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

REPLY BRIEF OF PLAINTIFF-APPELLANT MARK HORTON

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes

Other Authorities

INTRODUCTION

"Our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth." *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1727 (2018). Accordingly, "[t]he exercise of their freedom on terms equal to others must be given great weight and respect by the courts." *Id.*

"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, 239 (1989). "This broad rule of workplace equality strikes at the entire spectrum of disparate treatment based on protected characteristics, regardless of whether the discrimination is directed against majorities or minorities." *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 111 (2d Cir. 2018) (en banc) (cleaned up).[1] And while "Title VII should be interpreted broadly to achieve equal employment opportunity," *id.* (cleaned up), in this case, all that is required is a straightforward interpretation of "because of … sex" to conclude that sexual orientation discrimination is a form of sex discrimination.

[1] "'Cleaned up' is a new parenthetical used to eliminate unnecessary explanation of non-substantive prior alterations." *United States v. Steward*, 880 F.3d 983, 987 n.3 (8th Cir. 2018).

Defendant's attempts to carve out lesbian, gay, and bisexual employees from the scope of Title VII's prohibitions on sex and religious discrimination not only run counter to the aforementioned principles, they defy the Supreme Court's mandate on how to properly interpret Title VII.

For these and the reasons set forth below, this Court should reverse.

ARGUMENT

I. *WILLIAMSON*'S PERFUNCTORY STATEMENT REGARDING TITLE VII COVERAGE OF SEXUAL ORIENTATION DISCRIMINATION IS PARADIGMATIC *DICTUM*.

In seeking to prevent this Court from addressing the question whether sexual orientation discrimination is a form of sex discrimination prohibited by Title VII (something this Court has never truly done), Defendant and *amici* misguidedly argue that *Williamson*'s thirty-year-old perfunctory statement about sexual orientation discrimination constituted a binding holding from which this Court cannot deviate. Defendant is wrong. Not only was *Williamson* a case *solely* about race discrimination, its statement that "Title VII does not prohibit discrimination against homosexuals," *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989), bears all the distinctive earmarks and weaknesses of *dictum*. First, the question whether Title VII covers sexual orientation discrimination was not presented to the court on appeal; indeed, Darrell Williamson unequivocally disavowed such issue on appeal. *See* Ex. 1 to Appellee's Br. (hereinafter

"Williamson's Br.") at 1 ("Appellant brought suit … for violation of his civil rights *based upon racial discrimination*." (emphasis added)); *id.* at 3; *id.* at 12-13. Second, the court in *Williamson* uttered the statement with no accompanying analysis or careful consideration. Third, the statement was unnecessary to the resolution of Mr. Williamson's appeal. Such earmarks lead to only one conclusion: *Williamson*'s statement regarding sexual orientation discrimination is paradigmatic *dictum*.

Williamson did not involve the question whether sexual orientation discrimination is a form of sex discrimination prohibited by Title VII. The sole issue presented by Mr. Williamson on appeal was whether "he stated a cause of action of disparate treatment motivated in part by race which would have sustained a case brought under Title VII and [42] U.S.C. 1981." Williamson's Br. at v; *see also id.* at 3. To be sure, Mr. Williamson discussed *as a factual matter* that he may have been discriminated against based on his sexual orientation *in addition to* his race. But such factual discussion does not mean Mr. Williamson presented or argued to the court the *legal question* whether sexual orientation discrimination is actionable under Title VII. To the contrary, Williamson specifically argued that, under *Bibbs v. Block*, 778 F.2d 1318 (8th Cir. 1985) (en banc), *abrogated by Price Waterhouse*, 490 U.S. 228, he should have prevailed if race discrimination was a factor in his termination, even if sexual orientation discrimination also played a role. *See* Williamson's Br. at 11 (arguing that he "did not need to show that race was a

substantial or determining factor in the [adverse employment] decision but only that race more likely than not influenced the employer's decision").[2] Notwithstanding how many times the term "homosexual" is present in the parties' briefs in *Williamson*, the fact remains that there was only one issue presented to the court in *Williamson*: whether Mr. Williamson suffered unlawful *race* discrimination.[3]

Second, courts have defined *dictum* "as a statement in a judicial opinion that could have been deleted without seriously impairing the analytical foundations of the holding—that, being peripheral, may not have received the full and careful consideration of the court that uttered it." *In re Nat. Football League Players Concussion Injury Litig.*, 775 F.3d 570, 584 (3d Cir. 2014) (cleaned up); *see also Int'l Truck & Engine Corp. v. Bray*, 372 F.3d 717, 721 (5th Cir.), *op. corrected on denial of reh'g*, 380 F.3d 231 (5th Cir. 2004); *Sarnoff v. Am. Home Prods. Corp.*, 798 F.2d 1075, 1084 (7th Cir. 1986); *cf. Shephard v. United States*, 735 F.3d 797,

[2] For this reason, Defendant's reliance on *Blum v. Gulf Oil Corp.*, 597 F.2d 936 (5th Cir. 1979), *vis-à-vis Evans v. Georgia Regional Hospital*, 850 F.3d 1248 (11th Cir. 2017), is misplaced. In *Blum*, the plaintiff argued on appeal "that he was fired because he was Jewish, male, white, and homosexual and was discriminated against on all four bases." 597 F.2d at 937. Similarly, in *Evans*, the plaintiff argued that she "stated a claim under Title VII by alleging that she endured workplace discrimination because of her sexual orientation." 850 F.3d at 1255.

[3] Defendant attempts to make hay of the fact that Mr. Williamson checked the box for sex discrimination in his Charge of Discrimination with the Equal Employment Opportunity Commission, *see* Appellee's Br. at 13, n.4, but as noted herein, it is the issues *presented* and *briefed* before the court of appeals that control.

