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
Hon. Jean C. Hamilton, Judge
Case No. 4:17CV2324 JCH

BRIEF OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICUS CURIAE IN SUPPORT OF APPELLANT AND IN FAVOR OF REVERSAL

JAMES L. LEE
Deputy General Counsel

JENNIFER S. GOLDSTEIN
Associate General Counsel

ELIZABETH E. THERAN
Assistant General Counsel

GAIL S. COLEMAN
Attorney

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
Office of General Counsel
131 M Street, NE, Room 5SW24L
Washington, DC 20507
(202) 663-4055
gail.coleman@eeoc.gov

Table of Contents

Table of Authorities iii

Statement of Interest 1

Statement of the Issues 2

Statement of the Case 2

A. Statement of Facts 2

B. District Court Opinion 5

Argument 7

Sexual orientation discrimination is cognizable as sex discrimination under Title VII 7

A. *Price Waterhouse* holds that sex must be "irrelevant" in employment decisions 8

1. Sexual orientation discrimination inherently involves impermissible consideration of sex, in violation of Title VII 9

2. Sexual orientation discrimination involves associational discrimination in violation of Title VII whenever an employer is motivated by opposition to same-sex relationships 14

3. Sexual orientation discrimination involves sex stereotyping in violation of Title VII whenever an employer is motivated by the fact that gays and lesbians do not conform to the societal expectation of opposite-sex attraction 17

B. *Oncale v. Sundowner Offshore Services* directs that statutes must be interpreted as written, without judicial carve-outs, even when the language goes beyond the principal evil Congress sought to address 21

C. *Williamson* is no longer good law and does not bind this Court 24

Conclusion 27

Certificates of Counsel

Certificate of Service

Table of Authorities

Cases

Avendano-Hernandez v. Lynch, 800 F.3d 1072 (9th Cir. 2015).....25

Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257 (3d Cir. 2001).....26

Bob Jones Univ. v. United States, 461 U.S. 574 (1983).....14

Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006).....19

Centola v. Potter, 183 F. Supp. 2d 403 (D. Mass. 2002).....7, 20

Connecticut v. Teal, 457 U.S. 440 (1982).....13

DeSantis v. Pac. Tel. & Tel. Co., 608 F.2d 327 (9th Cir. 1979).....25

EEOC v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028 (2015).....15

EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., ___ F.3d ___,
2018 WL 1177669 (6th Cir. Mar. 7, 2018).....12, 26

EEOC v. Scott Med. Health Ctr., P.C., 217 F. Supp. 3d 834 (W.D. Pa. 2016).....7

Evans v. Ga. Reg'l Hosp., 850 F.3d 1248 (11th Cir. 2017).....18, 19, 23, 26

Floyd v. Amite Cty. Sch. Dist., 581 F.3d 244 (5th Cir. 2009).....14

Franchina v. City of Providence, 881 F.3d 32 (1st Cir. 2018).....26

Hall v. BNSF Ry. Co., No. C13-2160RSM, 2014 WL 4719007
(W.D. Wash. Sept. 22, 2014).....11

Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993).....26

Heller v. Columbia Edgewater Country Club, 195 F. Supp. 2d 1212
(D. Or. 2002).....7, 11, 20

Henson v. Santander Consumer USA Inc., 137 S. Ct. 1718 (2017).....21

Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252 (1st Cir. 1999) 26

Hively v. Ivy Tech. Cmty. Coll., 853 F.3d 339 (7th Cir. 2017) (en banc).....*passim*

Hively v. Ivy Tech Cmty. Coll., 830 F.3d 698 (7th Cir. 2016) (panel op.)..... 19-20

Holcomb v. Iona Coll., 521 F.3d 130 (2d Cir. 2008).....14

Hui v. Castaneda, 559 U.S. 799 (2010).....21

Hunter v. United Parcel Serv., Inc., 697 F.3d 697 (8th Cir. 2012) 19

Isaacs v. Felder Servs., LLC, 143 F. Supp. 3d 1190 (M.D. Ala. 2015) 20

Kolstad v. Am. Dental Ass'n, 527 U.S. 526 (1999) 16

L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978) 9, 16, 21

Lewis v. Heartland Inns of Am., L.L.C., 591 F.3d 1033 (8th Cir. 2010).....12, 13, 19

Loving v. Virginia, 388 U.S. 1 (1967) 6, 14, 16

McGinest v. GTE Serv. Corp., 360 F.3d 1103 (9th Cir. 2004).....14

Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986) 21, 22

Newport News Shipbldg. & Dry Dock Co. v. EEOC, 462 U.S. 669 (1983).....10

Nichols v. Azteca Rest. Enters., Inc., 256 F.3d 864 (9th Cir. 2001).....25

Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998) .....*passim*

Parr v. Woodmen of the World Life Ins. Co., 791 F.2d 888 (11th Cir. 1986).....14

Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633 (1990).....23

Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971).....13

Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).....*passim*

Schmedding v. Tnemec Co., 187 F.3d 862 (8th Cir. 1999) 26-27

Smith v. City of Salem, 378 F.3d 566 (6th Cir. 2004) 19

Sommers v. Budget Mktg., Inc., 667 F.2d 748 (8th Cir. 1982) 25

Terveer v. Billington, 34 F. Supp. 3d 100 (D.D.C. 2014) 7, 20

Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick & GMC Trucks, Inc., 173 F.3d 988 (6th Cir. 1999) 14-15

