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

BRIEF *AMICI CURIAE* OF THE STATES OF ILLINOIS, IOWA, MINNESOTA, CALIFORNIA, CONNECTICUT, HAWAII, MARYLAND, MASSACHUSETTS, NEW JERSEY, NEW MEXICO, NEW YORK, OREGON, VERMONT, VIRGINIA, AND WASHINGTON AND THE DISTRICT OF COLUMBIA IN SUPPORT OF APPELLANT

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INTEREST OF *AMICI CURIAE*

The States of Illinois, Iowa, Minnesota, California, Connecticut, Hawaii, Maryland, Massachusetts, New Jersey, New Mexico, New York, Oregon, Vermont, Virginia, and Washington and the District of Columbia (collectively, "*Amici* States") file this brief as *amici curiae* in support of Plaintiff-Appellant Mark Horton pursuant to Federal Rule of Appellate Procedure 29(a)(2).

The *Amici* States share a strong interest in combatting employment discrimination on the basis of sexual orientation. Research has consistently documented widespread discrimination against gay, lesbian, and bisexual individuals in the workplace and the negative impact such discrimination has on health, wages, job opportunities, productivity, and job satisfaction.[1] Recognizing the significant harms that result from such discrimination, many of the *Amici* States have enacted laws to prohibit sexual orientation discrimination in the workplace.[2]

Even the *Amici* States' laws, however, cannot protect residents who work in other States that lack similar statutes. The case before this Court provides a prime example. Plaintiff-Appellant Horton lives in Madison County, Illinois, near the

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[1] Brad Sears & Christy Mallory, *Documented Evidence of Employment Discrimination & Its Effects on LGBT People*, WILLIAMS INST. (2011), http://williamsinstitute.law.ucla.edu/wp-content/uploads/Sears-Mallory-Discrimination-July20111.pdf.

[2] *See, e.g.*, 775 ILCS 5/2-102; Minn. Stat. § 363A.08, subd. 2; Cal Gov. Code § 12940; Conn. Gen. Stat. section 46a-81c; Haw. Rev. Stat. § 378-2; N.M. Stat. Ann. § 28-1-7; Wash. Rev. Code §§ 49.60.030(1)(a), 49.60.180.

Missouri state line, and Defendant-Appellee Midwest Geriatric Management, LLC (Midwest Geriatric) is located in St. Louis. In cases like this one along a state border, discrimination that occurs in one State may cause injury in another State, as when increased financial insecurity caused by an employer's discrimination in one State increases its employees' likelihood of needing public assistance in their home State.[3] Overall, commuting and other forms of travel for work are increasingly common in our interconnected national economy.[4] Accordingly, the *Amici* States have an interest in ensuring that their gay, lesbian, and bisexual residents are protected under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*., in the States where they work.

Moreover, even in States where sexual orientation discrimination is prohibited, Title VII plays a complementary role by making additional remedies and resources available to victims of discrimination. First, Title VII prohibits discrimination by employers that are not generally subject to state anti-discrimination laws, such as federal employers. *See, e.g*., *Mathis v. Henderson*, 243 F.3d 446, 450 (8th Cir. 2001). Second, a claim brought under Title VII triggers the

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[3] *See* M.V. Lee Badgett et al., *New Patterns of Poverty in the Lesbian, Gay, and Bisexual Community*, WILLIAMS INST. 21–24 (2013), https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGB-Poverty-Update-Jun-2013.pdf.

[4] *See* U.S. Census, *2009-2013 5-Year American Community Survey Commuting Flows* tbl.1 (last revised May 10, 2017), https://www.census.gov/data/tables/time-series/demo/commuting/commuting-flows.html.

jurisdiction of the U.S. Equal Employment Opportunity Commission (EEOC), providing additional resources and the opportunity to have parallel or coordinated investigations with state agencies. Finally, in private enforcement actions, Title VII provides victims of discrimination with remedies that may not be available under some States' laws, such as the ability to recover punitive damages.[5]

Thus, recognition that Title VII provides protection against sexual orientation discrimination would further the *Amici* States' efforts to combat such discrimination.

