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. 17-02324
The Honorable Jean C. Hamilton, Judge

BRIEF OF PLAINTIFF-APPELLANT MARK HORTON

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SUMMARY OF THE CASE

Plaintiff-Appellant, Mark Horton ("Horton"), is a gay man who has been legally married to his husband under Illinois law since 2014. JA-003. In May 2016, Horton accepted a written offer of employment from Defendant-Appellee, Midwest Geriatric Management, LLC ("MGM"), a Missouri company. JA-008-009. After Horton revealed in an e-mail that he was in a relationship with a man, however, MGM withdrew the accepted offer of employment. JA-010-011.

Horton brought this action against MGM for violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq*., on account of the discrimination he suffered because of his sex and religion, both based on his sexual orientation.[1] MGM filed a Motion to Dismiss. JA-027. Believing it was bound by this Court's decision in *Williamson v. A.G. Edwards and Sons, Inc.*, 876 F.2d 69 (8th Cir. 1989), a race discrimination case, the District Court dismissed Horton's sex discrimination claim (Count I). JA-063. The District Court also dismissed the religious discrimination claim (Count II) based on *Williamson*, because the Court considered it a "re-packaged" sexual orientation claim. JA-071.

Horton respectfully requests 30 minutes per side for oral argument due to the current circuit split regarding, and importance of, these issues.

[1] While Horton also filed a state law claim for fraudulent inducement (Count III), he has abandoned that claim on appeal. Therefore, this brief focuses on Horton's Title VII claims (Counts I and II).

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JURISDICTIONAL STATEMENT

Horton filed his Complaint against MGM in the United States District Court for the Eastern District of Missouri under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq*., as amended by the Civil Rights Act of 1991, seeking relief from the unlawful employment discrimination he suffered because of his sex and religion. JA-005. The District Court had original jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343. On January 3, 2018, the District Court entered an Order of Dismissal, which dismissed Horton's Complaint for the reasons set forth in the court's Memorandum and Order entered December 21, 2017. JA-077, JA-093. The Order of Dismissal entered on January 3, 2018 disposed of all claims.[2] JA-093. On January 9, 2018, Horton filed a timely Notice of Appeal. JA-094. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

[2] Horton has abandoned his state law claim on appeal.

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STATEMENT OF ISSUES

1. Whether Title VII's prohibition against employment discrimination "because of an individual's … sex" encompasses discrimination based on an individual's sexual orientation.

- Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq*.
- *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998)
- *Zarda v. Altitude Express, Inc.*, No. 15-3775, 2018 WL 1040820 (2d Cir. Feb. 26, 2018) (*en banc*)
- *Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339 (7th Cir. 2017) (*en banc*)
- *Williamson v. A.G. Edwards and Sons, Inc.*, 876 F.2d 69 (8th Cir. 1989)

2. Whether Title VII's prohibition on discrimination "because of … religion" prohibits an employer from discriminating against an employee when the employee's sexual orientation conflicts with the employer's religious beliefs.

- Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq*.
- *Campos v. City of Blue Springs, Mo.*, 289 F.3d 546 (8th Cir. 2002)
- *Shapolia v. Los Alamos Nat'l Lab.*, 992 F.2d 1033 (10th Cir. 1993)
- *Terveer v. Billington*, 34 F. Supp. 3d 100 (D.D.C. 2014)
- *Sarenpa v. Express Images Inc.*, No. CIV.04-1538(JRT/JSM), 2005 WL 3299455 (D. Minn. Sept. 8, 2005)

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INTRODUCTION

"In passing Title VII, Congress made the simple but momentous announcement that sex … [and] religion … are not relevant to the selection, evaluation, or compensation of employees." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 243 n.9 (1989). As such, Title VII "is a remedial statute designed to eradicate certain invidious employment practices. The evils against which it is aimed are defined broadly[.]" *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 381 (1977) (Marshall, J., concurring in part and dissenting in part); *see also Pullman Standard v. Swint*, 456 U.S. 273, 276 (1982) ("Title VII is a broad remedial measure, designed 'to assure equality of employment opportunities.'" (quotation omitted)). Through its enactment, Congress established a statutory imperative to extinguish discrimination in employment and "to strike at the entire spectrum of disparate treatment of men and women in employment," *Oncale*, 523 U.S. at 78 (1998) (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986)) – even forms of discrimination beyond those Congress may have been principally concerned with "when it enacted Title VII." *Id.* at 79. "[R]ecognizing that new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged," the Supreme Court has declared that discriminating against lesbian, gay, and bisexual people based on a "disapproval of their relationships"

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"diminish[es] their personhood" and "works a grave and continuing harm" that must be remedied. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602-04 (2015).

Here, MGM unlawfully revoked Horton's offer of employment only after it realized Horton had a same-sex partner, a man he legally married in 2014 in the neighboring state of Illinois. Seeking to remedy such unlawful discrimination, Horton filed suit against MGM on August 28, 2017, asserting claims of sex and religious discrimination under Title VII. Believing itself bound by passing *dicta* contained in *Williamson*, a one-page opinion in a race discrimination case, the District Court dismissed Horton's Title VII claims. However, the *dicta* stated in Williamson does not resolve the issue within the Eight Circuit of whether Title VII's ban on sex and religious discrimination permits an employer to fire (or otherwise discriminate against) lesbian, gay, and bisexual people based on their sexual orientation. Indeed, not only is *Williamson*'s observation that "Title VII does not prohibit discrimination against homosexuals" the epitome of non-binding *dicta*, "[t]he logic of the Supreme Court's decisions, as well as the common-sense reality that it is actually impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex," dictate that Title VII *does* prohibit discrimination based on sexual orientation. *Hively*, 853 F.3d at 350-51; *see also Zarda*, 2018 WL 1040820, at *19.

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In this case, the District Court erred in relying on nearly 30-year-old *dicta* from a race discrimination case in refusing to follow Title VII's mandate to eradicate certain invidious employment practices and to strike at the entire spectrum of sex and religious discrimination in employment. This Court must now carry out that task. Ours is a national economy, and through Title VII, Congress has set forth a national imperative to eradicate discrimination in the workforce. As such, basic protections in the workforce, like those set forth in Title VII, do not depend on geography. Put simply, the width of the Mississippi River cannot curtail the *federal* workplace rights of an Illinois resident that crosses the Stan Musial Bridge to work in Missouri.

Lesbian, gay, and bisexual Americans, like Mark Horton, will not enjoy true legal equality until their sexual orientation is irrelevant, not only to their right to enter into consenting relationships and to lawfully marry, but also as to their ability to maintain jobs and pursue their livelihoods.

STATEMENT OF THE CASE

Horton, a gay man who legally married his husband under the laws of the State of Illinois on November 14, 2014, was employed as Vice President of Sales and Marketing with one of MGM's competitors, Celtic Healthcare ("Celtic"), until approximately May 4, 2016. JA-007. In February of 2016, Horton received an unsolicited e-mail from MGM's authorized agent, an executive search firm called

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"Jobplex," which represented to Horton that it had been exclusively retained to identify a Vice President of Sales and Marketing for MGM. JA-007.

Horton agreed to undergo the application process, including one or more interviews with MGM's President and C.E.O., Judah Bienstock, and his wife, Faigie ("Faye") Bienstock. JA-007. Judah and Faye Bienstock are Jewish. JA-007. Judaism plays a large role in their professional lives, and they have made their religion and its influence on their business known. JA-007 – JA-008.

On April 21, 2016, after completing a detailed assessment and interview process, the Bienstocks sent Horton a written job offer on behalf of MGM. JA-008. The offer was contingent on the successful completion of background checks. JA-026. After he received the written job offer, Horton was informed that a company called HireRight that had been retained by MGM to perform the background check was having difficulty verifying Horton's education with two colleges. JA-008. After investigating the issue, Horton determined that one of the colleges he had attended had been sold to another university and, as a result, the name of the college had changed and the request for verification needed to be sent to the new entity. JA-008. Horton further determined that the second college did not have computerized records and, therefore, needed additional time to locate and copy his records. JA-008. Horton conveyed this information to Jobplex, HireRight, and MGM, and indicated that it could take four to six weeks to obtain

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the requested information. JA-008. Neither Jobplex, HireRight, nor MGM voiced any concern over the potential delay. JA-008.

On May 4, 2016, Horton signed the written job offer accepting the position of Vice President of Sales and Marketing with MGM and transmitted the signed document via e-mail to Faye and Jobplex. JA-008 – JA-009. That same day, with full knowledge that the background check would take several weeks more to be completed, Faye responded on behalf of MGM, stating, *"Wonderful! Congratulations! We are so excited! When will be your anticipated start date?"* JA-009. Horton told Faye that he would be able to begin working for MGM on May 31, 2016. JA-011. Based on this exchange, Horton gave notice to Celtic that he was resigning his employment. JA-009.

On May 10, 2016, Horton e-mailed Faye to advise her that Celtic had agreed to release him from his employment early. JA-009. Later that day, Faye again responded on behalf of MGM, saying, *"We are ready whenever works for you!"* JA-009. On Thursday, May 12, 2016, Faye sent another e-mail stating, "*Let's just meet Monday [May 16, 2016 at] 9:00 am to get everything started!*" JA-009.

