandedly referred to a rule as jurisdictional without engaging in the "close analysis" necessary to determine whether a ruling truly is jurisdictional. *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 161 (2010) ("Our recent cases evince a marked desire to curtail such 'drive-by jurisdictional rulings,' *ibid.*, which too easily can miss the 'critical difference[s]' between true jurisdictional conditions and nonjurisidictional limitations on causes of action."). At most, the *Schemedding* court's statement that *Williamson* "held that Title VII does not afford a cause of action for

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discrimination against homosexuals" was a "drive-by" labeling of the *Williamson* sentence as a holding. It was not the product of a close analysis of whether those eight words were truly part of the precedent created by *Williamson*. Furthermore, the holding in *Schmedding* actually supports Appellant's arguments here. Relying on *Oncale*'s expansion of the concept of sex discrimination under Title VII to include same-sex harassment, *Schmedding* held that illegal sexual harassment includes anti-gay epithets because those also constitute sex-stereotyping discrimination. 187 F.3d at 865.

Because the question of whether Title VII prohibits discrimination based on sexual orientation was not before the *Williamson* court, that opinion's comment regarding that issue was outside the scope of the court's jurisdiction and was therefore advisory. Consequently, a three-judge panel of this Court is free to conclude, as an issue of first impression, that Title VII prohibits discrimination based on sexual orientation.

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Conclusion

The careful distinction between dicta and precedent is essential to the work of the federal appellate courts. Here, the Court should not consider itself bound by a previous panel's eight-word comment on the law, where that comment was neither responsive to the plaintiff's claims presented in that case nor necessary to its holding.

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Certificate of Brief Length

The undersigned counsel for Amicus Curiae Columbia Law School Sexuality and Gender Law Clinic, certifies that this brief complies with the requirements of Fed. R. App. P. 32(a)(7)(B) in that it is printed in 14-point, proportionately spaced typeface utilizing Microsoft Word 2016 and contains 2,945 words, including headings, footnotes, and quotations.

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The undersigned counsel for Amicus Curiae Columbia Law School Sexuality and Gender Law Clinic, hereby certifies under 8th Cir. R. 28A(h)(2) that the brief has been scanned for computer viruses and that the brief is virus free.

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Certificate of Service

The undersigned counsel for Amicus Curiae Columbia Law School Sexuality and Gender Law Clinic hereby certifies that on March 14, 2018, she electronically filed the Brief of Amicus Curiae Columbia Law School Sexuality and Gender Law Clinic with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. She certifies that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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