STATEMENT OF THE CASE

In his Complaint, Horton advanced three claims in connection with his inability to secure employment with Midwest Geriatric: (1) sex discrimination in violation of Title VII, (2) religious discrimination in violation of Title VII, and (3) fraudulent inducement in violation of state law. JA-005. The district court granted Midwest Geriatric's motion to dismiss all three claims. JA-089. In doing so, the court rejected Horton's three sex discrimination theories under Title VII—specifically, that sexual orientation discrimination amounts to sex discrimination, associational discrimination, and discrimination based on sex stereotypes. JA-081–85. This brief addresses those three theories.

[5] *Compare* 42 U.S.C. § 1981a(b)(1), *with, for example*, *Tomick v. United Parcel Serv., Inc.*, 153 A.3d 615, 625 (Conn. 2016), *and Trujillo v. N. Rio Arriba Elec. Coop.*, 41 P.3d 333, 344 (N.M. 2001).

SUMMARY OF THE ARGUMENT

The district court erred in dismissing Horton's Title VII sex discrimination claim for three reasons. *First*, sexual orientation discrimination is a form of sex discrimination because it would not occur "but for" the employee's sex. *Second*, sexual orientation discrimination is a form of associational discrimination because it is based on a protected classification—sex—of the individual with whom the employee associates. *Third*, sexual orientation discrimination amounts to unlawful sex stereotyping because it concerns the employee's failure to conform to the sex-based stereotype that men can love only women, not other men.

ARGUMENT

I. Sexual Orientation Discrimination Is a Form of Sex Discrimination

Interpreting Title VII's prohibition on sex discrimination to exclude sexual orientation discrimination ignores decades of Supreme Court precedent, "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." *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 351 (7th Cir. 2017) (en banc).

The test for determining whether an employment practice discriminates on the basis of sex shows that Horton stated a claim of sex discrimination. In *City of Los Angeles, Department of Water and Power v. Manhart*, the Supreme Court articulated the "simple test of whether the evidence shows treatment of a person in a manner which but for that person's sex would be different." 435 U.S. 702, 711 (1978)

(internal quotation marks omitted). Applied in the context of sexual orientation, the "but for" test illustrates the difficulty of divorcing sexual orientation from sex. Treating a man who loves a man worse than a woman who loves a man is the epitome of sex discrimination. The Seventh and Second Circuits, sitting en banc, have recently revisited this question and reached the same conclusion. *See Hively*, 853 F.3d at 345 ("[I]f she had been a man married to a woman [] and everything else had stayed the same, Ivy Tech would not have refused to promote her and would not have fired her."); *Zarda v. Altitude Express, Inc.*, No. 15-3775, 2018 WL 1040820, at *5 (2d Cir. Feb. 26, 2018) (en banc) ("Because one cannot fully define a person's sexual orientation without identifying his or her sex, sexual orientation is a function of sex.").

This Court has long recognized that Title VII is a "broad rule of workplace equality [that] strikes at the entire spectrum of disparate treatment of men and women in employment," *Quick v. Donaldson Co.*, 90 F.3d 1372, 1377 (8th Cir. 1996) (citation and internal quotation marks omitted), and, as such, must be accorded a liberal construction, *Sandoval v. Am. Bldg. Maint. Indus., Inc.*, 578 F.3d 787, 792–93 (8th Cir. 2009). The Supreme Court has routinely recognized that, to effectuate the remedial purposes of Title VII, the statute's reach includes conduct that was not always recognized as falling within its scope, such as sexual harassment and gender stereotyping claims. *See, e.g., Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 66

(1986); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989). The fact that Congress in 1964 may not have believed that Title VII's prohibition on sex discrimination would encompass sexual orientation discrimination cannot defeat the commonsense meaning of the words it enacted. *See Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998) (recognizing same-sex sexual harassment as actionable under Title VII, explaining that "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils"). After all, "it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Id.*; *see also Hively*, 853 F.3d at 345.

In rejecting Horton's argument that sexual orientation discrimination is necessarily sex discrimination, the district court pointed to this Court's opinion in *Williamson v. A.G. Edwards & Sons*, 876 F.2d 69 (8th Cir. 1989) (per curiam). But *Williamson*'s declaration that "Title VII does not prohibit discrimination against homosexuals," *id.* at 70, is fatally flawed and should not control this Court's decision. For one, the Court in *Williamson* was presented with a one-count complaint alleging only race discrimination. *See id.* In addition, the declaration in *Williamson* came in a single sentence without analysis or support, save for its citation to a case that referenced in conclusory fashion Congress's intent to "restrict the term 'sex' to its traditional meaning," and that has not been meaningfully revisited in nearly 20 years. *See id.* (citing *DeSantis v. Pac. Tel. & Tel. Co.*, 608 F.2d 327, 329–30 (9th

Cir. 1979), *overruled on other grounds by Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 875 (9th Cir. 2001) (overruling *DeSantis* to the extent it conflicts with *Price Waterhouse*'s holding that Title VII encompasses gender stereotyping)).