798 (8th Cir. 2013) ("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." (quoting *Passmore v. Astrue*, 533 F.3d 658, 661 (8th Cir. 2008)).

Here, there is little doubt that the deletion of *Williamson*'s statement regarding sexual orientation would not impair the analytical foundations of the court's holding in any way. Not only was that "issue" peripheral to the appeal, such "issue" did not receive the full and careful consideration of the court that uttered the perfunctory statement that "Title VII does not prohibit discrimination against homosexuals." *Williamson*, 876 F.2d at 70. In reality, the court in *Williamson* provided no rationale for its statement, let alone show a "full and careful consideration" of whether such view is the law. As the Second and Seventh Circuits noted when holding that sexual orientation discrimination is a form of sex discrimination prohibited by Title VII, the previous decisions upon which Defendant relies (including *Williamson*) failed to consider the arguments advanced by Horton now. *See Zarda*, 883 F.3d at 108 (en banc); *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 350 (7th Cir. 2017) (en banc); *Christiansen v. Omnicom Grp., Inc.*, 852 F.3d 195, 207 (2d Cir. 2017) (Katzmann, C.J., concurring).

Thus, as it did in *Prince v. Kids Ark Learning Center, LLC*, 622 F.3d 992 (8th Cir. 2010), another Title VII case, this Court should hold that it is not bound by the

perfunctory statement in *Williamson*.[4] In other words, *Williamson* "did not require [this Court] to decide whether" sexual orientation discrimination is a form of sex discrimination prohibited by Title VII, "and the statement on that issue is *dicta* [the Court is] not bound to follow." *Masters v. UHS of Del., Inc.*, 631 F.3d 464, 472 (8th Cir. 2011); *see also Prince*, 622 F.3d at 995, n. 4; *United States v. Knowles*, 817 F.3d 1095, 1097 (8th Cir. 2016) ("[W]e have never squarely addressed the issue presented in this appeal in circumstances in which a determination of the issue was necessary to the resolution of the case, and so we are not bound by the *dicta* in those earlier cases.").

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

Largely drawing from the dissents in *Hively* and *Zarda*, Defendant attempts to undermine the basic truth that sexual orientation discrimination is a form of sex discrimination. Unfortunately for Defendant and *amici*, "[t]his is a straightforward case of statutory construction." *Zarda*, 883 F.3d at 135 (Cabranes, J., concurring); *see also Hively*, 853 F.3d at 343 ("This is a pure question of statutory interpretation

[4] Defendant's attempt to bolster *Williamson*'s *dictum* by arguing that a different result would have been obtained is belied by *Prince*. In *Prince*, the court refused to follow *dicta* contained within *Dominguez v. Hotel, Motel, Restaurant & Miscellaneous Bartenders Union, Local # 64; Holiday Inn*, 674 F.2d 732, 733-34 (8th Cir. 1982). In *Dominguez*, the court explicitly applied the "clear error" standard to uphold four separate rulings of the district court, *see id.*; yet, because the appellant did not put at issue the correct standard of review in *Dominguez*, the *Prince* court felt no obligation to follow *Dominguez*'s application of the "clear error" standard.

and thus well within the judiciary's competence."). And while none of Defendant's arguments can overcome the basic truth that sexual orientation discrimination is a form of sex discrimination, still, we refute some of Defendant's arguments below.

A. Title VII's Plain Text, As Well As Contemporaneous Sources, Reveal That Its Prohibition on Sex Discrimination Encompasses Sexual Orientation Discrimination.

Defendant is correct that, "as with any question of statutory interpretation, the court begins its analysis with the plain language of the statute." *Owner-Operator Indep. Drivers Ass'n, Inc. v. Supervalu, Inc.*, 651 F.3d 857, 862 (8th Cir. 2011). And it is the plain language of Title VII's prohibition on sex discrimination which leads to the conclusion that sexual orientation discrimination is a form of sex discrimination prohibited by Title VII. "The text here pulls in one direction," namely, that sex discrimination encompasses sexual orientation discrimination. *Zarda*, 883 F.3d at 137 (Lohier, J., concurring).

Defendant confuses the phrase "ordinary, contemporary, common meaning" with "Congressional intent." *See id.* What masquerades as a "meaning of the words" argument is anything but. For if one looks at dictionaries contemporaneous with Title VII's enactment, one comes to the conclusion that "sexual orientation is inseparable from and inescapably linked to sex and, therefore, that allegations of sexual orientation discrimination involve sex-based considerations." *Baldwin v. Foxx*, Appeal No. 0120133080, 2015 WL 4397641, at *5 (E.E.O.C. July 16, 2015).

Indeed, all one needs to conclude sexual orientation discrimination is a form of sex discrimination is a straightforward interpretation of the words "because of … sex."

Put simply, "[o]ne cannot consider a person's homosexuality without also accounting for their sex." *Hively*, 853 F.3d at 358 (Flaum, J., concurring).[5] And while dictionaries at the time of the enactment of Title VII did not necessarily define the term "sexual orientation," *see id.* at 350 n.5, they did define the term "homosexual." And, dictionaries at the time of enactment of Title VII defined homosexuality in terms of *sex*. *See, e.g.*, *Homosexual*, WEBSTER'S NEW WORLD DICTIONARY OF AMERICAN LANGUAGE (16th ed. 1966) ("of, relating to, or exhibiting sexual desire toward a member of *one's own sex*" (emphasis added)); *Homosexual*, OXFORD ENGLISH DICTIONARY (5th ed. 1964) ("Having a sexual propensity for persons of *one's own sex*." (emphasis added)); *Homosexuality*, THE NEW CENTURY DICTIONARY (12th ed. 1952) ("… sexual desire for a person of the *same sex*" (emphasis added)). "To operationalize this definition and identify the sexual orientation of a particular person, we need to know the sex of the person and that of the people to whom he or she is attracted." *Zarda*, 883 F.3d at 113. In other words, to discriminate against an employee based on his sexual orientation necessarily means that the employer "discriminat[ed] against an employee because

[5] Even the *Hively* dissent had to concede that a refusal "to hire a lesbian applicant because she is a lesbian" needed to account for the applicant's sex. 853 F.3d at 367 (Sykes, J., dissenting).

of (A) the employee's sex, and (B) their sexual attraction to individuals of the same sex." *Hively*, 853 F.3d at 358 (Flaum, J., concurring).