United States v. Eason, 829 F.3d 633 (8th Cir. 2016) 27

United States v. Ron Pair Enters., Inc., 489 U.S. 235 (1989) 21

United States v. Williams, 537 F.3d 969 (8th Cir. 2008) 27

Vickers v. Fairfield Med. Ctr., 453 F.3d 757 (6th Cir. 2006) 20, 26

Videckis v. Pepperdine Univ., 150 F. Supp. 3d 1151 (C.D. Cal. 2015) 7, 11, 20, 27

Williamson v. A.G. Edwards & Sons, Inc., 876 F.2d 69 (8th Cir. 1989) 1, 2, 6, 19, 24-27, 28

Wrightson v. Pizza Hut of Am., Inc., 99 F.3d 138 (4th Cir. 1996) 26

Zarda v. Altitude Express, Inc., ___ F.3d ___, 2018 WL 1040820 (2d Cir. Feb. 26, 2018) (en banc) ..... *passim*

Statute

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq*.....1

§ 2000e-2 .....2, 7, 8, 18

Rule

Fed. R. App. P. 29(a) 2

Other Authority

Baldwin v. Foxx, EEOC Appeal No. 0120133080,
2015 WL 4397641 (EEOC July 15, 2015) 7, 9

Kate B. Rhodes, *Defending ENDA: The Ramifications of Omitting the BFOQ Defense in the Employment Non-Discrimination Act*,
19 Law & Sexuality 1 (2010).....24

Statement of Interest

Congress charged the Equal Employment Opportunity Commission ("EEOC") with interpreting, administering, and enforcing Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq*. This appeal addresses whether claims of sexual orientation discrimination are cognizable as sex discrimination claims under Title VII. The district court dismissed Mark Horton's complaint, saying, "the Eighth Circuit has squarely held that 'Title VII does not prohibit discrimination against homosexuals.'" JA82 (quoting *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989)). But intervening Supreme Court law has abrogated *Williamson*. *See Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). Accordingly, this Court should reconsider its interpretation of Title VII.

The EEOC's interest in the issue is substantial. Between January 1, 2013, when the EEOC began tracking the data, and September 30, 2017, it has received 5,822 charges of sexual orientation discrimination against private sector employers, labor organizations, employment agencies, and state or local government employers. The EEOC received 1,522 such charges in fiscal year 2017 alone. Each charge contends that, but for an employee's sexual orientation, the respondent employer would not have taken an adverse employment action. The EEOC devotes significant resources to these charges by investigating, making

reasonable cause determinations, conciliating with respondents, and sometimes seeking relief in court.

The Court's disposition of this case will significantly affect the EEOC's enforcement efforts. The EEOC accordingly files this brief. Fed. R. App. P. 29(a).

Statement of the Issues[1]

1. Is sexual orientation discrimination a form of sex discrimination prohibited by Title VII, 42 U.S.C. § 2000e-2(a)(1), because it involves impermissible consideration of sex, gender-based associational discrimination, and/or sex stereotyping? *See, e.g., Zarda v. Altitude Express, Inc.*, ___ F.3d ___, 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).
2. Has *Williamson v. A.G. Edwards & Sons,* 876 F.2d 69 (1989), which states that Title VII does not prohibit sexual orientation discrimination, been abrogated by *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), and *Oncale v. Sundowner Offshore Services,* 523 U.S. 75 (1998)?

Statement of the Case

A. Statement of Facts

Plaintiff Mark Horton is a gay man who has been legally married to his male partner since 2014. Horton alleges that he was working for a competitor of

[1] The EEOC takes no position on any other issue in this case.

defendant Midwest Geriatric Management ("MGM") when an executive search firm solicited him in February 2016 for a position as Vice President of Sales and Marketing for MGM. JA7.

Horton had never considered leaving his job, but the search firm representative assured him, "I can promise you that it will NOT be a waste of your time." JA7. Horton agreed to undergo a detailed assessment and interview process with Judah Bienstock and his wife, Faigie ("Faye") Bienstock, who together run MGM. JA7- 8. He did so, and on April 22, 2016, MGM sent Horton a written job offer contingent upon a background check, to be conducted by a company called HireRight. JA8.

HireRight had trouble verifying Horton's education with two colleges. JA8. After investigating, Horton found that one of the colleges had been sold to another university and the other college did not maintain computerized records. As a result, Horton advised MGM and HireRight, it could take four to six additional weeks to procure the records. Neither company expressed concern about the potential delay. JA8, 10.

On May 4, before HireRight had completed the background check, Horton signed the written job offer and emailed it to MGM. Faye Bienstock emailed Horton on behalf of MGM later that day, saying, "Wonderful! Congratulations! We are so excited! When will be your anticipated start date?" JA8-9.

Relying upon MGM's written offer, his acceptance, and Faye's confirmation, Horton submitted his resignation and advised Faye that he would be available beginning May 31. JA9, 11. On May 10, he emailed Faye that his employer had agreed to release him early so that he could "begin his new adventure." Faye replied that day, "We are ready for you whenever works for you!" JA9.

On May 12, Faye emailed Horton, saying, "Let's just meet Monday [May 16] 9:00 am to get everything started!" JA9. The next day, she emailed him that he needed to complete documentation regarding his education and a pre-hire assessment, after which he could attend orientation the following week and "[w]e can pick a new start date." JA9-10.

Horton completed the pre-hire assessment and explained that he had been working closely with HireRight to obtain his educational records. JA10. Without having been formally hired, he began working with Faye to identify and recruit candidates for vacant positions at MGM. JA9.