Moreover, it is of no moment that Congress has not passed legislation adding the precise term "sexual orientation" to the list of characteristics that Title VII protects from workplace discrimination. As explained above, Title VII's plain language encompasses claims against discrimination based on sexual orientation. The Court does not need to reach beyond the words of the statute to decide this case, and should discount any argument from Midwest Geriatric about Congress's supposed opposition to "expanding" Title VII.

Evidence of a statute's subsequent legislative history is not "entitled to much weight." *United States v. Vig*, 167 F.3d 443, 448–49 (8th Cir. 1999). Such evidence, this Court has held, is no more than a "straw in the wind," considering that "it is generally held that the rejection by Congress of amendments or other legislation relating to the statute in question is not conclusive as to the meaning of the bill in the unamended form." *State Highway Comm'n of Mo. v. Volpe*, 479 F.2d 1099, 1117 (8th Cir. 1973). It is thus irrelevant that later Congresses did not enact any particular change to Title VII; absent other legislation to the contrary, it is the language of the statute that controls. *See, e.g., Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1015 (2017) (rejecting reliance on the "history of failed legislation," given

that "congressional inaction lacks persuasive significance in most circumstances"); *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 170 (2001) ("A bill can be proposed for any number of reasons, and it can be rejected for just as many others."); *Zuber v. Allen*, 396 U.S. 168, 185–86 n.21 (1969) ("Congressional inaction frequently betokens unawareness, preoccupation, or paralysis.").

References to past attempts to amend the language of Title VII, therefore, should be accorded little weight. The Second Circuit just weeks ago held that Congress's failure to amend Title VII does not affect the meaning of the word "sex" in the law. *See Zarda*, 2018 WL 1040820, at *18 ("We do not know why Congress did not act" to amend the statute, "and we are thus unable to choose among the various inferences that could be drawn from Congress's inaction on the bills identified by the government."); *see also Hively*, 853 F.3d at 344 ("[W]e have no idea what inference to draw from congressional inaction or later enactments, because there is no way of knowing what explains each individual member's votes, much less what explains the failure of the body as a whole to change this 1964 statute."). This Court should reach the same conclusion.

II. Sexual Orientation Discrimination Constitutes Unlawful Associational Discrimination Based on Sex.

In his Complaint, Horton also argued that Midwest Geriatric violated Title VII because Horton's "association with his male partner motivated [Midwest Geriatric]

to '*withdraw*' its already-accepted offer of employment." JA-012. The district court rejected this argument, concluding that because the Supreme Court case upon which Horton relied, *Loving v. Virginia*, 388 U.S. 1 (1967), was decided over 20 years before *Williamson*, the former cannot be construed to overrule the latter. JA-083. But this reasoning misrepresents the import of *Loving*; *Loving* is simply an early example of unlawful associational discrimination, and there is ample case law from within and outside this Circuit, independent of *Loving*, that supports a claim of sex-based associational discrimination under Title VII.

The Seventh Circuit recently observed that *Loving* helped introduce the theory of associational discrimination, which instructs that "a person who is discriminated against because of the protected characteristic of one with whom she associates is actually being disadvantaged because of her own traits." *Hively*, 853 F.3d at 347. In *Loving*, the Supreme Court held that an anti-miscegenation law violated the Equal Protection Clause of the Fourteenth Amendment because marriages cannot be prohibited on the basis of a racial classification. *Loving*, 388 U.S. at 11–12. Here, as in *Loving*, Horton alleges that he was subjected to discrimination based on his association with a member of a protected class, except that sex, rather than race, is the protected class at issue. In other words, treating a man who loves a man worse than a man who loves a woman is a form of sex discrimination.