On Friday, May 13, 2016, Faye e-mailed Horton again, this time informing him that he needed to complete the documentation regarding his education and complete a pre-hire assessment before attending orientation the following week. JA-009 – JA-010. Faye indicated that after completion of those two items, MGM

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and Horton could pick a new start date. JA-010. Horton responded the same day, indicating that he had been working closely with MGM's agent over the past few weeks, and had visited one of the colleges that day to request a copy of his transcript for verification. JA-010.

On Tuesday, May 17, 2016, Horton e-mailed Faye to update her on the status of obtaining his educational records, stating that he had reached out to all of his colleges and requested transcripts and diplomas. JA-010. In that e-mail, Plaintiff discussed the possibility of completing his MBA, stating, "*My partner has been on me about [my MBA] since **he** completed his PHD a while back*." JA-010 (emphasis added). In that innocent moment, Plaintiff disclosed his relationship with his life partner of the same sex. JA-010.

Faye did not respond to Horton until May 20, 2016. JA-010. On that date, she e-mailed him, stating, "*Are you able to come this afternoon? We would like to discuss the status of your employment*." JA-010. At that time, only one week had passed since Faye had indicated to Horton that he could pick a new start date after MGM received his records. JA-011. Horton replied that he was out of town, but could come in on a different date. JA-010.

Two days later, on Sunday, May 22, 2016, Faye e-mailed Horton again, stating, "*Mark – I regret to inform you that due to the incompletion of the background check of supportive documentation – we have to withdraw our offer*

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letter for employment at MGM. We wish you much luck in your future endeavors. Judah and Faye." JA-011. At that time, there were still nine days left before the original date Horton had told MGM he could begin work. JA-011.

Horton eventually obtained the requested college records and, on June 21, 2016, upon learning that the Vice President of Sales and Marketing position with MGM was still open, Horton sent the Bienstocks an e-mail stating, in relevant part, "*I would like to meet this week to discuss moving forward with the VP of Sales role with MGM*." JA-011. On June 23, 2016, Faye responded on behalf of MGM, stating, "*Thank you Mark for your communication. At this time – we are considering other candidates. We appreciate your continued interest in MGM – and will contact you if we wish to pursue a relationship*." JA-011.

Horton filed a Charge of Discrimination with the Equal Employment Opportunity Commission ("EEOC") on November 29, 2016, alleging that MGM discriminated against him on the bases of sex, religion, and sexual orientation. JA-022. The EEOC issued a Notice of Right to Sue letter on August 23, 2017. JA-025. On August 28, 2017, Horton filed his Complaint against MGM in the United States District Court for the Eastern District of Missouri, alleging discrimination on the bases of sex (based on his sexual orientation) and religion. JA-005.

MGM filed a Motion to Dismiss. JA-027. The District Court dismissed Count I of Horton's Complaint, which alleged a violation of Title VII based on the

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discrimination Horton suffered because of his *sex*, holding that sexual orientation discrimination is not a form of sex discrimination protected by Title VII. JA-063. In so holding, the District Court determined that it was bound by *Williamson*, 876 F.2d 69, a decision addressing a *race* discrimination claim. JA-063. Similarly, the District Court dismissed Count II of Horton's Complaint, which alleged a violation of Title VII based on religious discrimination, holding that it was a "re-packaged" claim for sexual orientation discrimination and, again, asserting that the District Court was bound by this Court's race discrimination decision in *Williamson*. JA-071.

On January 9, 2018, Horton filed a timely Notice of Appeal to this Court. JA-094.

SUMMARY OF THE ARGUMENT

The District erred in dismissing Horton's Title VII claims of sex and religious discrimination. In so doing, the District Court failed to follow Title VII's clear statutory language and the guidance of the U.S. Supreme Court; erroneously felt itself bound by the passing *dicta* in *Williamson*; and improperly carved out lesbian, gay, and bisexual people from Title VII's protective mantle.

First, sexual orientation discrimination is a form of sex discrimination prohibited by Title VII. Indeed, as the Courts of Appeals for the Second and Seventh Circuits have recognized, "the most natural reading of the statute's

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prohibition on discrimination 'because of … sex,'" dictates that Title VII prohibits discrimination based on sexual orientation. *Zarda*, 2018 WL 1040820, at *5; *Hively*, 853 F.3d at 350-51.

Second, Title VII seeks to protect employees not only from discrimination based on their religious beliefs, but also from forced religious conformity or adverse treatment because they do "not hold or follow [their] employer's religious beliefs." *Shapolia*, 992 F.2d at 1038. This includes a prohibition on adverse treatment against a gay man for his failure to conform to the employer's religious beliefs on account of his sexual orientation; anything less is "to create an exception" to otherwise established standards when the target of religious discrimination is gay. *See Terveer*, 34 F. Supp. 3d at 116–17.

Third, ignoring Title VII's statutory language and the Supreme Court's jurisprudence surrounding its proper interpretation, the District Court improperly carved out lesbian, gay, and bisexual people from Title VII's protections. In so doing, the District Court failed "to give effect to the law Congress enacted" even if the "effect was unintended." *Lewis v. City of Chicago*, 560 U.S. 205, 217 (2010). Put simply, "there is 'no justification in the statutory language … for a categorical rule excluding' such claims from the reach of Title VII." *Zarda*, 2018 WL 1040820, at *19.

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Fourth, the District Court improperly relied on *Williamson*'s *dicta*, notwithstanding this Court's admonition in *Passmore v. Astrue*, 533 F.3d 658 (8th Cir. 2008), that "we need not follow *dicta*." *Id.* at 661.

Finally, the District Court's decision and reliance on *Williamson* ignores today's legal landscape, one in which lesbian, gay, and bisexual people are deserving of equal dignity in our social institutions and the workplace.

Accordingly, the Court should reverse the judgment below and recognize the validity of Horton's claims for sex and religious discrimination under Title VII.

STANDARD OF REVIEW

The grant of a motion to dismiss for failure to state a claim is reviewed *de novo*. *H & Q Properties, Inc. v. Doll*, 793 F.3d 852, 855 (8th Cir. 2015).

ARGUMENT

I. SEXUAL ORIENTATION DISCRIMINATION IS A FORM OF SEX DISCRIMINATION PROHIBITED BY TITLE VII.

For at least three reasons, "discrimination on the basis of sexual orientation is a form of sex discrimination." *Hively*, 853 F.3d at 341; *see also Zarda*, 2018 WL 1040820, at *19. *First*, under a basic differential treatment theory, such discrimination necessarily involves sex-based considerations because the discrimination endured by a man based on his attraction to men is not suffered by any woman with an identical attraction to men. *Second*, just as discrimination against a man who is romantically involved with someone of a different race has

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universally been recognized as discrimination because of *his* race, discrimination against a man is discrimination because of *his* sex if it is based on his relationship with a man. *Third*, under a sex stereotyping theory, sexual orientation discrimination is sex discrimination because it rests on the sex-specific stereotype (in this case) that men are, or should be, attracted only to women. As such, Count I of Horton's Complaint for sex discrimination states a cause of action under Title VII. Indeed, Horton expressly relied on these three reasons in articulating his sex discrimination claim. JA-012.

A. When Employers Discriminate Based On Sexual Orientation, They Necessarily Consider An Employee's Sex.

Discriminating against lesbian, gay, or bisexual employees based on their sexual orientation inherently "is sex discrimination for the simple reason that such discrimination treats otherwise similarly-situated people differently solely because of their sex." *Christiansen v. Omnicom Grp., Inc.*, 852 F.3d 195, 202 (2d Cir. 2017) (Katzmann, C.J., concurring). In other words, "[b]ecause one cannot fully define a person's sexual orientation without identifying his or her sex, sexual orientation is a function of sex." *Zarda*, 2018 WL 1040820, at *5; *see also Hively*, 853 F.3d at 345. That is, "sexual orientation is inseparable from and inescapably linked to sex." *Baldwin v. Foxx*, Appeal No. 0120133080, 2015 WL 4397641, at *5 (E.E.O.C. 2015); *see also Hively*, 853 F.3d at 358 (Flaum, J., concurring) ("One cannot consider a person's homosexuality without also accounting for their sex:

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doing so would render 'same' [sex] … meaningless."). "Indeed sexual orientation is doubly delineated by sex because it is a function of both a person's sex and the sex of those to whom he or she is attracted." *Zarda*, 2018 WL 1040820, at *5. Thus, "[l]ogically, because sexual orientation is a function of sex and sex is a protected characteristic under Title VII, it follows that sexual orientation is also protected." *Id.*

Conceptually, this is a straightforward formulation. *See Zarda*, 2018 WL 1040820, at *23 (Cabranes, J., concurring). The Court need only ask whether the employee would have faced discrimination if the employee had been of a different sex. *See Zarda*, 2018 WL 1040820, at *10. And, for more than forty years, the Supreme Court has instructed that Title VII forbids an employer from having "one hiring policy for women and another for men." *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (per curiam). One way to articulate this "simple test" is that it forbids any "treatment of a person in a manner which but for that person's sex would be different." *City of L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978) (citation omitted); *see also Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 682-83 (1983). Put simply, if the employee would have been treated differently had they been of the other sex, then the discrimination was based on sex.