On May 17, Horton emailed Faye to update her on the status of obtaining his educational records. In passing, he mentioned, "My partner has been on me about [my MBA] since he completed his PhD a while back." JA10. With this statement, he disclosed that he was in a same-sex relationship.

On Friday, May 20, Faye emailed Horton, "Are you able to come this afternoon? We would like to discuss the status of your employment." JA10. Horton responded that he was out of town but could come in on a different day. JA10. Two days later, Faye emailed Horton, saying, "Mark – I regret to inform you that due to the incompletion of the background check of supportive documentation – we have to withdraw our offer letter for employment at MGM. We wish you much luck in your future endeavors." JA11.

Horton obtained the educational records and, upon learning that the position was still open, emailed MGM on June 21 that he "would like to meet this week to discuss moving forward with the VP of Sales role." JA11. Faye responded two days later, thanking him and saying, "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." JA11.

Horton sued under Title VII, alleging in relevant part that MGM withdrew its job offer because of his sexual orientation. JA12-15. MGM moved to dismiss the complaint for failure to state a claim. JA27. Horton responded that sexual orientation discrimination violates Title VII because (1) it is necessarily based on sex, (2) it treats someone less favorably because of his association with a person of a particular sex, and (3) it treats someone less favorably because he fails to conform to sex stereotypes. JA48-54.

B. District Court Opinion

The district court granted MGM's motion to dismiss. JA77. With respect to Horton's argument that sexual orientation discrimination is necessarily based on sex, the court said, "the Eighth Circuit has squarely held that 'Title VII does not prohibit discrimination against homosexuals.'" JA82 (quoting *Williamson*, 876 F.2d at 70). The court also noted Congress's repeated rejection of proposed amendments to Title VII expressly prohibiting discrimination on the basis of sexual orientation. JA82. Although the court recognized that other federal courts have recently interpreted sexual orientation discrimination as a form of sex discrimination, it held that *Williamson* controls. JA82-83 (citations omitted).

The district court rejected Horton's analogy to laws barring interracial marriage, which the Supreme Court invalidated based on the Equal Protection and Due Process Clauses of the Fourteenth Amendment. *See Loving v. Virginia*, 388 U.S. 1, 2 (1967). "*Loving* was decided over twenty years before *Williamson*," the court said, "and so cannot be construed to overrule *Williamson*." JA83.

Finally, the court rejected Horton's argument that he was treated less favorably because he failed to conform to male stereotypes. The court held that "'[s]exual orientation alone cannot be the alleged gender non-conforming behavior that gives rise to an actionable Title VII claim under a sex-stereotyping theory.'" JA84 (citation and internal quotation marks omitted).

Argument

Sexual orientation discrimination is cognizable as sex discrimination under Title VII.

Title VII prohibits employment discrimination "because of … sex." 42 U.S.C. § 2000e-2(a)-(c). For many years, both the EEOC and the courts assumed without analysis that the prohibition on sex discrimination does not extend to sexual orientation discrimination. In 2015, the EEOC took a hard look at this question and concluded that this assumption was mistaken. *Baldwin v. Foxx*, EEOC Appeal No. 0120133080, 2015 WL 4397641, at *5 (EEOC July 15, 2015).

The Second and Seventh Circuits recently issued en banc decisions agreeing with the EEOC. *Zarda v. Altitude Express, Inc.*, ___ F.3d ___, 2018 WL 1040820, at *2 (2d Cir. Feb. 26, 2018) (en banc); *Hively v. Ivy Tech. Cmty. Coll.*, 853 F.3d 339, 341 (7th Cir. 2017) (en banc). These decisions explain in detail why sexual orientation discrimination falls within Title VII's prohibition on sex discrimination. Numerous district courts share this view. *See, e.g.*, *EEOC v. Scott Med. Health Ctr., P.C.*, 217 F. Supp. 3d 834 (W.D. Pa. 2016); *Videckis v. Pepperdine Univ.*, 150 F. Supp. 3d 1151 (C.D. Cal. 2015); *Terveer v. Billington*, 34 F. Supp. 3d 100 (D.D.C. 2014); *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212 (D. Or. 2002); *Centola v. Potter*, 183 F. Supp. 2d 403 (D. Mass. 2002).

For the following reasons, the EEOC and these courts are correct.

A. *Price Waterhouse* holds that sex must be "irrelevant" in employment decisions.

Title VII forbids employers from using sex as a basis "to fail or refuse to hire or to discharge … or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment."[2] 42 U.S.C. § 2000e-2(a)(1); *Price Waterhouse*, 490 U.S. at 240 ("gender must be irrelevant to employment decisions"). An employer that rescinds a job offer to an individual after learning he is gay, as MGM allegedly did here, violates this prohibition for three related but independent reasons. First, sexual orientation discrimination inherently involves impermissible consideration of an employee's sex. Second, when an employer's motivation for an adverse employment action is opposition to same-sex relationships, the employer is engaged in gender-based associational discrimination. Finally, when discrimination against a gay employee rests on that individual's failure to conform to the societal expectation of opposite-sex attraction, the employer violates Title VII's prohibition on gender stereotyping.

[2] Sex-based employment actions must meet these criteria to violate section 2000e-2(a)(1) of Title VII. For example, an employer that requires males to use the men's restroom and females to use the women's restroom obviously does so "because of … sex." But whether that policy violates section 2000e-2(a)(1) depends on whether, in the context of a particular case, it constitutes an adverse employment action. *See Zarda*, 2018 WL 1040820, at *10 (noting that "[w]hether sex-specific bathroom and grooming policies impose disadvantageous terms or conditions is a separate question from … whether sexual orientation discrimination is 'because of … sex'"); *cf. Oncale*, 523 U.S. at 81-82 (courts must consider "social context" in evaluating harassment claims).