Even if *Loving* were somehow inapposite, which it is not, Horton's claim of associational discrimination would remain strong, as it is well established that Title VII outlaws associational discrimination. For one, several district courts within this Circuit have recognized that race-based associational discrimination violates Title VII. *See LaRocca v. Precision Motorcars, Inc.*, 45 F. Supp. 2d 762, 772 (D. Neb. 1999); *see also Hutton v. Maynard*, No. 13-cv-00378, 2015 WL 114723, at *7 (E.D. Ark. Jan. 8, 2015); *Casada v. Lester E. Cox Med. Ctrs.*, No. 04-cv-3467, 2006 WL 89840, at *4 (W.D. Mo. Jan. 13, 2006). At least five other circuits have reached the same conclusion. *See, e.g.*, *Holcomb v. Iona Coll.*, 521 F.3d 130, 139 (2d Cir. 2008); *Tetro v. Elliot Popham Pontiac, Oldsmobile, Buick & GMC Trucks, Inc.*, 173 F.3d 988, 994–95 (6th Cir. 1999); *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 156 F.3d 581, 589 (5th Cir. 1998), *vacated in part on other grounds by Williams v. Wal-Mart Stores, Inc.*, 182 F.3d 333 (5th Cir. 1999); *Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 892 (11th Cir. 1986); *cf. Drake v. Minn. Mining & Mfg. Co.*, 134 F.3d 878, 884 (7th Cir. 1998) (accepting defendant's concession that "an employee can bring an associational race discrimination claim under Title VII").

Critically, two of these circuits recently recognized that associational discrimination under Title VII encompasses not only race but also sex. In *Hively*, the Seventh Circuit concluded that "to the extent the statute prohibits discrimination on the basis of the race of someone with whom the plaintiff associates, it also prohibits

discrimination on the basis of … the sex of the associate." 853 F.3d at 349. The court emphasized that "[t]he text of the statute draws no distinction, for this purpose, among the different varieties of discrimination it addresses—a fact recognized by the [*Price Waterhouse*] plurality." *Id.* at 349; *see also Zarda*, 2018 WL 1040820, at *14. Although neither court's analysis hinged on *Loving*, both courts discussed the case extensively. *See Zarda*, 2018 WL 1040820, at *16; *Hively*, 853 F.3d at 347–49.

The district court in this case opined that *Loving* is irrelevant because it was decided two decades before this Circuit's decision in *Williamson*. But rather than "overrul[ing]" *Williamson*, JA-083, the reasoning of *Loving* is better understood as "reinforc[ing]" the case law cited above, which establishes that sexual orientation discrimination constitutes sex-based associational discrimination in violation of Title VII. *Zarda*, 2018 WL 1040820, at *16.

III. Sexual Orientation Discrimination Constitutes Unlawful Discrimination Based on Sex Stereotypes.

In his Complaint, Horton alleged that Midwest Geriatric violated Title VII by discriminating against him because his "sexual orientation is not consistent with [Midwest Geriatric's] perception of acceptable gender roles." JA-012. The district court rejected this argument as an improper attempt to disguise a sexual orientation discrimination claim as a sex stereotyping claim. JA-084. This rejection, however, depends upon a distinction between certain sex stereotypes that is arbitrary, unworkable, and divorced from Supreme Court precedent.

In *Price Waterhouse v. Hopkins*, the Supreme Court declared that *all* sex-based stereotyping is unlawful under Title VII when it asserted that "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group." 490 U.S. at 251 (plurality); *see also id.* at 259 (White, J., concurring in the judgment); *id.* at 261 (O'Connor, J., concurring in the judgment). The plaintiff in *Price Waterhouse* alleged that she was denied a promotion based on her noncompliance with certain stereotypical female traits—specifically, her perceived failure to walk, talk, and dress with the requisite degree of femininity, as well as her perceived failure to wear makeup, have her hair styled, and wear jewelry. *Id.* at 235. Of course, a woman's choosing a romantic partner who is another woman rather than a man constitutes a similar failure to comply with the stereotype that all women prefer men as romantic partners.