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Thus, where an employer fires a male employee because the employee is married to (or lives with, dates, or is attracted to) a man, but would not fire a female employee for identical conduct with (or attraction to) a man, the employer has engaged in "paradigmatic sex discrimination." *Hively*, 853 F.3d at 345; *see also Zarda*, 2018 WL 1040820, at *10. A growing number of courts have recognized the intrinsic logic of this position. *See*, *e.g.*, *Zarda*, 2018 WL 1040820, at *10; *id.* at *23 (Cabranes, J., concurring); *Hively*, 853 F.3d at 350-51; *id.* at 358 (Flaum, J., concurring); *Hall v. BNSF Ry. Co.*, No. C13-2160 RSM, 2014 WL 4719007, at *3 (W.D. Wash. Sept. 22, 2014); *Koren v. Ohio Bell Tel. Co.*, 894 F. Supp. 2d 1032, 1038 (N.D. Ohio 2012); *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212, 1223 (D. Or. 2002); *see also Videckis v. Pepperdine Univ.*, 150 F. Supp. 3d 1151, 1161 (C.D. Cal. 2015); *Baldwin*, 2015 WL 4397641, at *5.[3]

B. Discrimination Based On Same-Sex Relationships Is Analogous To Discrimination Based On Interracial Relationships And, Therefore, Equally Violates Title VII.

Discrimination based on sexual orientation constitutes "associational" discrimination forbidden by Title VII. Put in other words, sexual orientation discrimination is sex discrimination because it treats otherwise similarly-situated

[3] The use of the comparator method is instructive in this regard. *See* Part I.D.1, *infra*.

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people differently because of their sex, viewed in relation to the sex of the individuals with whom they associate (or to whom they are attracted). *See Zarda*, 2018 WL 1040820, at *17; *id.* at *23-24 (Sack, J., concurring); *id.* at *24 (Lohier, J., concurring); *id.* at *20-21 (Jacobs, J., concurring); *Hively*, 853 F.3d at 347-48; *id*. at 359 (Flaum, J., concurring); *Christiansen*, 852 F.3d at 204 (Katzmann, C.J., concurring).

Indeed, every circuit to address the question has held that discrimination based on the race of a person with whom an employee has a relationship constitutes a form of discrimination "because of … race" prohibited by Title VII. In *Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888 (11th Cir. 1986), for example, the Eleventh Circuit held that "[w]here a plaintiff claims discrimination based upon an interracial marriage or association, he alleges, by definition, that he has been discriminated against because of his race." *Id.* at 892; *see also Hively*, 853 F.3d at 348-50; *Holcomb v. Iona Coll.*, 521 F.3d 130, 138 (2d Cir. 2008); *Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick, & GMC Trucks, Inc.*, 173 F.3d 988, 994 (6th Cir. 1999); *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 156 F.3d 581, 589 (5th Cir. 1998), *op. reinstated on reh'g en banc sub nom. Williams v. Wal-Mart Stores, Inc.*, 182 F.3d 333 (5th Cir. 1999); *Collin v. Rectors and Visitors of Univ. of Va.*, No. 96-1078, 1998 WL 637420, at *2 (4th Cir. Aug. 31, 1998).

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Furthermore, the Supreme Court has mandated that courts treat discrimination based on the enumerated traits protected under Title VII the same, because the statute "on its face treats each of the enumerated categories exactly the same." *Price Waterhouse*, 490 U.S. at 243 n.9; *see also Faragher v. City of Boca Raton*, 524 U.S. 775, 787 n.1 (1998); *Meritor*, 477 U.S. at 66; *Manhart*, 435 U.S. at 709; *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 26 (1993) (Ginsburg, J., concurring); *cf. Oncale*, 523 U.S. at 78.

Thus, based on the inescapable logic of race discrimination cases, treating an employee differently because of the sex of the person to whom he or she is married, or with whom he or she has an intimate relationship, is discrimination because of sex. *See Zarda*, 2018 WL 1040820, at *14-17; *id.* at *23 (Sack, J., concurring); *id.* *24 (Lohier, J., concurring); *Hively*, 853 F.3d at 347-48; *id.* at 359 (Flaum, J., concurring); *Christiansen*, 852 F.3d at 204 (Katzmann, C.J., concurring). Just as "[c]hanging the race of one partner made a difference in determining the legality of" the marriage at issue in *Loving v. Virginia*, 388 U.S. 1 (1967), the employer in a case involving discrimination based on sexual orientation would have acted differently "if we were to change the sex of one partner." *Hively*, 853 F.3d at 348-49.

Accordingly, this Court must hold that Title VII protects employees from employment discrimination based on their association with persons of a particular

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sex, just as it protects against discrimination based on association with persons of a different race.[4]

C. Title VII Protects All Employees, Including Lesbian, Gay, and Bisexual Employees, From Discrimination Based On Sex Stereotypes.

Finally, "sexual orientation discrimination is rooted in gender stereotypes and is thus a subset of sex discrimination." *Zarda*, 2018 WL 1040820, at *12. The Supreme Court's decision in *Price Waterhouse* makes clear that Title VII does not permit employers to "evaluate employees by assuming or insisting that they match[] the stereotype associated with their group." 490 U.S. at 251. As such, Horton's "claim is no different from the claims brought by women who were rejected for jobs in traditionally male workplaces[;] … [t]he employers in those cases were policing the boundaries of what jobs or behaviors they found acceptable for a woman (or in some cases, for a man)." *Hively*, 853 F.3d at 346.

Discrimination based on sexual orientation is rooted in stereotypes about what it means to be a man or to be a woman and about how men and women should conduct their lives. *See Zarda*, 2018 WL 1040820, at *10 ("this framework demonstrates that sexual orientation discrimination is almost invariably rooted in

[4] Numerous other courts have found the analogy to discrimination against those in interracial relationships persuasive. *See*, *e.g.*, *Boutillier v. Hartford Pub. Sch.*, 221 F. Supp. 3d 255, 268 (D. Conn. 2016); *EEOC v. Scott Med. Health Ctr., P.C.*, 217 F. Supp. 3d 834, 840 n.5 (W.D. Penn. 2016).

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stereotypes about men and women."). It rests on the idea that women should not be attracted to women and that men should not be attracted to men. "In fact, stereotypes about homosexuality are directly related to our stereotypes about the proper roles of men and women." *Christiansen*, 852 F.3d at 205 (Katzmann, C.J., concurring) (citation omitted). An individual's same-sex attraction "represents the ultimate case of failure to conform to [a sex] stereotype (at least as understood in a place such as modern America, which views heterosexuality as the norm and other forms of sexuality as exceptional)." *Hively*, 853 F.3d at 346. And, as the Supreme Court explained last term, "[f]or close to a half century" it has been the law that "overbroad generalizations about the different talents, capacities, or preferences of males and females" constitute sex discrimination. *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1692 (2017) (quotations omitted).

Thus, the suggestion that Title VII does not cover discrimination based on an individual's sexual orientation is untenable. For a court to hold otherwise, it would have to ignore the Supreme Court's repeated admonition to interpret Title VII "to strike at *the entire spectrum* of disparate treatment of men and women resulting from sex stereotypes." *Price Waterhouse*, 490 U.S. at 251 (emphasis supplied) (quoting *Manhart*, 435 U.S. at 707 n.13).[5]

[5] Many cases throughout Title VII's history reflect the broad understanding of sex stereotypes that the statute combats, including stereotypes about life choices about

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In short, there is simply no principled basis for lower courts to cut back on the Supreme Court's command to hear claims regarding the "entire spectrum" of sex stereotyping discrimination. This includes sex discrimination claims such as Horton's arising out of discrimination based on sexual orientation.

D. Arguments Against Title VII's Coverage Of Sexual Orientation Lack Merit.

The small minority of federal appellate judges who have rejected the aforementioned arguments for coverage of sexual orientation discrimination as a form of sex discrimination prohibited by Title VII have relied on misguided concerns that, while unconvincing, warrant brief refutation.

1. *Title VII's coverage of sexual orientation discrimination does not mean that sexual orientation and sex are synonyms.*

The *Hively* dissent belabors the irrelevant point that "'sexual orientation' … is not synonymous with 'sex.'" *Hively*, 853 F.3d at 363 n.3 (Sykes, J., dissenting); *see also id.* at 363. But the issue before this Court is whether sexual orientation discrimination is discrimination *because of* sex. To prevail on that question, Horton need not demonstrate that "sexual orientation" and "sex" are synonyms or that they are interchangeable concepts or terms. "While synonyms are coextensive, sex

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families and relationships. *See*, *e.g.*, *Sobel v. Yeshiva Univ.*, 839 F.2d 18, 33 (2d Cir. 1988); *Hardin v. Stynchcomb*, 691 F.2d 1364, 1370 n.20 (11th Cir. 1982); *Pond v. Braniff Airways, Inc.*, 500 F.2d 161, 166 (5th Cir. 1974); *cf. Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975); *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 130 (2d Cir. 2004).

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discrimination obviously encompasses more than sexual orientation discrimination, including sexual harassment and other recognized subsets of sex discrimination." *Zarda*, 2018 WL 1040820, at *5, n.7. The terms "race" and "interracial marriage" are not synonyms and are not used interchangeably; nevertheless, courts have recognized that "[w]here a plaintiff claims discrimination based upon an interracial marriage or association, he alleges, by definition, that he has been discriminated against because of *his* race." *Parr*, 791 F.2d at 892.