Defendant and *amici* argue that no one in 1964 would have understood "sex discrimination" to include "sexual orientation discrimination." Not only is this argument incorrect, it also focuses on the wrong question. The Supreme Court's decision in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), should suffice in addressing Defendant's arguments. In *Oncale*, a unanimous Supreme Court pronounced, specifically with regards to Title VII's sex discrimination prohibition, 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." *Id.* at 79.

Still, even assuming the concerns of people in 1964 shed any light on the issue before the court, scholarship and public debate reasonably contemporaneous to the enactment of Title VII reveals that a significant number of people viewed prohibitions on sex discrimination to encompass sexual orientation discrimination. *See, e.g.*, James C. Oldham, *Questions of Exclusion and Exception under Title VII--Sex-Plus and the BFOQ*, 23 Hastings L.J. 55, 71 (1971) (arguing in 1971 that "homosexuality could be viewed as an individual condition sufficiently sex-related to be enveloped by the term 'sex' as used in Title VII"); *see also* Eugene Volokh, *Same-Sex Marriage and Slippery Slopes*, 33 Hofstra L. Rev. 1155, 1162 (2005)

(noting how Equal Rights Amendment foes "argued that the sex discrimination ban might lead to legalization of same-sex marriage"); Andrew Koppelman, THE GAY RIGHTS QUESTION IN CONTEMPORARY AMERICAN LAW ch. 3 (2002) (citing scholarship from the 1970's); Edward Stein, *Evaluating the Sex Discrimination Argument for Lesbian and Gay Rights*, 49 UCLA L. Rev. 471, 473–74 (2001) (citing to *Singer v. Hara*, 522 P.2d 1187, 1193-94 (Wash. Ct. App. 1974)). Thus, Defendant's (unsupported) contention that no reasonable person fifty years ago would have understood a law barring sex discrimination to encompass sexual orientation discrimination is wholly divorced from history. As scholarship and public debate surrounding the time period of Title VII's enactment demonstrates, there certainly were people who understood sex discriminations laws to encompass sexual orientation discrimination.

What Defendant and *amici* fail to grasp is that Title VII prohibits the "impermissible consideration" of an employee's sex. 42 U.S.C. § 2000e-2(m) ("an unlawful employment practice is established when the complaining party demonstrates that ... sex ... *was a motivating factor for any employment practice*, even though other factors also motivated the practice" (emphasis added)). And it is obvious to any person—whether in 1964 or 2018—that one cannot consider a person's sexual orientation without taking into account and factoring in that person's sex.

The undisputable reality that sexual harassment, including same-sex sexual harassment, is a form of unlawful sex discrimination illustrates why Defendant's argument fails. Like sexual orientation, the term "sexual harassment" was not defined in 1964 and is not coterminous with the term "sex." *Hively*, 853 F.3d at 350 n.5. Still, "sexual harassment" "has at least since 1986 been included by the Supreme Court under the umbrella of sex discrimination." *Id.* If one were to accept Defendant and *amici*'s interpretative approach, and ignore Supreme Court precedent, then sexual harassment would still be permitted in the workplace. And that, we know, is not the case.

In sum, "[w]hile every statute's *meaning* is fixed at the time of enactment, new *applications* may arise in light of changes in the world." *See Wisconsin Cent. Ltd. v. United States*, 585 U.S. ___, 2018 WL 3058014, at *6 (June 21, 2018) (Gorsuch, J.). "[T]here is no reasonable way to disentangle sex from sexual orientation in interpreting the plain meaning of the words 'because of ... sex.'" *Zarda*, 883 F.3d at 136 (Lohier, J., concurring). Accordingly, there is "no justification in the statutory language" or in the Supreme Court's "precedents for a categorical rule excluding" sexual orientation claims "from the coverage of Title VII." *Oncale*, 523 U.S. at 79.

B. The Comparator Analysis Serves To Reinforce Why Sexual Orientation Is a Form of Sex Discrimination.

Defendant argues that the comparator analysis serves no interpretive function, Appellee's Br. at 26-29, but this argument is wrong. The Supreme Court has repeatedly stressed that the *sine qua non* of a Title VII sex discrimination claim is differential treatment, as demonstrated by cases such as *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, (1971), *City of Los Angeles Department of Water & Power v. Manhart*, 435 U.S. 702 (1978), and *Oncale*, 523 U.S. 75. Indeed, in *Price Waterhouse*, "by changing the plaintiff's gender, the Supreme Court also changed the plaintiff's gender non-conformity." *Zarda*, 883 F.3d at 117. Thus, the comparator analysis helps courts "determine[] whether the trait that is the basis for discrimination is a function of sex by asking whether an employee's treatment would have been different but for that person's sex." *Id.* at 116 (cleaned up). In this case, Horton, who is married to a man, would not have had his job offer rescinded had he been a woman married to a man. *See Zarda*, 883 F.3d at 116; *Hively*, 853 F.3d at 341.

When using a comparator analysis to determine whether discrimination against a gay person is based on sex, the proper comparator to a gay man, *i.e.*, a man attracted to men, is a woman attracted to men. Relying on the *Hively* dissent, 853 F.3d at 366, Defendant argues the correct comparator to a gay man fired because of his attraction to men is a lesbian. But that cannot be squared with logic or well-

settled law, including *Loving v. Virginia*, 388 U.S. 1 (1967), and *Manhart*, 435 U.S. at 711.