Accordingly, the Seventh and Second Circuits have acknowledged that it is untenable to continue distinguishing between sexual orientation discrimination and discrimination based on other sex stereotypes. In *Hively*, the Seventh Circuit held that the plaintiff, a gay college professor whose employment was terminated, stated a cognizable claim of sex discrimination under Title VII, explaining that sexual orientation discrimination "is based on [stereotyped] assumptions about the proper behavior for someone of a given sex." 853 F.3d at 346; *see also Zarda*, 2018 WL 1040820, at *10–11 (stating that "[t]he gender stereotype at work here is that 'real'

men should date women, and not other men" (citation and internal quotation marks omitted)). In other words, discrimination based on sexual orientation is a form of the sexual stereotyping that *Price Waterhouse* held is outlawed under Title VII. Courts deciding otherwise have failed to venture beyond conclusory analysis of *Price Waterhouse*, adhering instead to pre-*Price Waterhouse* precedents that do not address or even mention sex stereotyping. *E.g.*, *Evans v. Ga. Reg'l Hosp.*, 850 F.3d 1248, 1255 (11th Cir. 2017) (leaving intact 40-year-old circuit law by stating without explanation that *Price Waterhouse* "do[es] not squarely address whether sexual orientation discrimination is prohibited by Title VII").

In addition, the courts in *Hively* and *Zarda* explained that differentiating between sexual orientation discrimination and sex stereotyping is a difficult, if not impossible, task to accomplish. *Zarda*, 2018 WL 1040820, at *12; *Hively*, 853 F.3d at 342. This difficulty has led courts in this Circuit to reach decisions in Title VII cases that lack a discernable framework to guide courts and parties in future disputes. In *Lewis v. Heartland Inns of America*, for example, this Court found that a gay employee had stated a plausible claim of sex stereotyping where supervisors had complained that the employee had "an Ellen DeGeneres kind of look." 591 F.3d 1033, 1036 (8th Cir. 2010). In doing so, the court focused on the employee's perceived physical appearance and not her sexual orientation. *Id.* at 1036.

In another case, the district court denied an employer's motion to dismiss because the employee adequately pleaded that she was harassed because of her supervisor's same-sex desire for her. *Robertson v. Siouxland Cmty. Health Ctr.*, 938 F. Supp. 2d 831, 850 (N.D. Iowa 2013). But while the court acknowledged that "[g]ender stereotyping can violate Title VII when it influences employment decisions," *id.* at 841 (alteration in original) (citation and internal quotation marks omitted), it rejected the notion that impermissible stereotyping may have occurred since the plaintiff had alleged harassment based on her sexual orientation and not on "rumors that falsely labeled her a lesbian in an effort to debase her femininity," *id.* at 842. And in another case, the district court granted the employer's motion for partial judgment on the pleadings where a gay employee had alleged that she was fired after her employer received an anonymous letter referring to her as an "immoral lesbian." *Pambianchi v. Ark. Tech Univ.*, No. 13-cv-00046, 2014 WL 11498236, at *1 (E.D. Ark. Mar. 14, 2014). In doing so, the court opined that sex-stereotyping theories can be actionable if "based on stereotypical notions of femininity and masculinity" but not on sexual orientation. *Id.* at *5.

No principled rule can explain why the employee in *Lewis* secured a favorable outcome on her sex-stereotyping claim while the employees in *Klein* and *Pambianchi* fared more poorly. This Court can provide clarity to employees and

employers alike by declaring that sexual orientation discrimination amounts to unlawful discrimination based on sex stereotypes.

Accordingly, this Court should follow the Seventh and Second Circuits in concluding that sexual orientation discrimination constitutes impermissible sex stereotyping—as well as sex discrimination and associational discrimination—in violation of Title VII.

CONCLUSION

For these reasons, this Court should hold that sexual orientation discrimination amounts to sex discrimination in violation of Title VII and reverse and remand the district court's decision.

Dated: March 14, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE AND FILING

I hereby certify that on March 14, 2018, I electronically filed the foregoing document described as the Brief *Amici Curiae* of the States of Illinois, Iowa, Minnesota, California, Connecticut, Hawaii, Maryland, Massachusetts, New Jersey, New Mexico, New York, Oregon, Vermont, Virginia, and Washington and the District of Columbia in Support of Appellant with the Clerk of Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system.

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Dated: March 14, 2018

/s/ Deborah R. Sterling-Scott

CERTIFICATE OF COMPLIANCE

1. This Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 3,588 words, exclusive of the matters exempted by Fed. R. App. P. 32(f).

2. This Brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirement of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportional spaced typeface using MS Word 2010 in 14 point Times New Roman font.

3. Pursuant to Eighth Circuit Local Rule 28A(h)(2), this Brief has been scanned for viruses and is virus-free.

Dated: March 14, 2018

/s/ Deborah R. Sterling-Scott