Moreover, the *Hively* and *Zarda* dissents' reliance on adherence to some surmised "original public meaning" for Title VII—a phrase popular among some academics but wholly absent from the Supreme Court's voluminous Title VII jurisprudence—is misplaced. *See Zarda*, 2018 WL 1040820, at *30 (Lynch, J., dissenting); *Hively*, 853 F.3d at 360, 362 (Sykes, J., dissenting). For one, ascertaining Title VII's "original public meaning" is not the simple exercise that the *Hively* and *Zarda* dissents assume. *See generally* Cary Franklin, *Inventing the "Traditional Concept" of Sex Discrimination*, 125 Harv. L. Rev. 1307 (2012). To the contrary, it requires some sort of "divine" exercise that is "little more than a roundabout search for legislative history." *Zarda*, 2018 WL 1040820, at *24 (Lohier, J., concurring). And as the Supreme Court has instructed, such an exercise is not "an interpretive option of first resort." *Id.* Moreover, even under a narrow definition of sex discrimination, sexual orientation discrimination fits the

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definition. *See Zarda*, 2018 WL 1040820, at *5; *id.* at *24 (Lohier, J., concurring) ("there is no reasonable way to disentangle sex from sexual orientation in interpreting the plain meaning of the words 'because of … sex.' The first term clearly subsumes the second, just as race subsumes ethnicity."); *Hively*, 853 F.3d at 345-46.[6]

2. *The correct comparator to a man attracted to men is a woman attracted to men.*

Jurists on both sides of the coverage question emphatically agree "[i]t is critical, in applying the comparative method, to be sure that only the variable of the plaintiff's sex is allowed to change." *Hively*, 853 F.3d at 345; *id*. at 366 (Sykes, J., dissenting); *Zarda*, 2018 WL 1040820, at *8-10; *Christiansen*, 852 F.3d at 203 (Katzmann, C.J., concurring). Thus, when using the comparator method to determine whether an employer has discriminated against a gay plaintiff because of sex, the relevant inquiry is whether the employer treats a man attracted to men differently than it treats a woman attracted to men.

[6] "Sexual harassment" was not in the legal or social lexicon in 1964, and four of the first five courts to consider whether sexual harassment was discrimination "because of … sex" answered in the negative. *See Tomkins v. Pub. Serv. Elec. & 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*, 413 F. Supp. 654 (D.D.C. 1976), stood alone as the only court holding in the affirmative). Nevertheless, Title VII's coverage of sexual harassment has been hornbook law for over three decades.

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The *Hively* dissent reasoned that comparing a woman attracted to women with a man attracted to women involves changing "two variables—the plaintiff's sex and sexual orientation" and fails to "hold *everything* constant except the plaintiff's sex." 853 F.3d at 366 (citation omitted). Such thinking is erroneous. The *Hively* dissent cheats by including the "sum" in the equation. Consider this scenario: if you start with vodka and orange juice, and then replace the orange juice with grapefruit juice, have two things changed, or just one thing? The answer is "one thing." However, the *Hively* dissent would erroneously argue that what was a Screwdriver is now a Greyhound and, therefore, two things have changed.

3. *The analogy to interracial association cases is apt*.

In addition, dissenters' arguments that discrimination against those in same-sex relationships cannot be compared to discrimination against those in interracial relationships because the latter involves notions of "white supremacy," *see Hively*, 853 F.3d at 368 (Sykes, J., dissenting), are wrong for at least two reasons. For one, the Supreme Court obviously was aware of the very different social and historical contexts underlying race, color, sex, religion, and national origin discrimination, when it nevertheless declared in *Price Waterhouse*, *Faragher*, *Meritor*, *Manhart*, *Harris*, and *Oncale*, as a matter of statutory construction, that courts should treat discrimination under the enumerated traits the same.

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For another, when there is differential treatment of employees based on an enumerated trait, Title VII does not concern itself with how unreasonable or malevolent the differential treatment is. *See Zarda*, 2018 WL 1040820, at *16, n. 29 ("Malice, which the Supreme Court has described as an "evil motive," is not required by Title VII, *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 530 (1999); to the contrary, it is merely a basis on which an aggrieved employee may seek punitive damages, *see* 42 U.S.C. § 1981a(b)(1)."). In fact, "[t]here is no doubt that Congress considered reliance on gender or race in making employment decisions an evil in itself." *Price Waterhouse*, 490 U.S. at 265 (O'Connor, J., concurring).[7]

* * * *

In sum, "[t]his is a straightforward case of statutory construction." *Zarda*, 2018 WL 1040820, at *23 (Cabranes, J., concurring). Title VII prohibits discrimination "because of … sex." "It would require considerable calisthenics to remove the 'sex' from 'sexual orientation.'" *Hively*, 853 F.3d at 350. Accordingly, "[d]iscrimination against [Horton] because of his sexual orientation

[7] That said, scholarship and judicial opinions have explored the relationship between antigay oppression and the gender norms that have traditionally privileged men and masculinity. *See, e.g.*, Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. Rev. 197, 234-257 (1994) (discussing "[t]he connection between sexism and the homosexuality taboo"); *see also Zarda*, 2018 WL 1040820, at *16 (noting "research suggesting that sexual orientation discrimination has deep misogynistic roots"); *Centola v. Potter*, 183 F. Supp. 2d 403, 410 (D. Mass. 2010); *Videckis*, 150 F. Supp. 3d at 1160.

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therefore *is* discrimination because of his sex, and is prohibited by Title VII." *Zarda*, 2018 WL 1040820, at *23 (Cabranes, J., concurring).

II. TITLE VII PROSCRIBES DISCRIMINATION BECAUSE OF AN EMPLOYEE'S FAILURE TO CONFORM TO AN EMPLOYER'S RELIGIOUS BELIEFS.

In addition to sex discrimination, Title VII prohibits religious discrimination, which can occur in many forms. An employer violates Title VII when it rescinds an offer of employment upon learning that the hired applicant fails to adopt the employer's religious beliefs or to comport himself in conformity with the employer's religious beliefs. Count II of Horton's complaint, for religious discrimination based on his failure to comport himself in conformity with MGM's religious beliefs, states a cause of action under Title VII.

A. Allegations Of Hostility To One's Religious Beliefs Or Attempted Forced Religious Conformity With The Beliefs Of One's Employer Satisfy Title VII's Requirements For Coverage.

Title VII forbids an employer from terminating an employee because of the employee's religious beliefs, or because the employee fails to adopt the employer's religious beliefs or comport himself or herself in conformity with the employer's religious expectations. *See Campos*, 289 F.3d 546; *see also Winspear v. Cmty.*

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Dev., Inc., 574 F.3d 604 (8th Cir. 2009). The latter form, known as a "nonadherence claim," is at issue in this case.[8]

The principle 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," was first elucidated by the Tenth Circuit in the seminal case of *Shapolia v. Los Alamos National Laboratory*, 992 F.2d 1033. *Id.* at 1037. Since then, this Court, along with several district courts within this Circuit, has adopted the framework for nonadherence claims set forth in *Shapolia*. *See Campos*, 289 F.3d 546; *Winspear*, 574 F.3d 604.[9] *See also Kaminsky v. Saint Louis Univ. Sch. of Med.*, No. 4:05CV1112 CDP, 2006 WL 2376232, *5 (E.D. Mo. Aug. 16, 2006); *Sarenpa*, 2005 WL 3299455, at *3 (relying on *Campos* and *Shapolia*).[10]

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[8] Nonadherence claims have also been referred to as "reverse religious discrimination claim[s]." *Noyes v. Kelly Servs.*, 488 F.3d 1163, 1168 (9th Cir. 2007). However, the term "reverse discrimination," which often refers to instances where the targeted party is one of historical privilege, renders its use in this context potentially confusing and less descriptive than "nonadherence." *See generally Shapolia*, 992 F.2d at 1138.

[9] In *Campos*, this Court utilized the same framework set forth in *Shapolia* for nonadherence claims. Likewise, in *Winspear*, the court's majority, the dissent, and the district court all agreed on the nonadherence theory. *See* 574 F.3d at 606 and n.1; *id*. at 611 (Smith, J., dissenting); *Winspear v. Cmty. Dev., Inc.*, 553 F. Supp. 2d 1105, 1108 (D. Minn. 2008), *rev'd on other grounds*, 574 F.3d 604 (8th Cir. 2009), with the dissent and district court explicitly relying on *Shapolia*.

[10] Numerous other appellate and district courts have adopted the same framework

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Two features of nonadherence claims are important to understanding the relevance of *Shapolia*'s progeny. First, the focus of the inquiry is on discrimination motivated by the *employer*'s religious beliefs and the plaintiff's nonadherence thereto. In such actions, unlike other Title VII religious discrimination claims, the plaintiff's own religious beliefs are not central to the claim. *Venters*, 123 F.3d at 972 ("What matters in this context is not so much what Venters' own religious beliefs were, but [her employer's] asserted perception that she did not share his own. She need not put a label on her own religious beliefs, therefore, or demonstrate that she communicated her religious status and needs[.]"); *accord EEOC v. Preferred Mgmt. Corp.*, 216 F. Supp. 2d 763, 826-827 n.22 (S.D. Ind. 2002); *Backus*, 224 F. Supp. 2d at 1233; *Henegar*, 965 F. Supp. at 835. Thus, it is immaterial whether a plaintiff advancing a nonadherence claim professes a given denomination or has religious beliefs himself.