Per Defendant's argument, rather than "hold[ing] everything constant except the plaintiff's sex," by comparing a man married to a man to a woman married to a man, one changes "two variables—the plaintiff's sex and sexual orientation." *Hively*, 853 F.3d at 366 (Sykes, J., dissenting). But "when evaluating a comparator for a gay, lesbian, or bisexual plaintiff, we must hold every fact except the sex of the plaintiff constant—changing the sex of *both* the plaintiff and his or her partner would no longer be a 'but–for–the–sex–of–the–plaintiff' test." *Christiansen*, 852 F.3d at 203 (Katzmann, C.J., concurring). Moreover, Defendant "commits the logical fallacy of assuming the conclusion it sets out to prove. It makes no sense to control for or rule out discrimination on the basis of sexual orientation if the question before us is whether that type of discrimination is nothing more or less than a form of sex discrimination." *Hively*, 853 F.3d at 347. Indeed, Defendant's framing is premised on the notion that a man attracted to men and a woman attracted to men have different sexual orientations; Defendant thus acknowledges (implicitly, and perhaps unwittingly) that a person's sexual orientation is necessarily defined, in part, by his or her own sex. It "helpfully illustrates that sexual orientation is a function of sex."

Zarda, 883 F.3d at 116. In the comparison, changing Horton's sex changes his sexual orientation. "Case in point." *Id*.[6]

C. Analogies to Interracial Association Cases Are Apt.

Analogies to cases on interracial association are apt. Indeed, there is "no principled basis for recognizing a violation of Title VII for associational discrimination based on race but not on sex." *Zarda*, 883 F.3d at 128; *see also Boutillier v. Hartford Pub. Sch.*, 221 F. Supp. 3d 255, 268 (D. Conn. 2016) ("If Title VII protects individuals who are discriminated against on the basis of race because of interracial association (it does), it should similarly protect individuals who are discriminated against on the basis of sex because of sexual orientation—which could otherwise be named 'intrasexual association.'").

"This outcome is easy to analogize to *Loving*." *Zarda*, 883 F.3d at 133 (Jacobs, J., concurring). *Loving* invalidated Virginia's anti-miscegenation law not only because it endorsed "White Supremacy," 388 U.S. at 11, but also based on the racial classification on the law's face, *see id.* at 8-9. *Accord McLaughlin v. Florida*,

[6] Perhaps recognizing the flaws of its argument, Defendant belittles the very exercise of comparator framing. Appellee's Br. at 27-28. But Defendant cites no support, other than the *Hively* dissent, for its far-fetched theory that courts can learn "*nothing*" about Title VII's scope by comparing the treatment of men and women, and case law does not support it. There was no evidentiary dispute before the Court in *Phillips*, for example; rather, the Justices compared the employer's policy on women with small children to the employer's very different policy on men with small children, and held that the Fifth Circuit "erred in reading [Title VII] as permitting one hiring policy for women and another for men." 400 U.S. at 544.

379 U.S. 184, 188, 191-92, 195 (1964) (invalidating law criminalizing interracial cohabitation—without any discussion of "white supremacy"—because the law impermissibly classified based on race). "*McLaughlin* did not rely on any claims whatsoever about the motive for the law"; the "sex discrimination argument for protecting gays from discrimination requires nothing more." Andrew Koppelman, *Defending the Sex Discrimination Argument for Lesbian and Gay Rights*, 49 U.C.L.A. L. Rev. 519, 522-23 & n.19 (2001) (footnote omitted).

Defendant argues that race discrimination aroused by couples of different races is premised on animus against one of the races (based on the idea of white supremacy), and that discrimination against gays and lesbians is obviously not driven by animus against men or against women. "But it cannot be that the protections of Title VII depend on particular races; there are a lot more than two races, and Title VII likewise protects persons who are multiracial." *Zarda*, 883 F.3d at 133 (Jacobs, J., concurring). Defendant "may identify analytical differences; but to persons who experience the racial discrimination, it is all one." *Id.*

In any event, Defendant ignores decades of constitutional and statutory case law by suggesting that a law or policy that draws distinctions based on race or sex should not be analyzed as a racial or sex-based classification unless it aims to promote racial supremacy or the subjugation of women. *See, e.g.*, *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 226-27 (1995) (holding that "all racial

classifications" by governmental actors trigger strict judicial scrutiny, regardless of motive). Of course, while *Oncale* forecloses such argument, 523 U.S. at 79, to the extent Defendant argues "racism and sexism are necessary elements of a Title VII claim because these beliefs are invidious or malicious," such "contentions are misguided." *Zarda*, 883 F.3d at 127.

An analogy perhaps best helps demonstrate the error that Defendant and the *Hively*/*Zarda* dissents commit. Take Company A, which believes that men make lousy spouses and thus does not hire or retain employees married to men, and Company B, which believes people should only marry someone of a different sex. Company A fires two of its employees, a man and a woman, who each married men; Company B fires the male employee for marrying a man, but not the female employee who did the same. If all three fired employees challenge their terminations as sex discrimination under Title VII, it is the man at Company B who has the clearest claim, notwithstanding that it is Company A's policy which exhibits animus against a whole gender. That is because the man at Company B was treated differently from his female co-worker who did the same thing. In other words, the termination of the man at Company B "was based on [the] employee's own protected characteristic, even if the significance of that characteristic was defined in relation to the characteristics of a third party." *Tovar v. Essentia Health*, 857 F.3d 771, 776 (8th Cir. 2017).