See Zarda, 2018 WL 1040820, at *5; *Hively*, 853 F.3d at 345; *Baldwin*, 2015 WL 4397641, at *5-7.

1. Sexual orientation discrimination inherently involves impermissible consideration of sex, in violation of Title VII.

An employer cannot identify an employee as gay or lesbian, and therefore cannot engage in sexual orientation discrimination, without considering that employee's sex in relation to the sex of the persons to whom the employee is attracted. *Zarda*, 2018 WL 1040820, at *5; *Hively*, 853 F.3d at 358-59 (Flaum, J., concurring); *Baldwin*, 2015 WL 4397641, at *5. The employer necessarily considers sex even if it would say that its adverse action is motivated solely by sexual orientation, not by sex. "The employer's failure to reference gender directly does not change the fact that a 'gay' employee is simply a man who is attracted to men." *Zarda*, 2018 WL 1040820, at *6.

Imagine an employer that receives identical emails from Mark Horton, a male writing about his male partner, and "Mary" Horton, a female writing about her male partner. The employer rescinds Mark's job offer but not Mary's. In this scenario, only the employee's sex has changed, but this one change makes all the difference to the employer. Thus, the employer's conduct fails the Supreme Court's "simple" test for sex discrimination: "whether the evidence shows 'treatment of a person in a manner which but for that person's sex would be different.'" *L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978)

(citation omitted); *see also Newport News Shipbldg. & Dry Dock Co. v. EEOC*, 462 U.S. 669, 682-83 (1983) (applying *Manhart*'s "simple test of Title VII discrimination").

Numerous courts have applied this "simple" test for discrimination by considering how the employer would have responded if the plaintiff had been of the opposite sex but was attracted to the identical person. In *Hively*, for instance, a part-time, adjunct professor alleged that the college refused to grant her a full-time position and then refused to renew her contract because she is openly lesbian. 853 F.3d at 341. Asking whether Hively had "described a situation in which, holding all other things constant and changing only her sex, she would have been treated the same way," the Seventh Circuit said no. "Hively alleges that if she had been a man married to a woman (or living with a woman, or dating a woman) and everything else had stayed the same, Ivy Tech would not have refused to promote her and would not have fired her," the court said. "This describes paradigmatic sex discrimination." *Id.* at 345.

The Second Circuit agrees. In *Zarda*, a gay skydiver alleged that he was fired because he had disclosed his sexual orientation. The district court dismissed his complaint for failure to state a claim, and the Second Circuit reinstated it. The court held that the relevant inquiry was not whether the employer also would have fired a lesbian, but whether the employer would have fired a woman who was

attracted to men. *Zarda*, 2018 WL 1040820, at *9. *See also, e.g.*, *Hall v. BNSF Ry. Co.*, No. C13-2160RSM, 2014 WL 4719007, at *3 (W.D. Wash. Sept. 22, 2014) (holding that treating male plaintiff married to a man differently from women married to men for purposes of spousal benefits stated a plausible Title VII claim); *Heller*, 195 F. Supp. 2d at 1223 (jury finding that plaintiff's supervisor "would not have acted as she (allegedly) did if Plaintiff were a man dating a woman, instead of a woman dating a woman" would support a claim of gender discrimination); *Videckis*, 150 F. Supp. 3d at 1161 (holding that plaintiffs stated a "straightforward claim of sex discrimination" because "[if they] had been males dating females, instead of females dating females, they would not have been subjected to the alleged different treatment").

Comparing an employer's treatment of men attracted to men versus women attracted to men is the correct way to analyze whether an employee was treated adversely "because of sex." Looking instead at the employer's treatment of gay men versus lesbians, as some jurists and commentators have suggested, misses the point. *See, e.g.*, *Hively*, 853 F.3d at 366 (Sykes, J., dissenting) (opining that both comparator and plaintiff must be homosexual). As the Second Circuit explained, "That would be equivalent to comparing the gender-nonconforming female plaintiff in *Price Waterhouse* to a gender-nonconforming man; such a comparison would not illustrate whether a particular stereotype is sex dependent but only

whether the employer discriminates against gender non-conformity in only one gender." *Zarda*, 2018 WL 1040820, at *9; *see also EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, ___ F.3d ___, 2018 WL 1177669, at *7 (6th Cir. Mar. 7, 2018) (under *Price Waterhouse*, employer violates Title VII even if it expects both male and female employees to comply with gender stereotypes).

Title VII requires that everything in a discrimination analysis remain unchanged except for the *one* variable at issue: the *employee's* protected characteristic. *Zarda*, 2018 WL 1040820, at *9; *Hively*, 853 F.3d at 345. The only way to compare gay men with lesbians is to change *two* factors: the sex of the employee and the sex of the person to whom the employee is attracted. Changing the sex of the second person ignores Title VII's critical inquiry: whether the employee's sex makes the difference.