In *Campos*, this Court alluded to the fact that the plaintiff followed "tenets of Native American spirituality rather than Christianity," 289 F.3d at 549, but

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for nonadherence claims. *See Venters v. City of Delphi*, 123 F.3d 956, 972 (7th Cir. 1997); *see also Noyes*, 488 F.3d at 1166, 1168-69; *Young v. Sw. Sav. & Loan Ass'n*, 509 F.2d 140 (5th Cir. 1975); *Tillery v. Asti, Inc.*, 247 F. Supp. 2d 1051, 1062-63 (N.D. Ala. 2003), *aff'd without op.*, 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. Nat'l Ctr. on Inst. and Alt.*, 986 F. Supp. 945, 955 (D. Md. 1997).

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never again mentioned any aspect of the plaintiff's religion other than she was "not a Christian," which contravened her employer's wishes and motivated the discrimination she endured. *See id.* at 551.

The second notable aspect of a nonadherence claim is that it can be based on discrimination that occurs either because the employee generally does not adhere to the employer's religious beliefs or because one specific aspect of plaintiff's life or beliefs conflicts with a religious belief of the employer. "[P]roperly understood," an employee's claim is based, for example, on the fact "that she was discharged because she did not measure up to [her employer's] religious expectations" and requires only a showing "that her perceived religious shortcomings (her unwillingness to strive for salvation as [her employer] understood it, for example) played a motivating role in her discharge." *Venters*, 123 F.3d at 972.

Accordingly, this Court, and district courts within this circuit, have deemed actionable discrimination based on a wide spectrum of an employee's actions, beliefs, and non-beliefs that contravened their employer's creed or religious beliefs. *See Winspear*, 574 F.3d at 608; *Campos*, 289 F.3d at 551; *Kaminsky*, 2006 WL 2376232, at *5; *Sarenpa*, 2005 WL 3299455, at *3; *Backus*, 224 F. Supp. 2d at 1230-31.

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Case law around the country reflects a similar diversity in the impetus for discrimination in nonadherence claims. *See, e.g.*, *Noyes*, 488 F.3d at 1166, 1168-69; *Venters*, 123 F.3d at 972; *Baker v. Washington Bd. of Works*, No. IP 99-0642-C-T/G, 2000 WL 33252101, at *1 (S.D. Ind. June 8, 2000); *Mandeville v. Quinstar Corp.*, No. CIV.A. 98-1408-MLB, 2000 WL 1375264, at *1 (D. Kan. Aug. 29, 2000); *Henegar*, 965 F. Supp. at 834.

Thus, a male plaintiff, like Horton, who alleges that the conflict between his same-sex relationship and his employer's religious beliefs motivated the rescission of his job offer states a claim under Title VII pursuant to the nonadherence framework described herein.

B. Nonadherence Claims By Lesbian And Gay Plaintiffs Satisfy The Basic Prerequisites Of Such Claims.

Prior to the District Court's ruling below, six cases had considered nonadherence claims by lesbian or gay plaintiffs alleging that discrimination or harassment was motivated by a conflict between the employee's same-sex attraction or relationship and the employer's religious beliefs. *See Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 292 (3d Cir. 2009); *Pedreira v. Ky. Baptist Homes for Children, Inc.*, 579 F.3d 722, 728 (6th Cir. 2009); *Burrows v. Coll. of Cent. Fla.*, No. 5:14CV197-Oc-30PRL, 2014 WL 7224533, at *4 (M.D. Fla. Dec. 17, 2014); *Bennefield v. Mid-Valley Healthcare, Inc.*, No. 6:13CV252 MC, 2014 WL

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4187529, at *5 (D. Or. Aug. 21, 2014); *Terveer*, 34 F. Supp. 3d 100; and *Erdmann v. Tranquility Inc.*, 155 F. Supp. 2d 1152 (N.D. Cal. 2001).

These six cases fall equally into three categories: *Pedreira* and *Bennefield* improperly faulted the plaintiffs for not presenting a case regarding their own religious beliefs. *See* note 13, *infra*. *Erdmann* and *Terveer* reviewed case law on nonadherence claims, recognized that the gay men's claims satisfied the requisite elements, and allowed the claims. *Terveer*, 34 F. Supp. 3d at 116-17; *Erdmann*, 155 F. Supp. 2d at 1161-62. *Prowel* and *Burrows* reviewed case law on nonadherence claims, recognized that the claims satisfied the requisite elements, but improperly superimposed a requirement on Title VII's religious protections that the religious beliefs in question be anything *other than* "that a man should not lay with another man." *Prowel*, 579 F.3d at 292; *Burrows*, 2014 WL 7224533, at *4.

An examination of the cases that embraced the true elements of a nonadherence claim reveals a rather unapologetic creation of a "sexual orientation exception" to the viability of such claims. In 2001, *Erdmann*, citing *Shapolia*, *Venters*, and *Young*, held that the plaintiff's claims were essentially analogous, especially to the discrimination endured in *Venters*. *Erdmann*, 155 F. Supp. 2d at 1161-62.

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Conversely, even though the court in *Prowel* clearly understood the gravamen of a nonadherence claim, 579 F.3d at 292, *Prowel* ruled that an employer indeed can fire an employee for failing to conform to a religious belief held by the employer *if* the belief in question is "that a man should not lay with another man." *Id.* at 293. *Prowel* proffered only one reason to reject what it otherwise recognized as a theoretically sound claim of religious discrimination: a *purported* intent by Congress, manifested nowhere in the language of Title VII, to foreclose all employment discrimination claims based on sexual orientation or gender identity. *Id.*

In 2014, the *Terveer* court not only analyzed *Shapolia* and *Venters* for the standards for a nonadherence claim, but also examined *Erdmann* and *Prowel* for application of the principle to a claim sounding in sexual orientation discrimination. *Terveer*, 34 F. Supp. 3d at 116-17. *Terveer* recognized the obvious; that many courts have recognized Title VII religious discrimination claims when "employers have fired or otherwise punished an employee because the employee's personal activities or status—for example, divorcing or having an extramarital affair—failed to conform to the employer's religious beliefs." 34 F. Supp. 3d at 117 (citing *Henegar* and *Sarenpa*). In recognizing those claim, the court summarized perfectly the real question presented: "The Court sees no reason ***to create an exception*** to these cases for employees who are targeted for religious

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harassment due to their status as a homosexual individual." *Terveer*, 34 F. Supp. 3d at 117-18 (emphasis added).

Like *Prowel* before it, *Burrows* unquestionably understood the gravamen of a nonadherence claim. Indeed, the *Burrows* court specifically adopted *Shapolia*'s "different, more flexible standard for establishing a prima facie case of religious discrimination." *Burrows*, 2014 WL 7224533, at *2. But in its decision, siding with *Prowel* instead of *Terveer*, the *Burrows* court transparently created an exception to viable nonadherence claims, specifically stating that "The sole religious belief to which Plaintiff alleges that she failed to conform related to her sexual orientation. Plaintiff has alleged ***no other instances of religious discrimination***." *Id*. at *4 (emphasis supplied).

C. The District Court Erred In Dismissing Horton's Properly-Pled Nonadherence Claim.

Here, Horton alleges that his lawful marriage to a man conflicted with his employer's religious beliefs, and that the employer learning of his relationship with another man motivated the rescission of his job offer. This claim stands on the same footing as Cheryl Campos' claim that her good standing at work "apparently changed on October 31, 2001 after she disclosed to Petrillo that she observed tenets of Native American spirituality rather than Christianity." *Campos*, 289 F.3d at 549; *see also Winspear*, 574 F.3d at 605; *Sarenpa*, 2005 WL 3299455, at *3; *Backus*, 224 F. Supp. 2d at 1231. As such, the District Court erred in two specific

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ways by dismissing Horton's nonadherence claim: (1) the District Court improperly relied on a judicially-created sexual orientation exception to Title VII; and (2) the District Court improperly focused its inquiry on Horton's religious beliefs, rather than the employer's religious beliefs.

The District Court erred by resting its rejection of Horton's nonadherence claim on the "sexual orientation exception" improperly created by *Prowel* and *Burrows*, and on *Williamson*'s supposed immunization of all sexual orientation discrimination.[11] Remarkably the District Court and the cases upon which it relied demonstrated a clear understanding and acceptance of what constitutes a valid nonadherence claim and yet, based their rejection of such a claim solely on a judicially-created sexual orientation exception to the standards for a nonadherence claim. However, as explained herein, there is no such thing as a "sexual orientation exception" to nonadherence claims, or sex discrimination claims for that matter.

[11] MGM argued little else against the religious discrimination claim. MGM called out the absence of allegations about Horton's own religious beliefs, but did not attempt to rehabilitate that argument after Horton pointed out that such allegations are not needed for a nonadherence claim. JA-040-041. The only other argument MGM advanced was that the cases Horton cited involved forced religious conformity. JA-071-072. MGM cited no authority to the effect that, upon learning of an employee's nonadherence to the employer's religious tenets, the employer *cannot* lawfully pressure the employee to conform his or her beliefs or conduct but *can* lawfully terminate the employment relationship because of the nonconformity. Such is obviously not the law. *See Young*, 509 F.2d at 143; *see also Terveer*, 34 F. Supp. 3d at 116-17.

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Likewise, the District Court's rejection of Horton's nonadherence claim based on the absence of allegations about his own religion or beliefs was erroneous because Horton's own beliefs have no relevance to the nonadherence claim that he advances.[12]

Horton properly plead a religious discrimination claim in Count II of his Complaint based upon a nonadherence theory.