Finally, while this reasoning alone exposes the error in Defendant's analysis, it is also worth pointing out that Defendant does not provide any support for its contention that sexual orientation discrimination is not inherently sexist. In claiming that "[s]exual orientation discrimination does not 'aim[] to promote or perpetuate the supremacy of one sex,'" Appellee's Br. at 38-39 (quoting *Hively*, 853 F.3d at 368 (Sykes, J., dissenting)), Defendant completely ignores the authority provided by Horton to the contrary. Appellant's Br. at 24, n.7. In so doing, Defendant overlooks decades of extensive scholarship and advocacy—and numerous judicial opinions—exploring the relationship between antigay oppression and the gender norms that have traditionally privileged men and masculinity. *See Zarda*, 883 F.3d at 126 (noting "research suggesting that sexual orientation discrimination has deep misogynistic roots").

D. Sexual Orientation Discrimination Falls Within The Spectrum Of Sex Stereotyping Prohibited By Title VII.

Just last year, the Supreme Court emphatically reaffirmed the principle that, "[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) (quoting *United States v. Virginia*, 518 U.S. 515, 533 (1997)). One of those overbroad generalizations is that a man is presumed to be attracted to women and not men, and that a woman is presumed to be attracted to men and not women. *See*

Zarda, 883 F.3d at 120-21; *Hively*, 853 F.3d at 346 (noting how "modern America" "views heterosexuality as the norm and other forms of sexuality as exceptional"); *Christiansen*, 852 F.3d at 205 (Katzmann, C.J., concurring) ("In fact, stereotypes about homosexuality are directly related to our stereotypes about the proper roles of men and women.").[7]

Defendant contends that such stereotype is not a sex-based stereotype prohibited by Title VII because it is (allegedly) not sex-specific, *i.e.*, it treats women no worse than men. *See* Appellee's Br. at 41. Defendant "goes astray by getting off on the wrong foot." *Zarda*, 883 F.3d at 123 n.23. Not only is Defendant's contention wrong from a definitional standpoint, it runs counter to *Price Waterhouse*'s mandate. "*Price Waterhouse*, read in conjunction with *Oncale*, stands for the proposition that employers may not discriminate against women or men who fail to conform to conventional gender norms." *Zarda*, 883 F.3d at 123. As the majority in *Zarda* explained,

> Title VII does not ask whether a particular sex is discriminated against; it asks whether a particular "*individual*" is discriminated against "because of such *individual*'s ... sex." Taking individuals as the unit of analysis, the question is not whether discrimination is borne only by men or only by women or even by both men and women; instead, the question is whether an individual is discriminated against because of his or her sex. And this means that a man and a woman are both entitled

[7] Even courts that have held that sexual orientation discrimination is not actionable under Title VII had to concede that "all homosexuals, by definition, fail to conform to traditional gender norms in their sexual practices." *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 764 (6th Cir. 2006).

> to protection from the same type of discrimination, provided that in each instance the discrimination is "because of such individual's ... sex." As we have endeavored to explain, sexual orientation discrimination is because of sex.

Id. at 123 n.23 (citations omitted). In short, an employer who imposes male gender norms on its male employees and female gender norms on its women employees does not immunize itself by putting a superficially neutral label like "old-fashioned" on its preferences that can only be enforced in gender-specific ways.

The Supreme Court has repeatedly admonished 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 (quoting *Manhart*, 435 U.S. at 707 n.13). "[C]arving out gender stereotypes related to sexual orientation ignores the fact that negative views of sexual orientation are often, if not always, rooted in the idea that men should be exclusively attracted to women and women should be exclusively attracted to men—as clear a gender stereotype as any." *Christiansen*, 852 F.3d at 206 (Katzmann, C.J., concurring).

E. Sexual Orientation Discrimination is Actionable Under Title VII Under a Simple Sex-Plus Theory.

Defendant suggests that sexual orientation discrimination does not involve wholesale discrimination against either sex, but only discrimination against a particular subset of a sex sharing the same attribute. *See* Appellee Br. at 29. This is simply wrong. Defendant's argument has not been tenable since 1971, when the

Supreme Court unanimously held that Martin Marietta's impressive track record of giving women jobs didn't save a policy whereby some women – those with young children – were fired, while men with young children kept their jobs. "A failure to discriminate against all women does not mean that an employer has not discriminated against one woman on the basis of sex." *Hively*, 853 F.3d at 346 n.3; *see also Connecticut v. Teal*, 457 U.S. 440, 455 (1982); *Franchina v. City of Providence*, 881 F.3d 32, 54 (1st Cir. 2018).

F. Congressional History Does Not Provide a Basis to Carve Out Sexual Orientation Discrimination From Title VII's Protections.

Perhaps acknowledging the lack of contemporaneous legislative history to support their arguments, Defendant and its *amici* resort to arguing that subsequent legislative developments militate against interpreting "because of ... sex" to include sexual orientation discrimination. "Legislative history, however, is notoriously malleable." *Hively*, 853 F.3d at 343. As a result, Defendant and its *amici* err on several fronts. The legislative history subsequent to Title VII's enactment in 1964 does nothing to undermine the fact that sexual orientation discrimination is a form of sex discrimination.