Moreover, even if an employer were to discriminate against all homosexual employees, both male and female, it would still discriminate against each *individual* employee on the basis of sex. *See Lewis v. Heartland Inns of Am., L.L.C.*, 591 F.3d 1033, 1040, 1041 (8th Cir. 2010) (observing that Supreme Court precedent does not "compel a woman alleging sex discrimination to prove that men were not subjected to the same challenged discriminatory conduct or to show that the discrimination affected anyone other than herself.… Lewis need only offer evidence that *she* was discriminated against because of her sex."). Mark Horton

allegedly lost a job because he is a man with a husband. If Horton had been a woman with the same husband, the job offer would not have been revoked. The discrimination against Horton is no less true even if MGM would also have revoked a job offer to a female applicant with a wife. An employer does not insulate itself from Title VII by discriminating against both gay men and lesbians; rather, it commits two separate Title VII violations.

Nor does it matter that an employer discriminates only against gay men and lesbians, not against all men or all women. Title VII recognizes discrimination against subsets of a protected class. *See, e.g.*, *Connecticut v. Teal*, 457 U.S. 440, 455 (1982) ("It is clear that Congress never intended to give an employer license to discriminate against some employees … merely because he favorably treats other members of the employees' group."); *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971) (holding that employer discriminating only against women with small children, not all women, violates Title VII); *see also Lewis*, 591 F.3d at 1039 ("'[T]he ultimate issue is the reasons for *the individual plaintiff*'s treatment, not the relative treatment of different *groups* within the workplace.'"). Thus, "had the plaintiff in *Price Waterhouse* been denied a promotion while a gender-conforming woman was made a partner, this would have strengthened rather than weakened the plaintiff's case that she was discriminated against for failing to conform to sex stereotypes." *Zarda*, 2018 WL 1040820, at *13 n.24.

2. Sexual orientation discrimination involves associational discrimination in violation of Title VII whenever an employer is motivated by opposition to same-sex relationships.

Title VII prohibits employers from taking adverse employment actions based on opposition to same-sex relationships. This prohibition stems inevitably from Title VII's prohibition of discrimination based on opposition to interracial relationships.

When the Supreme Court struck down laws barring interracial marriage, it held that every individual has a right to marry regardless of race. Laws prohibiting interracial marriage, the Court held, violate the Fourteenth Amendment rights of both partners. *Loving*, 388 U.S. at 12. Subsequently, the Court confirmed that "discrimination on the basis of racial affiliation and association is a form of racial discrimination." *Bob Jones Univ. v. United States*, 461 U.S. 574, 605 (1983).

Courts have applied the reasoning of *Loving* to the Title VII context, holding that an employee claiming discrimination based upon an interracial marriage "alleges, by definition, that he has been discriminated against because of *his* race." *Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 892 (11th Cir. 1986); *see also Holcomb v. Iona Coll.*, 521 F.3d 130, 139 (2d Cir. 2008) (interracial marriage); *Floyd v. Amite Cty. Sch. Dist.*, 581 F.3d 244, 249 (5th Cir. 2009) (interracial friendship); *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1118 (9th Cir. 2004) (interracial friendships or associations); *Tetro v. Elliott Popham*

Pontiac, Oldsmobile, Buick & GMC Trucks, Inc., 173 F.3d 988, 994-95 (6th Cir. 1999) (biracial child).

Title VII "on its face treats each of the enumerated categories exactly the same." *Price Waterhouse*, 490 U.S. at 243 n.9. Therefore, associational discrimination claims are valid not only in the race discrimination context, but also in the sex discrimination context. *Zarda*, 2018 WL 1040810, at *14; *Hively*, 853 F.3d at 349. Just as discrimination based on an interracial association targets an employee based on that employee's race, discrimination based on a same-sex association targets an employee based on that employee's sex.

Here, the associational component to the employer's action is particularly strong because MGM withdrew its job offer immediately after learning that Horton's partner is male. But, as the *Zarda* en banc majority explained, a plaintiff need not currently be in a disfavored relationship to state an associational discrimination claim under Title VII. 2018 WL 1040820, at *17 n.30. An employer that discriminates based on a general opposition to same-sex (or interracial) relationships violates Title VII because its "motive" necessarily involves the employee's sex or race. *See EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2032 (2015) (observing that Title VII "prohibit[s] even making a protected characteristic a 'motivating factor' in an employment decision").

It is irrelevant that discrimination based on racial association evokes "racial purity and white supremacy," *Hively*, 853 F.3d at 368 (Sykes, J., dissenting), which is plainly anathema to Title VII, while discrimination based on sexual orientation may not be inherently sexist. *Zarda*, 2018 WL 1040820, at *16; *see also id.* (noting research suggesting that sexual orientation discrimination "has deep misogynistic roots"). In *Loving*, while the Supreme Court found the white supremacy at the heart of Virginia's anti-miscegenation statute independently sufficient to invalidate the law, it explained that it would have reached the same conclusion even if white supremacy had not been an issue. 388 U.S. at 11 & n.11 ("[W]e find the racial classifications in these statutes repugnant to the Fourteenth Amendment, even assuming an even-handed state purpose to protect the 'integrity' of all races.").

Moreover, Title VII prohibits sex discrimination whether or not the employer is motivated by sexism (as opposed to sex). *See Manhart*, 435 U.S. at 711 (invalidating sex-based pension scheme premised on non-sexist, actuarial fact that women as a group live longer than men as a group). Malice is relevant only to punitive damages, not to liability. *Zarda*, 2018 WL 1040820, at *16-17 & n.29 (citing *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526 (1999)).

All that matters for associational discrimination is whether the employer would have taken the same action if the employee's race or sex changed, but the

person with whom they were associating remained the same. If the answer is no, as Horton alleges here, the employer has illegally taken the employee's protected characteristic into account and thereby violated Title VII. *Zarda*, 2018 WL 1040820, at *17 & n.30; *Hively*, 853 F.3d at 348-49.