III. THE COURT SHOULD REJECT EFFORTS TO CREATE A SEXUAL ORIENTATION EXCEPTION TO TITLE VII'S CLEAR STATUTORY LANGUAGE.

There is no sexual orientation exception to Title VII's broad protective umbrage. Here, the District Court erred by carving out lesbian, gay and bisexual people from Title VII's broad protection, both with regard to Horton's sex discrimination claim and his religious nonadherence claim. Congress's actions subsequent to *Price Waterhouse* and the legal developments affecting lesbians and gay men subsequent to the cases upon which the District Court relied weigh heavily against judicially engrafting a sexual orientation exception to Title VII's coverage.

[12] Two cases with a misplaced focus on the plaintiff's own religious beliefs rejected nonadherence claims by lesbian plaintiffs. *See Pedreira*, 579 F.3d at 728; *Bennefield*, 2014 WL 4187529, at *5. However, these cases (upon which MGM and the District Court relied) employed the wrong framework for nonadherence claims.

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The District Court erroneously ignored the validity of Horton's Title VII claims, both of which met the statutory requirements of Title VII, and instead relied upon a judicially-created sexual orientation exception to these claims. In so doing, the District Court improperly adopted a notion 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 based on sex and religion. Supreme Court precedent, however, elucidates why such judicially-created carve-outs are not rooted in Title VII's clear statutory language, are based on improper considerations of Congressional intent, and fail to consider the Supreme Court's recognition of the equal dignity of lesbian, gay and bisexual people. Indeed, "[a]pplying these precedents to sexual orientation discrimination, it is clear that there is 'no justification in the statutory language … for a categorical rule excluding' such claims from the reach of Title VII." *Zarda*, 2018 WL 1040820, at *19 (quoting *Oncale*, 523 U.S. at 80).

A. The Statutory Text, Not Musing About Congressional Intent, Guides The Proper Interpretation Of Title VII.

First, the Supreme Court has specifically instructed that Title VII should be interpreted based on the words of the statute and not on some divining of the evils that Congress meant to address. For example, when the Supreme Court held in *Oncale* "that nothing in Title VII necessarily bars a claim of discrimination

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'because of … sex' merely because the plaintiff and the defendant … are of the same sex", it did so while noting that "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." 523 U.S. at 79-80. Similarly, the Supreme Court has stated that it is not for the courts "to rewrite the statute so that it covers only what we think is necessary to achieve what we think Congress really intended." *Lewis*, 560 U.S. at 215; *see also id.* at 217 (court's "charge is to give effect to the law Congress enacted" even if the "effect was unintended"). One can be reasonably sure that the unanimous *Oncale* Court, in dismissing the relevance of the motivations of the 88th Congress that passed Title VII, was not inviting courts deciding coverage issues to shift their focus to what *later* sessions of Congress did *not* enact into statutory law.[13]

[13] *Prowel* and *Burrows* are very similar to the leading case against coverage of same-sex sexual harassment overruled by *Oncale*: *Goluszek v. Smith*, 697 F. Supp. 1452 (N.D. Ill. 1988). Like *Prowel* and *Burrows*, *Goluszek* recognized that the plaintiff there "easily" met the customary prerequisites of a sex discrimination claim, citing evidence that the employer "react[ed] differently to female complaints of sexual harassment than to male complaints." *Id*. at 1456. Yet, *Goluszek* based its rejection on the notion that such a claim was not consistent "with the underlying concerns of Congress." *Id*. Thus, the court denied the claim despite recognizing that a "wooden application of the verbal formulations created by the courts would salvage Goluszek's sexual-harassment claim." Yet, *Oncale* has clarified that no matter a court's reasons for adding restrictions to the elements of a Title VII claim, it must stick with a "wooden application" of established standards, absent statutory

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Indeed, *Oncale's holding*, as confirmed by its progeny, is that "we are governed" by "the provisions of our laws," and courts must entertain any Title VII claim "that meets the statutory requirements." 523 U.S. at 79-80; *id.* at 79 (there must be a "justification in the statutory language or our precedents for a categorical rule excluding [otherwise valid] claims from the coverage of Title VII."); *see also EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2033 (2015); *id.* at 2035 (Alito, J., concurring in the judgment); *Thompson v. N. Am. Stainless, LP*, 562 U.S. 170, 174-75 (2011); *Christiansen*, 852 F.3d at 202, 203, 207 (Katzmann, C.J., concurring).

In sum, a court cannot judicially limit the scope of Title VII out of a belief that the limitation is required or appropriate because of a perception of Congressional intent, or a need for clarity or judicial efficiency. There is no permissible judicially-imposed limitation, unless it is based on words in the statute.

B. Congress's Actions Subsequent To *Price Waterhouse* Demonstrate That There Is No Sexual Orientation Exception To Title VII.

Second, while Congressional intent should not be the North Star this Court should follow for interpreting Title VII, if this Court insists on resorting to reliance on the absence of Congressional action in doing so, it must consider Congress's actions subsequent to *Price Waterhouse*. Such actions reveal that Congress never

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language justifying a limitation.

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intended for Title VII to have a sexual orientation exception to its coverage. The Supreme Court has placed great weight on the significance of what amendments were and were not made in the Civil Rights Act of 1991. *See Univ. of Texas Southwestern Med. Ctr. v. Nassar*, 133 S. Ct. 2517 (2013); *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167 (2009). In ***1989***, *Price Waterhouse* ruled that firing employees for their nonconformity with gender norms constitutes a form of unlawful sex discrimination under Title VII. In ***1990***, Congress passed the Americans with Disabilities Act ("ADA") and incorporated a specific provision excluding homosexuality from the definition of "disability," despite the fact that it had not been viewed by medical and mental health authorities as an impairment since 1973. *See* 42 U.S.C. § 12211(a); Am. Psychiatric Ass'n, *Position Statement: Homosexuality and Civil Rights* (1973), 131 Am. J. Psychiatry 497 (1974). A year later, Congress passed the Civil Rights Act of ***1991***, which specifically repealed the part of *Price Waterhouse* regarding mixed-motive liability but not limiting in any way its sex-stereotyping holding and *did not* amend Title VII to exclude coverage of sexual orientation discrimination, as it had a year earlier in passing the ADA. Congress's decision not to add the 1990 ADA exception for sexual orientation to Title VII coverage in 1991 speaks volumes.

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C. The Adoption Of The "Motivating Factor" Standard By Congress Demonstrates That Even When Sexual Orientation Bias Is Present, Sex And Religious Discrimination Claims Must Proceed.

Third, in passing the Civil Rights Act of 1991, not only did Congress fail to include a version of its 1990 antigay ADA exclusion, Congress *did specifically include* an explicit provision establishing a violation whenever an enumerated trait is a "motivating factor" in discrimination, even if other factors are present. 42 U.S.C. § 2000e(m). Thus, Congress flatly rejected the *Prowel* and *Burrows* approach of immunizing religious discrimination because sexual orientation bias also was present. *See id*.; *see also 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).

Simply put, *Prowel* and *Burrows* are outliers, in that courts otherwise have not hesitated to recognize nonadherence claims, even when the nonadherence results from a status that Congress explicitly considered protecting explicitly. The applicability of mixed-motive liability does not change simply because the way in which plaintiff fails to live up to the employer's religious expectations is a status for which explicit protection was sought from Congress but not enacted. *Kaminsky* and *Henegar* underscore a basic error in the analysis of *Prowel* and *Burrows* in relying on congressional inaction to reject an otherwise viable nonadherence claim.

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The *Kaminsky* court was willing to assume (had the facts borne it out) that the plaintiff could prevail on a claim of discrimination motivated by religious objections to his divorce. *Kaminsky*, 2006 WL 2376232 at **5-6. And *Henegar* actually held that the plaintiff stated a valid nonadherence claim based on a religious objection to her moving in with a man while each was technically still legally married. *Henegar*, 965 F. Supp. at 834-35. These theories of liability were deemed valid, despite the fact that Congress considered, but did not pass, legislation to add explicit marital status protections in employment. *See* Equality Act of 1974, H.R. 14752, 93d Cong. (1974).

* * * *

"Time and time again, the Supreme Court has told us that the cart of legislative history is pulled by the plain text, not the other way around. The text here pulls in one direction, namely, that sex includes sexual orientation." *Zarda*, 2018 WL 1040820, at *24 (Lohier, J., concurring). Whatever flexibility lower courts might have, when it comes to Title VII, a court's job is to entertain all claims that fall within "the statutory requirements," *Oncale*, 523 U.S. at 80, and not limit claims to only those "necessary to achieve what we think Congress really intended." *Lewis*, 560 U.S. at 215. To do otherwise is contrary to the Supreme Court's clear instructions regarding the interpretation of Title VII, which is to follow the words of the statute.

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IV. *WILLIAMSON* IS NOT CONTROLLING AUTHORITY ON THE VIABILITY OF HORTON'S CLAIMS OF SEX DISCRIMINATION AND RELIGIOUS DISCRIMINATION.

The District Court and MGM relied almost exclusively on *Williamson* in determining that MGM did not discriminate against Mr. Horton "because of … sex" or "because of … religion." However, *Williamson* is not binding authority on either of these issues because it in no way addressed claims of discrimination based on sex or religion.

A. The *Williamson* Court Did Not Decide the Issues Before This Court.

Williamson was ***not*** a sex or religious discrimination case. It was a racial discrimination case. The Plaintiff, Darrell Williamson, was a black gay male whose ***sole*** claim before the court was that his employer had "discharged him on the basis of his race." *Id*. at 70. Williamson did not present a claim for sex or religious discrimination. Nonetheless, the District Court sought to recast Williamson's lone claim of race discrimination as one of sexual orientation discrimination.