For example, Defendant and *amici* contend that when Congress enacted the Civil Rights Act of 1991, Pub. L. No. 102–166, 105 Stat. 1071 (1991), it ratified judicial decisions construing discrimination "because of ... sex" as excluding sexual orientation discrimination. According to them, this amendment implicitly ratified

the decisions of the couple of courts of appeals that had, as of 1991, stated that Title VII does not bar discrimination based on sexual orientation.[8]

In advancing this argument, Defendant and *amici* analogize the Civil Rights Act of 1991 to the Supreme Court's discussion of an amendment to the Fair Housing Act ("FHA"). In *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 (2015), the Supreme Court considered whether disparate-impact claims were cognizable under the FHA by looking to, *inter alia*, a 1988 amendment to the statute. The Court found it relevant that "all nine Courts of Appeals to have addressed the question" by 1988 "had concluded [that] the [FHA] encompassed disparate-impact claims." *Id.* at 2519. When concluding that Congress had implicitly ratified these holdings, the Court considered (1) the

[8] A deep look into Defendant's argument reveals otherwise. Of the four cases to which Defendant and *amici* refer, *only two* involved claims of sex discrimination based on sexual orientation discrimination. As noted herein, *Williamson* was a race discrimination case. *See* Part I, *supra*. And *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984), since abrogated by *Whitaker v. Kenosha Unified School District No. 1 Board of Educaction*, 858 F.3d 1034, 1047 (7th Cir. 2017), involved a claim of sex discrimination "against a transgender individual, a distinct question not at issue here." *Zarda*, 883 F.3d at 129 n.32.

Furthermore, *Blum*, 597 F.2d at 938, *DeSantis v. PT&T Co.*, 608 F.2d 327 (9th Cir. 1979), and *Ulane* all predate *Price Waterhouse*, while *Williamson* was published only a couple of weeks after *Price Waterhouse* and makes no mention of it. "Given that these cases did not have the opportunity to apply a relevant Supreme Court precedent, even if Congress was aware of them, there was reason for Congress to regard the weight of these cases with skepticism." *Zarda*, 883 F.3d at 129 n.32.

amendment's legislative history, which confirmed that "Congress was aware of this unanimous precedent," *id*., and (2) the fact that the precedent was directly relevant to the amendment, which "included three exemptions from liability that assume the existence of disparate-impact claims." *Id.* at 2520.

"The statutory history of Title VII is markedly different," however. *Zarda*, 883 F.3d at 129. When one looks at the history of the Civil Rights Act of 1991, there is "no indication in the legislative history that Congress was aware of the circuit precedents identified by [Defendant]." *Id.* Indeed, there is "no reason to believe that the new provisions it enacted were in any way premised on or made assumptions about whether sexual orientation was protected by Title VII." *Id.* To the contrary, it is noteworthy that by 1991 *only two* courts of appeals "had considered whether Title VII prohibited sexual orientation discrimination." *See* n. 8, *supra*. "Mindful of this important context, this is not an instance where we can conclude that Congress was aware of, much less relied upon, the handful of Title VII cases discussing sexual orientation." *Zarda*, 883 F.3d at 129. Indeed, "[t]he acquiescence rationale, which assumes that a majority of Congress supports a particular statutory interpretation, only works if a majority of Congress knows about the statutory interpretation at issue. Empirical research shows fairly conclusively, however, that Congress is generally unaware of circuit-level statutory interpretations." Amy Coney Barrett, *Statutory* Stare Decisis *in the Courts of Appeals*, 73 Geo. Wash. L. Rev. 317, 331

(2005). "Congress's general lack of actual knowledge of circuit opinions and the unreasonableness of imposing constructive knowledge in this context drastically limit the number of cases in which the inference of congressional approval from congressional silence is at all plausible in the court of appeals context." *Id.* at 335.[9]

Next, Defendant and *amici* argue that Congress's failure to enact a statute explicitly listing "sexual orientation" as a protected category in employment implicitly ratified the notion, no matter how faulty, that sexual orientation was not covered by Title VII.[10] "This theory of ratification by silence is in direct tension with the Supreme Court's admonition that 'subsequent legislative history is a hazardous basis for inferring the intent of an earlier Congress,' particularly when 'it concerns, as it does here, a proposal that does not become law.'" *Zarda*, 883 F.3d at 130 (quoting *Pension Benefit Guar. Corp. v. LTV Corp*., 496 U.S. 633, 650

[9] What is more, in 1990, Congress passed the Americans with Disabilities Act ("ADA") and incorporated a specific provision excluding homosexuality from the definition of "disability." A year later, when Congress passed the Civil Rights Act of 1991, it 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. *See* Appellant's Br. at 38.

[10] "Those failures can mean almost anything, ranging from the lack of necessity for a proposed change because the law already accomplishes the desired goal, to the undesirability of the change because a majority of the legislature is happy with the way the courts are currently interpreting the law, to the irrelevance of the non-enactment, when it is attributable to nothing more than legislative logrolling or gridlock that had nothing to do with its merits." *Hively*, 853 F.3d at 343–44.

(1990)). "It is impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional approval of [a particular] statutory interpretation." *Patterson v. McLean Credit Union*, 491 U.S. 164, 175 n.1 (1989) (quotations omitted), *superseded by statute on other grounds*.[11]

"Few people would insist that there is a need to delve into secondary sources if the statute is plain on its face." *Hively*, 853 F.3d at 343. However, for some, this "becomes somewhat harder to swallow if the language reveals suspected or actual unintended consequences." *Id.* But the Supreme Court could not have been clearer on this point, particularly in the context of Title VII. "[S]tatutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale*, 523 U.S. at 79. Discrimination against individuals on the basis of their sexual orientation, like the same-sex sexual

[11] Defendant argues that Congress considers sexual orientation discrimination to be distinct from sex discrimination because it has expressly prohibited sexual orientation discrimination in certain statutes but not Title VII. *See* Appellee's Br. at 34 (citing *Hively*, 853 F.3d at 363–64 (Sykes, J., dissenting)). "While it is true that Congress has sometimes used the terms 'sex' and 'sexual orientation' separately, this observation is entitled to minimal weight in the context of Title VII." *Zarda*, 883 F.3d at 130; *cf. EEOC v. R.G. &. G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 578–79 (6th Cir. 2018) ("Nor can much be gleaned from the fact that later statutes, such as the Violence Against Women Act, expressly prohibit discrimination on the basis of "gender identity," while Title VII does not, because Congress may certainly choose to use both a belt and suspenders to achieve its objectives." (citations and quotations omitted)).

harassment at issue in *Oncale*, "meets the statutory requirements" for sex discrimination prohibited by Title VII. *Id.* at 80. "[N]othing in the subsequent legislative history identified by [Defendant and] the *amici* calls into question [the] conclusion that sexual orientation discrimination is a subset of sex discrimination and is thereby barred by Title VII." *Zarda*, 883 F.3d at 131.