3. Sexual orientation discrimination involves sex stereotyping in violation of Title VII whenever an employer is motivated by the fact that gays and lesbians do not conform to the societal expectation of opposite-sex attraction.

Finally, the plain language of Title VII incorporates sexual orientation because the statute prohibits discrimination based on sex stereotypes. *Price Waterhouse*, 490 U.S. at 250-51. Taken to its logical conclusion, *Price Waterhouse*'s prohibition of gender stereotyping extends not only to outwardly nonconforming behavior or appearance, such as a woman's refusal to wear makeup or a man's flamboyant clothing, but also to homosexuality, which constitutes the ultimate failure to comply with gender stereotypes. *Hively*, 853 F.3d at 346.

The plaintiff in *Price Waterhouse* was a woman whose employer perceived her as insufficiently feminine. Several partners in her firm commented that she would have a better chance of becoming a partner if she would "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." *Price Waterhouse*, 490 U.S. at 235. Six members of the Court agreed that these comments indicated gender discrimination based on sexual stereotypes. *Id.* at 251 (plurality op.) ("[W]e are beyond the day when an

employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group."); *id.* at 259 (White, J., concurring) (plaintiff showed sex was a substantial factor in the adverse employment action); *id.* at 272-73 (O'Connor, J., concurring) (in light of plaintiff's substantial evidence of sex bias, "one would be hard pressed to think of a situation where it would be more appropriate to require the defendant to show that its decision would have been justified by wholly legitimate concerns").[3]

In *Price Waterhouse*, the Court found the plaintiff stated a claim for sex discrimination because she engaged in gender nonconforming conduct. The same could be said of Mark Horton in this case, who married a man. Nonetheless, the holding of *Price Waterhouse* is not limited to "conduct" cases, as one judge has suggested. *See Evans v. Ga. Reg'l Hosp.*, 850 F.3d 1248, 1259 (11th Cir. 2017) (Pryor, J., concurring) (*Price Waterhouse* does not provide "status-based class of protection"). Title VII's antidiscrimination provisions protect employees based on their status as well as their conduct. *See, e.g.*, 42 U.S.C. § 2000e-2(a); *see also*

[3] The *Price Waterhouse* plurality observed that remarks based on sex stereotypes, while evidence of sex discrimination, would not "inevitably prove" that an adverse action was "because of … sex." 490 U.S. at 251. This observation does not weaken the Court's holding that Title VII prohibits discrimination based on gender stereotyping. Rather, it acknowledges that a Title VII plaintiff must always prove causation. *See Zarda*, 2018 WL 1040820, at *11 n.20.

Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 63 (2006) ("The antidiscrimination provision seeks a workplace where individuals are not discriminated against because of their racial, ethnic, religious, or gender-based *status*.") (emphasis added). Thus, *Price Waterhouse*'s holding necessarily extends beyond the facts of that case, and Horton is protected as a man who is attracted to men, apart from the act of his marriage. *See Zarda*, 2018 WL 1040820, at *11 n.18 (*Price Waterhouse* does not limit sex-stereotyping theory to stereotypes affecting job-related traits).

Since *Price Waterhouse*, this Court has acknowledged, as it must, the general proposition that discrimination on the basis of gender nonconformity violates Title VII. *E.g., Hunter v. United Parcel Serv., Inc.*, 697 F.3d 697, 702 (8th Cir. 2012); *Lewis*, 591 F.3d at 1035. Other courts have done the same. *E.g.*, *Evans*, 850 F.3d at 1254-55; *Smith v. City of Salem*, 378 F.3d 566, 572 (6th Cir. 2004).

Nevertheless, this Court and some others have drawn a line between claims of gender nonconformity, which they hold are actionable, and claims of sexual orientation discrimination, which they hold are not. *Compare Williamson*, 876 F.2d at 70 (sexual orientation), *with Lewis*, 591 F.3d at 1042 (gender nonconformity). Courts drawing this line have strained to distinguish between the two types of claims, especially where an employee's gender nonconforming conduct gives rise to a suspicion that the employee may be gay. *See Hively*,

830 F.3d 698, 704-09 (7th Cir. 2016) (panel op.) (cataloging cases), *vacated by Hively*, 853 F.3d 339 (en banc).

As the EEOC and an ever-increasing number of courts have come to recognize, the line between gender nonconformity claims and claims of sexual orientation discrimination is so blurry as to be nonexistent. *E.g., Zarda*, 2018 WL 1040820, at *12; *Hively*, 853 F.3d at 346; *Videckis*, 150 F. Supp. 3d at 1160; *Isaacs v. Felder Servs., LLC*, 143 F. Supp. 3d 1190, 1194 (M.D. Ala. 2015); *Terveer*, 34 F. Supp. 3d at 116; *Heller*, 195 F. Supp. 2d at 1224; *Centola*, 183 F. Supp. 2d at 410. Homosexuality, in our culture, "represents the ultimate case of failure to conform to the [sex] stereotype." *Hively*, 853 F.3d at 346; *see also Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 764 (6th Cir. 2006) ("[A]ll homosexuals, by definition, fail to conform to traditional gender norms in their sexual practices."). Efforts to carve out this one gender stereotype from all others are artificial, and nothing in the statutory language or the reasoning of *Price Waterhouse* supports the distinction. *See Hively*, 830 F.3d at 715 (panel op.) ("It seems likely that [no one] would be satisfied with a body of case law that protects 'flamboyant' gay men and 'butch' lesbians but not the lesbian or gay employee who acts and appears straight.").