On appeal, this Court appropriately addressed Mr. Williamson's race discrimination claim on his terms by analyzing whether he had presented sufficient evidence to support his claim that he was treated differently from other "*similarly situated*" white coworkers. In so doing, this Court made the observation that "Title VII does not prohibit discrimination against homosexuals." *Williamson*, 876 F.2d

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at 70. However, this Court's *holding* in *Williamson* was limited to addressing the only claim before the Court: Mr. Williamson's claim for racial discrimination. In so doing, this Court observed that Williamson "believed he was treated differently because he was black" and that "he failed to allege facts sufficient to establish that other *similarly situated* white employees were treated differently." *Id.*

In short, this Court appropriately held only that Mr. Williamson failed to properly compare his disparate treatment to other *similarly situated white employees* (*i.e.,* white employees who were also gay, instead of white employees who were heterosexual). Because *Williamson* was neither a sex nor a religious discrimination case, and because no such arguments were before this Court, the passing statement in *Williamson* regarding sexual orientation discrimination cannot be applied to the claims asserted by Mr. Horton herein. *See* Victoria Schwartz, *Title VII: A Shift from Sex to Relationships*, 35 Harv. J. L. & Gender 209, 237 (2012).

Although this Court did not lay out its reasoning explicitly, Darrell Williamson was unquestionably not similarly situated to his white heterosexual male colleagues who talked about their sexual exploits at work. This is because in the 1980's, Missouri's sodomy statute applied only to same-sex conduct.[14]

[14] Missouri was one of nine states that, beginning in "the 1970's … singled out same-sex relations for criminal prosecution." *Lawrence v. Texas*, 539 U.S. 558,

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While the application of *Williamson* to preclude Horton's sex discrimination claim is clearly erroneous, the application of *Williamson* to bar Horton's religious discrimination claim borders on the unfathomable. As explained in the previous section, the theory underlying Horton's religious discrimination claim is that he endured discrimination because his beliefs and actions did not conform to those of the people who controlled his fate at MGM. The seminal case endorsing that theory—*Shapolia v. Los Alamos Nat'l Lab.*, 992 F.2d 1033—was decided some four years after *Williamson*. Not only is there not a whiff of a suggestion that Darrell Williamson advanced a religious discrimination claim, the claim as Horton advances it was an unknown quantity at the time of the *Williamson* decision.[15]

B. This Court Should Afford *Williamson* Only The Respect That The Decision Is Due On The Issues It Reached – And No More.

Mr. Horton is not arguing that this Court must totally ignore *Williamson*, nor that it cannot choose to follow whatever Title VII coverage precedent that it deems

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570 (2003) (citing, *inter alia*, 1977 Mo. Laws p. 687). Statutes criminalizing sodomy, especially between same-sex partners, had been upheld by the Supreme Court just a few years earlier in *Bowers v. Hardwick*, 478 U.S. 186 (1986). Their unconstitutionality would be recognized many years later, however, in *Lawrence*.

[15] No legal significance should be attached to Williamson's decision not to allege sex discrimination based on his sexual orientation. As the opinion itself suggests, a reason why Mr. Williamson likely did not view A.G. Edwards & Sons as anti-gay was that the venerable financial institution appeared to have several gay employees and the management of the firm at that time appeared to have only one concern: wearing makeup or jewelry at work. *Williamson*, 876 F.2d at 70.

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persuasive. However, the position espoused by MGM and adopted by the District Court below is untenable – that *Williamson* precludes a panel of this Court from thoughtfully analyzing and deciding the questions of first impression in this Circuit, specifically whether Mr. Horton has stated claims for sex discrimination and religious discrimination based upon his allegations that he was discriminated against as a gay man.

1. Williamson's *statement regarding sexual orientation discrimination is a prime example of non-binding dicta*.

The District Court was not bound by *Williamson*'s assertion that "Title VII does not prohibit discrimination against homosexuals," 876 F.2d at 69, because this statement was unmistakably non-binding *dicta*. The Supreme Court's and this Court's jurisprudence reveal a basic truth: *dicta* is *dicta*. It does not matter the vehemence, lack of equivocation, or assertion of comprehensiveness in the opinion's wording – *dicta* is not precedential:

> It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.

Cohens v. Virginia, 19 U.S. 264, 399-400 (1821).

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This Court has repeatedly stressed the error in blindly treating passing commentary contained in an opinion as a binding holding, divorced from their context and a reasoned analysis of what was, and what was not, at issue in the case in question. This Court has set forth its standard clearly: "[W]hen an issue is not squarely addressed in prior case law, we are not bound by precedent through *stare decisis* … In addition, we need not follow *dicta*. *Dicta* is a judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential." *Passmore*, 533 F.3d at 661.

In *Shephard v. United States*, 735 F.3d 797 (8th Cir. 2013), this Court applied its standard set forth in *Passmore* in analyzing the significance of its prior statements in *Matheny v. Morrison*, 307 F.3d 709, 711 (8th Cir. 2002), regarding a challenge to the validity of a sentence based on ineffective assistance of counsel under 28 U.S.C. § 2255. *The Shephard* court noted that a superficial reading of the words it stated in *Matheny* would lead one to believe that a challenge to the restitution portion of a sentence is cognizable under Section 2255 and must be brought under that section. Not so. "This [C]ourt disagree[d]," stressing that "this [C]ourt did not address in *Matheny* whether a challenge to the restitution portion of the sentence was cognizable under section 2255, but simply put forth the more general proposition that claims attacking the validity of a sentence should be raised under section 2255 in the sentencing district." *Shephard*, 735 F.3d at 798. Relying

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on *Passmore*, this Court held that "the portion of *Matheny* advanced by Shephard in support of her claim is mere *obiter dictum*." *See id.*

While this Court's statement in *Williamson* that "Title VII does not prohibit discrimination against homosexuals" may seem categorical, those words were merely an observation by the Court made in the context of a race discrimination case in a time when same-sex relationships could be outlawed and at a time when the Supreme Court was deciding *Price Waterhouse*. Thus, *Williamson*'s general observation did not address the issues presented herein; indeed, it could not have. Elevating such language to a holding applicable to a sex and religious discrimination case, which lacks applicable context or reasoned analysis, results in an injustice based upon an inaccurate statement of the law. Applying this Court's well-established practice, the holding of *Williamson* must be limited to the context of race discrimination, and can have no preclusive effect against claims based on sex and religious discrimination. *See Shephard*, *supra*; *Passmore*, *supra*; *see also United States v. Rubin*, 609 F.2d 51, 51 n.2 (2d Cir. 1979) ("A judge's power to bind is limited to the issue that is before him; he cannot transmute dictum into decision by waving a wand and uttering the word 'hold.'"); *NLRB v. Hotel and Rest. Emp. 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.").

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2. *Unlike many of its sister courts and lower courts, this Court has specifically recognized* Williamson's *limitations*.

While *Williamson* has proven influential in leading other courts to hold against plaintiffs complaining of antigay discrimination, its fate in this Court is markedly different. The *only* decision of this Court citing *Williamson* is *Schmedding v. Tnemec Co*., 187 F.3d 862 (8th Cir. 1999), which validated a claim alleging harassment, which included antigay epithets, based on a failure to conform to sex stereotypes. *Schmedding's* open questioning of the meaning of *Williamson* following the Supreme Court's decision in *Oncale* is especially notable. In *Oncale*, the Supreme Court unanimously held that the plaintiff, Joseph Oncale, stated a claim under Title VII because he would not have endured the brutal sexual harassment he suffered had he not been a man. 523 U.S. at 80-81. It did not matter that his being a man got him the job as a roustabout on a Gulf of Mexico trawler, nor did it matter that "male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII." *Id*. at 79. What *did* matter was the words of the statute, proscribing the "entire spectrum of disparate treatment of men and women in employment," leading the Supreme Court to hold that courts have a duty to entertain any claims "that meet the statutory requirements." *Id*. at 78, 80 (citations omitted); *see also Christiansen*, 852 F.3d at 202, 203, 207 (Katzmann, C.J., concurring).

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In *Schmedding*, the district court dismissed the plaintiff's claim based on its assumption that Title VII did not permit claims of discrimination "because of his perceived sexual orientation rather than because of his sex." 183 F.3d at 863. This Court "remanded the case to the district court for further consideration in light of the Supreme Court's decision in *Oncale*." *Id*. at 864. Not taking the hint, the district court dismissed the claim again on remand, this time in explicit reliance on *Williamson*. *See* 187 F.3d. at 864 and n.3. On a second appeal, this Court again reversed, declaring *Williamson* to be a "pre-*Oncale* case," and held that the plaintiff could seek redress under Title VII for the harassment he endured, often in terms of anti-gay epithets that impugned his masculinity. *Id*. *Schmedding* serves as an important recognition of the inherent limitations of *Williamson*.

This Court is not responsible for the fact that lower courts and other circuits have misconstrued and misapplied clear *dicta* from *Williamson* as a holding regarding Title VII's sex discrimination provision. *Schmedding* reinforces this Court's obligation *not* to imbue mere *dicta* with a preclusive, binding effect. *See Passmore*, 533 F.3d at 662 n.2. And it goes without saying that this Court binds the district courts in this Circuit – not vice versa.