III. DEFENDANT SEEKS TO CREATE A GAY EXCEPTION TO NONADHERENCE CLAIMS.

Defendant seeks to establish a gay exception to nonadherence claims, notwithstanding its recognition of the general framework to evaluate nonadherence religious discrimination claims. This Court should reject such request, along with Defendant's additional arguments.

A. Defendant Offers No Legal Support For A "Gay Exception" To Title VII's Religious Protections.

In his opening brief, Horton set forth the elements of a religious nonadherence claim, Appellant's Br. at 25-29, and explained that almost every court to consider nonadherence claims by lesbians or gay men has acknowledged such claims meet the required elements, *id.* 29-32. In doing so, Horton pointed out that, of those courts, some had allowed the plaintiff to proceed, *see TerVeer v. Billington*, 34 F. Supp. 3d 100 (D.D.C. 2014); *Erdmann v. Tranquility, Inc.*, 155 F. Supp. 2d 1152 (N.D. Cal. 2001), while others had employed a "gay exception," *see Prowel v. Wise Business Forms, Inc.*, 579 F.3d 285, 292 (3d Cir. 2009); *Burrows v. College of*

Central Florida, Case No. 5:14CV197-Oc-30PRL, 2014 WL 7224533, at *4 (M.D. Fla. Dec. 17, 2014).

To be sure, Defendant nominally acknowledges that a nonadherence religious discrimination claim is properly alleged when:

1. "[E]mployment actions were taken because of a discriminatory motive based upon the employee's failure to hold or follow his or her employer's religious beliefs," Appellee's Br. at 51 (quoting *Shapolia v. Los Alamos Nat. Lab.*, 992 F.2d 1033, 1038 (10th Cir. 1993));
2. An employee endures an "[a]dverse employment action because he or she does not conform to the religious expectations of his or her employer," Appellee's Br. at 54, n.30 (quoting *Sarenpa v. Express Images Inc.*, Civ.04-1538(JRT/JSM), 2005 WL 3299455, *3 (D. Minn. Dec. 1, 2005)); or
3. An employer makes "adherence to his set of religious values a requirement of continued employment," Appellee's Br. at 52, n.29 (quoting *Venters v. City of Delphi*, 123 F.3d 956, 977 (7th Cir. 1997)).[12]

[12] As these cases establish, a nonadherence claim covers employment actions taken when an employer's religious belief conflicts with the employee's belief, conduct, or both. Horton's nonadherence claim embraces both, as reflected in the Complaint's allegations about conflicting beliefs, and Horton's arguments – not only in his brief, but also below. *See* JA-054; JA-055 – JA-056. While the District Court's resolution on broader grounds would have made a proffered amendment "inappropriate," Horton would be willing to amend the complaint on remand to reflect this clarification.

Yet, notwithstanding its recitation of the applicable standard for a nonadherence claim, Defendant fails to apply any one of these articulations of a nonadherence claim's elements or to attempt to explain how Horton's allegations do not meet them. Instead, Defendant seeks to establish a "gay exception" to nonadherence religious discrimination claims.

Defendant doubles down on the "gay exception" by emphasizing a half-true distinction between *TerVeer/Erdmann* and *Prowel/Burrows*: the nonadherence claims not allowed to proceed in the latter cases were based solely on sexual orientation, while the nonadherence claims allowed to proceed in the former cases involved other allegations of religious bias in addition to those based on sexual orientation. Defendant is correct that *Prowel*, as *TerVeer* acknowledged, exclusively relied on the gay exception to bar the plaintiff's claim. But *Prowel*'s holding is in direct conflict with *Erdmann* and *TerVeer*. For example, in *Erdmann*, the plaintiff's nonadherence claim was allowed to proceed on ***all*** of the allegations regarding religious nonadherence, including those based on sexual orientation. *See Erdmann*, 155 F. Supp. 2d at 1161. Moreover, Defendant's contention is only "half-true" because it also largely distorts the facts and the law in *TerVeer*. TerVeer's complaint was primarily based on the conflict between the supervisor's religious beliefs and TerVeer's homosexuality (and not TerVeer's religious beliefs), as is obvious from

the *TerVeer* court's depiction of the discrimination as "not due exclusively to his homosexual status." *TerVeer*, 34 F. Supp. 3d at 117.

Defendant refuses to acknowledge that *TerVeer* did not merely distinguish *Prowel*, but instead flatly rejected its "gay exception." With regards to *Prowel*, the *TerVeer* court stated:

> In any event, *Prowel*'s holding is not controlling in this Circuit. Courts in other circuits have found that plaintiffs state a claim of religious discrimination in situations where 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. *See, e.g., Henegar v. Sears Roebuck and Co.*, 965 F. Supp. 833, 838 (N.D.W.Va. 1997) (living with a man while divorcing her husband); *Sarenpa v. Express Images Inc.*, 2005 U.S. Dist. LEXIS 40531, 2005 WL 3299455, *4 (D.Minn. 2005) (extramarital affair). *The Court sees no reason to create an exception to these cases for employees who are targeted for religious harassment due to their status as a homosexual individual.*

34 F. Supp. 3d at 117-18 (emphasis added). *Prowel* and *Erdmann*/*TerVeer* cannot be distinguished. Put simply, *Prowel*'s gay exception is wrong.