B. *Oncale v. Sundowner Offshore Services* directs that statutes must be interpreted as written, without judicial carve-outs, even when the language goes beyond the principal evil Congress sought to address.

Congress added the prohibition on sex discrimination to Title VII "at the last minute," and there is virtually no legislative history to demonstrate congressional intent. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 63-64 (1986). Given Congress's silence regarding sexual orientation, courts must interpret the statute as written. *See Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017) ("[I]t is never our job to rewrite a constitutionally valid statutory text under the banner of speculation about what Congress might have done had it faced a question that, on everyone's account, it never faced."); *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989) ("The plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.'") (citation omitted).

The plain language of Title VII prohibits the "entire spectrum" of sex discrimination in employment. *Manhart*, 435 U.S. at 707 n.13. As the Supreme Court has observed, such broad statutory language "easily accommodates both known and unknown causes of action." *Hui v. Castaneda*, 559 U.S. 799, 806 (2010) (interpreting statute granting federal employees absolute immunity). Thus, notwithstanding arguments that Congress never intended the statute to reach so far, the Supreme Court has interpreted Title VII to prohibit opposite-sex sexual

harassment, *Meritor*, 477 U.S. at 66, same-sex sexual harassment, *Oncale*, 523 U.S. at 78-80, and discrimination based on failure to conform to gender stereotypes, *Price Waterhouse*, 490 U.S. at 251. All of these cases have relied on a literal interpretation of Title VII.

In holding that same-sex harassment is cognizable under Title VII, the Supreme Court in *Oncale* unanimously rejected the notion that Title VII only proscribes discrimination specifically considered by Congress. The Court acknowledged that same-sex harassment was not the "principal evil" Congress sought to address when enacting Title VII. 523 U.S. at 79. Nevertheless, it explained, "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.

The *Oncale* Court observed that Title VII protects men as well as women, citing precedents acknowledging the possibility that individuals may discriminate against members of their own race. *Id.* at 78. Finding no justification for a "categorical rule" excluding same-sex harassment, the Court held that Title VII's prohibition on sexual harassment "must extend to sexual harassment of any kind that meets the statutory requirements." *Id.* at 79-80. The Court explained that a same-sex harassment plaintiff could offer various forms of proof, including evidence that the harasser was gay, to establish that the harassment was "because

of … sex," in violation of Title VII. *Id.* at 80-81.

Oncale's interpretation of Title VII bears directly on the question of how broadly *Price Waterhouse* applies. Notwithstanding the Eleventh Circuit's observation that *Price Waterhouse* and *Oncale* "do not squarely address whether sexual orientation discrimination is prohibited by Title VII," *Evans*, 850 F.3d at 1256, the logic of the two opinions leads inevitably to the conclusion that it is.

Just as *Oncale* rejected an artificial carve-out from Title VII's prohibition on sexual harassment, Title VII also rejects an artificial carve-out from *Price Waterhouse*'s prohibition on gender stereotyping. As discussed *supra* at 17-20, sexual orientation discrimination against gays and lesbians implicates one of the most basic gender stereotypes of all: opposite-sex attraction. *Oncale* requires that Title VII treat this gender stereotype just as it treats all others.

The district court here found significant Congress's rejection of legislation prohibiting sexual orientation discrimination. JA82. As the Supreme Court has cautioned, however, "[S]ubsequent legislative history is a 'hazardous basis for inferring the intent of an earlier' Congress" and is "a particularly dangerous ground on which to rest an interpretation of a prior statute when it concerns … a proposal that does not become law." *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) (citation omitted). Moreover, since the mid-1990s, the proposed legislation would not simply have added "sexual orientation" to Title VII, but

would have created stand-alone statutes with numerous other provisions, some of which were highly controversial. *See* Kate B. Rhodes, *Defending ENDA: The Ramifications of Omitting the BFOQ Defense in the Employment Non-Discrimination Act*, 19 Law & Sexuality 1, *8-11 (2010) (describing ENDA congressional history). Congress's failure to pass any of those bills, therefore, shows only that a majority of legislators could not agree on any single version of the provisions.

The plain language of Title VII renders sexual orientation discrimination a form of sex discrimination. This Court should not rely on speculations about congressional intent to override the statutory text.

C. *Williamson* is no longer good law and does not bind this Court.

The district court relied on *Williamson*, an outdated circuit precedent, to hold that sexual orientation discrimination is not cognizable under Title VII. JA83. The plaintiff in *Williamson* alleged that he had been terminated because of his race. The district court granted summary judgment to the defendants after concluding he was really complaining about discrimination based on his homosexuality. This Court affirmed in a four-paragraph, per curiam opinion, stating without additional analysis, "Title VII does not prohibit discrimination against homosexuals." 876 F.2d at 70.

The *Williamson* Court primarily relied upon *DeSantis v. Pacific Telephone & Telegraph Co.*, 608 F.2d 327 (9th Cir. 1979), which was decided ten years before *Price Waterhouse* and held that discriminating against a man because he is effeminate does not violate Title VII. The Supreme Court plainly rejected that logic in *Price Waterhouse*, where it held that discriminating against a woman because she violated gender stereotypes constituted discrimination "because of … sex." Recognizing that *Price Waterhouse* had abrogated *DeSantis*, the Ninth Circuit overruled *DeSantis* in 2001. *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 874-75 (9th Cir. 2001).