3. *Cases should be respected both for what they decide and for what they do not decide*.

The arguments above suffice to explain why this Court cannot abdicate its duty to decide Mr. Horton's claims through mere reliance on *Williamson*. But

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there is an additional reason why it should not do so; to rely on *Williamson* here is to ignore what that decision actually was about. *Williamson* should be respected for what it is: a race discrimination decision focused on defining the class of individuals similarly situated to the plaintiff. MGM seeks to avoid any thoughtful or reasoned analysis of the two issues presented in this case by misdirecting the Court's attention toward the *dicta* in *Williamson*. This Court should refrain from relying upon that attempt to afford greater weight and adherence to superficial anti-coverage statements derived from cases where the coverage issues in question were never presented, analyzed or even at issue. To do so belies the appropriate course taken more recently by other Circuits that have thoughtfully reexamined actual anti-coverage *holdings* central to the disposition of the cases being decided, and to engage in actual meaningful and reasoned analysis.

As noted above, the Seventh Circuit, in a landmark *en banc* decision last year, held that sexual orientation discrimination constitutes sex discrimination under Title VII. *See Hively*, 853 F.3d 339. In so doing, the Seventh Circuit explicitly overruled at least three prior decisions by that court that had squarely rejected the sexual orientation discrimination claims of gay plaintiffs. *See Hively*, 853 F.3d at 341 (overruling *Hamm v. Weyauwega Milk Prods.*, 332 F.3d 1058 (7th Cir. 2003), *Spearman v. Ford Motor Co.*, 231 F.3d 1080, 1085 (7th Cir. 2000), and

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Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc., 224 F.3d 701, 704 (7th Cir. 2000)).

Likewise, a mere few days ago, the Second Circuit, in a similar landmark *en banc* decision, held that sexual orientation discrimination is a subset of sex discrimination prohibited by Title VII. *See Zarda*, 2018 WL 1040820, at *5. In so doing, the Second Circuit explicitly overruled two prior decisions by that court that had rejected sexual orientation discrimination claims by gay plaintiffs. *Id.* at *2 (overruling *Simonton v. Runyon*, 232 F.3d 33 (2d Cir. 2000), and *Dawson v. Bumble & Bumble*, 398 F.3d 211 (2d Cir. 2005)).

The Second and Seventh Circuits' careful reexamination of actual anti-coverage precedents may be contrasted with the puzzling preference that some courts have shown to citing mere anti-coverage *dicta*. *See, e.g., Higgins v. New Balance Ath. Shoe, Inc.*, 194 F.3d 252 (1st Cir. 1999);[16] *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 261 (3d Cir. 2001). Both *Higgins* and *Bibby* cite *Williamson*'s *dicta* as authority that Title VII excludes sexual orientation claims. Yet, the Supreme Court has observed the "truism" that "the grossest discrimination can lie in treating things that are different as though they were exactly alike." *Jenness v. Fortson*, 403 U.S. 431, 442 (1971). From a less profound and less

[16] Referring to *Higgins*, the First Circuit recently noted, "the tide may be turning when it comes to Title VII's protections." *Franchina v. City of Providence*, 881 F.3d 32, 54, n. 19 (1st Cir. 2018).

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dramatic jurisprudential standpoint, it is surely untenable to treat a race discrimination precedent as what it is not: an authoritative precedent for sex discrimination and/or religious discrimination.

V. TODAY'S LEGAL LANDSCAPE COUNSELS AGAINST EXCLUDING LESBIAN, GAY AND BISEXUAL EMPLOYEES FROM TITLE VII'S PROTECTIVE UMBRAGE.

Lastly, the world in which the cases cited by the District Court was decided no longer exists. "[T]he legal landscape has substantially changed, with the Supreme Court's decisions in *Lawrence*, 539 U.S. 558, and *Obergefell* 135 S. Ct. 2584, affording greater legal protection to gay, lesbian and bisexual individuals." *Christiansen*, 852 F.3d at 206 (Katzmann, C.J., concurring). Once we accept that "Title VII 'on its face treats each of the enumerated categories exactly the same,' and for that reason 'the principles … announce[d]' with respect to sex discrimination 'apply with equal force to discrimination based on race, religion, or national origin,' and vice versa[,] … it makes little sense to carve out same–sex relationships as an association to which these protections do not apply, particularly where, in the constitutional context, the Supreme Court has held that same–sex couples cannot be 'lock[ed] … out of a central institution of the Nation's society.'" *Id.* at 204 (quoting *Price Waterhouse*, 490 U.S. at 243 n.9, and *Obergefell*, 135 S. Ct. at 2602).

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Indeed, when *Prowel* and *Burrows*, as well as *Williamson*, were decided, it was constitutional for states to deny lesbians and gay men the fundamental right to marry, and for the federal government to refuse to recognize the marriages of same-sex couples that managed to travel to the handful of jurisdictions that recognized their right to marry. And indeed, when *Williamson* was decided, conduct central to gay people's very identity could be criminalized, subjecting them to widespread discrimination. *See Lawrence*, 539 U.S. at 575. As such, it is not difficult to understand why the courts that decided the cases upon which the District Court relied would engraft a gay exception onto Title VII's sex discrimination prohibition. For if a state could imprison someone for conduct central to being gay, how could employment discrimination on that basis be illegal? And if states could discriminate based on one's non-stereotypical sexual orientation, how could employment discrimination on such basis be illegal?

But "[t]he nature of injustice is that we may not always see it in our own times." *Obergefell*, 135 S. Ct. at 2598. Since *Prowel*, *Burrows*, and *Williamson*, the societal walls erected against gay people have steadily crumbled. In *Lawrence*, the Supreme Court "acknowledged, and sought to remedy, the continuing inequality that resulted from laws making intimacy in the lives of gays and lesbians a crime against the State," *Obergefell*, 135 S. Ct. at 2604, and it became clear that "same-sex couples have the same right as opposite-sex couples to enjoy intimate

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association." *Id.* at 2600. And in 2015, the Supreme Court held that laws barring same-sex couples from marriage "burden the liberty of same-sex couples, and … abridge central precepts of equality." *Obergefell*, 135 S. Ct. at 2604.

While none of these cases directly answer "of what protections Title VII affords,"[17] when considered together, they "reflect a shift in the perception, both of society and of the courts, regarding the protections warranted for same-sex relationships and the men and women who engage in them." *Christiansen v. Omnicom Grp., Inc.*, 167 F. Supp. 3d 598, 619 (S.D.N.Y. 2016), *aff'd in part, rev'd in part*, 852 F.3d 195 (2d Cir. 2017); *see also Roberts v. United Parcel Serv., Inc.*, 115 F. Supp. 3d 344, 348 (E.D.N.Y. 2015) ("As the nation's understanding and acceptance of sexual orientation evolve, so does the law's definition of appropriate behavior in the workplace."). It is thus incumbent upon this Court to reject efforts to inject a gay exception onto Title VII's prohibition on sex and

[17] *Lawrence* and *Obergefell* significantly undermine the *Zarda* dissenters' reliance on cases in which courts have blessed some disparate treatment of men and women, such as those regarding hair length and dress codes. *See Zarda*, 2018 WL 1040820, at *35 (Lynch, J., dissenting) (citing *Tavora v. N.Y. Mercantile Exch.*, 101 F.3d 907, 908–09 (2d Cir. 1996)). As the *Zarda* majority noted, cases concerning appearance requirements, like *Knott v. Mo. Pac. R.R. Co.*, 527 F.2d 1249, 1252 (8th Cir. 1975) ("concluding that 'slight differences in the appearance requirements for males and females have only a negligible effect on employment opportunities'"), did not suggest differential treatment of the sexes did not occur; rather, they shrugged at the triviality of the imposition on the complaining sex. *See Zarda*, 2018 WL 1040820, at *10. *Lawrence* and *Obergefell* dispel any notion that Horton's marriage to a person of the same sex is trivial, however.

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religious discrimination in contradiction to Title VII's clear statutory language. To do so "would disparage the[] choices and diminish the[] personhood" of gay people, *Obergefell*, 135 S. Ct. at 2602, and would cast lesbians and gay men out of Title VII's protective umbrage.

The anti-coverage cases upon which the District Court relied were decided in a period out-of-step with the legal landscape of today. No longer is it possible to carve out lesbian, gay and bisexual people from our societal institutions, or from the statutory protections to which they are entitled.[18]

CONCLUSION

Based on the foregoing, Plaintiff-Appellant Mark Horton respectfully requests the Court reverse the District Court's Order of Dismissal and remand this case to the District Court for further proceedings on Horton's sex and religious discrimination claims.

Dated this 7th day of March, 2018.

[18] This reality is reflected in Chief Judge Katzmann's observation, who was on the panel in *Simonton*, 232 F.3d 33, that many courts issuing anti-coverage decisions, including *Simonton* and *Dawson*, simply did not consider the arguments that Horton here advances. *See Christiansen*, 852 F.3d at 207 (Katzmann, C.J., concurring). Yet, having "convened en banc to reevaluate *Simonton* and *Dawson* in light of arguments not previously considered," the Second Circuit "now hold[s] that Title VII prohibits discrimination on the basis of sexual orientation as discrimination 'because of … sex.'" *Zarda*, 2018 WL 1040820, at *2.

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Dated: March 7, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on March 7, 2018, I electronically submitted the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify 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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