As set forth in our opening brief, Title VII forbids the creation of a judicial exemption from liability where all of the necessary elements of a claim have otherwise been satisfied. *See, e.g.*, Appellant's Br. at 37 (arguing that *Oncale* mandates courts entertain all claims that "meet the statutory requirements"); *id.* at 37-38 (Congressional inaction does not support creation of a gay exception); *id.* at 39-40 (arguing the adoption of the "motivating factor" standard allows claims to proceed even when sexual orientation bias is present); *id.* at 42-43 (*Williamson*, a

racial discrimination case, presents no barrier to religious nonadherence claims). Defendant offers nothing in response.

B. Defendant's Additional Arguments Are Unavailing.

Aside from its "gay exception" argument, Defendant presents three additional arguments against Horton's nonadherence claim. The Court should reject all three.

First, Defendant attempts to minimize the support that the caselaw provides Horton by pointing to allegations or evidence of explicit religious bias in those cases. *See* Appellee's Br. at 52-53 and n.30. But those obvious distinctions are to be expected when those cases involved hostile working environment/constructive discharge claims, and this case where the allegation is that the employer blocked the doors to the company immediately upon learning of the religious conflict. As Justice O'Connor noted in *Price Waterhouse*—a prominent adverse employment action case itself—"direct evidence of intentional discrimination is hard to come by." 490 U.S. at 271 (O'Connor, J., concurring).

Moreover, it defies logic to expect a plaintiff to have the entirety of the evidence of the discrimination he suffered at the motion to dismiss stage. That is what discovery is for. This Court should reject any suggestion that surviving a motion to dismiss requires a smoking gun of the employer invoking the religious conflict explicitly. In a case ignored by Appellee and *amici*, the court rejected the significance of the "[p]laintiff's failure to specifically identity her former

supervisor's religion" and rejected the defense argument that the supervisor's hostility to the plaintiff's extramarital relationship was based on "moral standards which are not even associated with a particular religion." *Henegar*, 965 F. Supp. at 837. As the *Henegar* court noted, such an argument "does not challenge the legal adequacy of plaintiff's complaint, but rather contests the accuracy of the facts which underlie it." *Id*.

Second, Defendant invokes *Pedreira v. Kentucky Baptist Homes for Children, Inc*., 579 F.3d 722 (6th Cir. 2009), to argue that "[t]o state a religious discrimination claim, the plaintiff must, at a minimum, allege that 'it was the religious aspect' of his or her conduct that motivated the adverse employment action." Appellee's Br. at 57 (quoting *Pedreira*, 579 F.3d at 728). *Pedreira* is wrong on this point. There is a reason no court outside of the Sixth Circuit has cited to *Pedreira* in a religious nonadherence case, not even by the four courts considering similar claims by lesbian and gay plaintiffs. The precedents of this Court, and every other to consider nonadherence claims, are clear that it is the employer's religious convictions, and the plaintiff's nonadherence thereto, that establish a valid claim. Whether the plaintiff has competing religious views (or any religious views at all) is not an essential element of the claim. *See Venters*, 123 F.3d at 972; *Backus v. Mena Newspapers, Inc.*, 224 F. Supp. 2d 1228, 1233 (W.D. Ark. 2002); *Henegar*, 965 F. Supp. at 835. Indeed, in this Court's ruling in *Winspear v. Community Development,*

Inc., 574 F.3d 604, 605 (8th Cir. 2009), it was the pointedly secular approach of the plaintiff that led to the conflict. *See also Mandeville v. Quinstar Corp.*, No. CIV.A. 98-1408-MLB, 2000 WL 1375264, at *1 (D. Kan. Aug. 29, 2000).

The obvious error of *Pedreira*'s focus is underscored in reviewing the plaintiff's conduct at issue in the cases that Horton cites and Defendant ignores. *See* Appellant's Br. 26-29 (citing, *inter alia*, *Kaminsky v. Saint Louis Univ. Sch. of Med.*, No. 4:05CV1112 CDP, 2006 WL 2376232, *5 (E.D. Mo. Aug. 16, 2006) (getting a divorce); *Backus*, 224 F. Supp. 2d at 1230-31 (employer stated that it did "not employ publishers that do not reflect the image of a Christian family"); *Baker v. Wash. Bd. of Works*, No. IP 99-0642-C-T/G, 2000 WL 33252101, at *1 (S.D. Ind. June 8, 2000) (owning a bar); *Henegar*, 965 F. Supp. at 834 (living with a man (not the husband) while going through divorce proceedings)).[13]

Third, Defendant engages in the puzzling argument that a religious nonadherence claim must focus on the employer's religious beliefs. *See* Appellee's Br. at 52; *id.* at 53; *id.* at 58. But of course, that is exactly what Horton did in his Complaint. It simply borders on the absurd to argue that opposition to marriage between same-sex couples cannot be a "religious belief," *see, e.g.*, *Masterpiece*

[13] Defendant's reliance on Judge Hansen's concurrence in *Cowan v. Strafford R-VI School District*, 140 F.3d 1153, 1160 (8th Cir. 1998), is also misplaced. Appellee's Br. at 50-51. Defendant ignores that Judge Cowan's opinion was essentially differing from the panel majority on this exact point.

Cakeshop, 138 S. Ct. at 1724; or that Horton did not adequately allege that exact conflict in the Complaint. *See* JA-015 (¶¶ 63-66).

* * *

In sum, this Court should reject Defendant's call for a gay exception to Title VII's scope of religious protections and hold that Horton properly pleaded a nonadherence religious discrimination claim.

CONCLUSION

The judgment of the district court should be reversed.

Dated this 10th day of July, 2018.

Respectfully submitted,

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Dated: July 10, 2018

CERTIFICATE OF SERVICE

I hereby certify that on July 10, 2018, I electronically filed 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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