Williamson also cited *Sommers v. Budget Marketing, Inc.*, 667 F.2d 748 (8th Cir. 1982), which held that Title VII does not prohibit transgender discrimination. This Court has never considered the effect of *Price Waterhouse* on *Sommers*. In any event, *Williamson*'s reliance on a case raising a different question was misplaced. *Cf. Avendano-Hernandez v. Lynch*, 800 F.3d 1072, 1081 (9th Cir. 2015) (noting that gender identity and sexual orientation are "distinct").

Critically, *Williamson* did not rely on *Price Waterhouse*. Although the Supreme Court issued *Price Waterhouse* one month before *Williamson* was decided, neither party made the *Williamson* panel aware of it.[4] *See Williamson v.*

[4] This may be because *Williamson* was a race discrimination case, not a gender stereotyping case. 876 F.2d at 70.

A.G. Edwards & Sons, No. 88-2421 (8th Cir. docket sheet). Accordingly, for all practical purposes, *Price Waterhouse* functions as an intervening precedent. *See Zarda*, 2018 WL 1040820, at *18 n.32 (*Williamson* may be regarded with "skepticism" because it did not apply *Price Waterhouse*).

For these reasons, Williamson rests on shaky ground.[5] Indeed, this Court has already narrowed its reach. In *Schmedding v. Tnemec Co.*, 187 F.3d 862 (8th Cir. 1999), the Court reversed the dismissal of a same-sex harassment claim where the harassment included taunts of being gay. The Court observed that the district court had relied on *Williamson* to dismiss the complaint because the harassment

[5] So do precedents in other circuits holding that Title VII does not prohibit discrimination on the basis of sexual orientation. Like *Williamson*, most of those cases rely on pre-*Price Waterhouse* law. *E.g., Evans*, 850 F.3d at 1256; *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 261 (3d Cir. 2001); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999); *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 143 (4th Cir. 1996). *But see Franchina v. City of Providence*, 881 F.3d 32, 54 (1st Cir. 2018) (qualifying *Higgins* to allow sex-plus claims where the "plus" factor is sexual orientation). The Sixth Circuit stated after *Price Waterhouse* that Title VII does not cover sexual orientation discrimination based on its belief, at that time, that *Price Waterhouse* is limited to "characteristics that [are] readily demonstrable in the workplace." *Vickers*, 453 F.3d at 763. The Sixth Circuit has subsequently criticized *Vickers* for disregarding its earlier, binding precedent and deemed the narrower rule of *Vickers* "not binding in this circuit." *Harris Funeral Homes*, 2018 WL 1177669, at *11 ("[I]t is clear that a plaintiff may state a claim under Title VII for discrimination based on gender nonconformance that is expressed outside of work."). *Id.* In any event, what matters is not whether characteristics are *apparent* in the workplace, but whether the employer has relied on those characteristics to *discriminate* in the workplace. *See, e.g., Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993) (discussing "Title VII's broad rule of workplace equality").

focused on perceived sexual orientation rather than on the plaintiff's sex. *Id.* at 864 n.3. However, the Court said, *Williamson* was decided prior to the Supreme Court's decision in *Oncale*, 523 U.S. 75, which recognized a claim for same-sex harassment notwithstanding the fact that some of the harassment included taunts of being gay. *Schmedding*, 187 F.3d at 864 n.3. The Court allowed the plaintiff to amend his complaint to delete any reference to his "perceived sexual preference," *id.* at 865, thereby drawing a line between discrimination based on sexual orientation and discrimination incorporating taunts regarding homosexuality. This line, as discussed *supra* at 19-20, is artificial and unworkable. *Zarda*, 2018 WL 1040820, at *12 ("'[T]he line between sex discrimination and sexual orientation discrimination is "difficult to draw" because that line does not exist, save as a lingering and faulty judicial construct.'") (quoting *Videckis*, 150 F. Supp. 3d at 1159 (internal citation omitted)).

Conclusion

This Court should hold that Title VII prohibits sexual orientation discrimination. One panel ordinarily cannot overrule another, but it may do so when there is intervening Supreme Court precedent and the overruling panel "'explicitly identif[ies] the error or changed circumstances and explain[s] why a different result is justified.'" *United States v. Williams*, 537 F.3d 969, 975 (8th Cir. 2008) (citation omitted); *see also United States v. Eason*, 829 F.3d 633, 641

(8th Cir. 2016). Even if this Court previously considered itself bound by *Williamson*, *Price Waterhouse* and *Oncale* undermine *Williamson*'s reasoning and demand a different result.

If the panel concludes that it lacks authority to overrule *Williamson* on its own, the EEOC urges the Court to consider this issue en banc.

Respectfully submitted,

JAMES L. LEE
Deputy General Counsel

JENNIFER S. GOLDSTEIN
Associate General Counsel

ELIZABETH E. THERAN
Assistant General Counsel

/s/ Gail S. Coleman
Attorney
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Office of General Counsel
131 M Street, NE, Room 5SW24L
Washington, DC 20507
(202) 663-4055
gail.coleman@eeoc.gov

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/s/ Gail S. Coleman
Attorney
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Certificate of Compliance

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,457 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2016 with 14-point Times New Roman.

/s/ Gail S. Coleman
Attorney
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

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I certify that on this 7th day of March, 2018, I submitted the foregoing brief in PDF format through this Court's CM/ECF system.

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/s/ Gail S. Coleman
Attorney
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Office of General Counsel
131 M Street, NE, Room 5SW24L
Washington, DC 20507
(202) 663-4055
gail.coleman@eeoc.gov