

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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| MARK HORTON, | : |
| | : |
| <i>Plaintiff-Appellant,</i> | : |
| | : |
| v. | : |
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| MIDWEST GERIATRIC MANAGEMENT, LLC, | : |
| | : |
| <i>Defendant-Appellee.</i> | : |
| | : |
| -----X | |

**MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE*
 AMERICAN CIVIL LIBERTIES UNION; ACLU OF MISSOURI;
 9to5, NATIONAL ASSOCIATION OF WORKING WOMEN;
 A BETTER BALANCE; AMERICAN ASSOCIATION OF UNIVERSITY
 WOMEN; CALIFORNIA WOMEN’S LAW CENTER; COALITION
 OF LABOR UNION WOMEN; EQUAL RIGHTS ADVOCATES;
 FEMINIST MAJORITY FOUNDATION; GENDER JUSTICE; LEGAL
 MOMENTUM; LEGAL VOICE; NATIONAL ORGANIZATION FOR
 WOMEN FOUNDATION; NATIONAL PARTNERSHIP FOR WOMEN
 & FAMILIES; NATIONAL WOMEN’S LAW CENTER; SOUTHWEST
 WOMEN’S LAW CENTER; WOMEN EMPLOYED; WOMEN’S LAW
 CENTER OF MARYLAND, INC.; and WOMEN’S LAW PROJECT
 IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL**

Pursuant to Rule 29(a)(3) of the Federal Rules of Appellate Procedure,
 proposed *amici curiae* move for leave to file the attached brief in support of
 Plaintiff-Appellant and reversal.

1. Proposed *amici curiae* are well positioned to submit a brief in this
 case. *Amici* are a coalition of civil rights groups and public interest organizations
 committed to preventing, combating, and redressing sex discrimination and

protecting the equal rights of women in the United States. *Amici* have a vital interest in ensuring that Title VII of the Civil Rights Act of 1964’s promise of equal employment opportunity effectively protects all people—including lesbian, gay, and bisexual persons—from invidious discrimination “because of sex.”

2. The **American Civil Liberties Union** (“ACLU”) is a nationwide, nonprofit, nonpartisan organization with over 1.6 million members dedicated to defending the principles embodied in the Constitution and our nation’s civil rights laws. The **ACLU of Missouri** is one of the ACLU’s statewide affiliates with over 19,000 members. Through its Women’s Rights Project, co-founded in 1972 by Ruth Bader Ginsburg, the ACLU has been a leader in legal advocacy aimed at ensuring sex equality, and has participated as counsel or *amicus* in virtually every Supreme Court case interpreting Title VII’s sex discrimination provision. *See, e.g., Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338 (2015) (failure to accommodate physical effects of pregnancy on same basis as other medical conditions violates Title VII); *United Auto. Workers of Am. v. Johnson Controls, Inc.*, 499 U.S. 187 (1991) (finding discriminatory employer’s “fetal protection” policy banning fertile women from lead-exposed jobs); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (adverse action premised on employee’s failure to conform to sex stereotype constitutes sex discrimination); *Dothard v. Rawlinson*,

433 U.S. 321 (1977) (striking height and weight requirements for Alabama prison guards that had unlawful disparate impact on women).

3. Additionally, the ACLU and the ACLU of Missouri have long fought to ensure that lesbian, gay, bisexual, and transgender people are treated equally and fairly under law, having served as counsel in cases including *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (holding that Constitution guarantees the fundamental right to marry to same-sex couples), *United States v. Windsor*, 570 U.S. 744 (2013) (holding that federal government cannot discriminate against married same-sex couples for purpose of determining federal benefits and protections); *Waters v. Ricketts*, 48 F. Supp. 3d 1271 (D. Neb.), *aff'd*, 798 F.3d 682 (8th Cir. 2015) (establishing freedom to marry for same-sex couples in Nebraska), and *Parents, Families & Friends of Lesbians & Gays, Inc. v. Camdenton R-III School District*, 853 F. Supp. 2d 888 (W.D. Mo. 2012) (granting plaintiffs' motion for preliminary injunction to block school district from using Internet filtering software that discriminated against content geared toward LGBT community).

4. **9to5, National Association of Working Women** is a 45-year-old national membership organization of women in low-wage jobs dedicated to achieving economic justice and ending all forms of discrimination. Our membership includes transgender individuals. 9to5 has a long history of supporting local, state and national measures to combat discrimination. The

outcome of this case will directly affect our members' and constituents' rights and economic well-being, and that of their families.

5. **A Better Balance** is a national legal advocacy organization dedicated to promoting fairness in the workplace and helping employees meet the conflicting demands of work and family. Through its legal clinic, A Better Balance provides direct services to low-income workers on a range of issues, including employment discrimination based on pregnancy and/or caregiver status. A Better Balance is also working to combat LGBTQ employment discrimination through its national LGBT Work-Family project. The workers we serve, who are often struggling to care for their families while holding down a job, are particularly vulnerable to retaliation that discourages them from complaining about illegal discrimination.

6. In 1881, the **American Association of University Women** (“AAUW”) was founded by like-minded women who had defied society's conventions by earning college degrees. Since then it has worked to increase women's access to higher education through research, advocacy, and philanthropy. Today, AAUW has more than 170,000 members and supporters, 1,000 branches, and 800 college and university partners nationwide. AAUW plays a major role in mobilizing advocates nationwide on AAUW's priority issues to advance gender equity. In adherence with our member-adopted Public Policy Program, AAUW supports civil rights for LGBT Americans.

7. **California Women’s Law Center** (“CWLC”) is a statewide, nonprofit law and policy center dedicated to advancing the civil rights of women and girls through impact litigation, advocacy and education. CWLC’s issue priorities include gender discrimination, reproductive justice, violence against women, and women’s health. Since its inception in 1989, CWLC has placed an emphasis on eliminating all forms of gender discrimination, including discrimination based on sexual orientation. CWLC remains committed to supporting equal rights for lesbians and gay men, and to eradicating invidious discrimination in all forms, including eliminating laws and policies that reinforce traditional gender roles. CWLC views sexual orientation discrimination in the workplace as a form of illegal gender discrimination that is harmful to our state and country, and needs to be eradicated.

8. The **Coalition of Labor Union Women** is a national membership organization based in Washington, DC with chapters throughout the country. Founded in 1974 it is the national women’s organization within the labor movement which is leading the effort to empower women in the workplace, advance women in their unions, encourage political and legislative involvement, organize women works into unions and promote policies that support women and working families. During our history, we have fought against discrimination in all

its forms, particularly when it stands as a barrier to employment or is evidenced by unequal treatment in the workplace or unequal pay.

9. **Equal Rights Advocates** (“ERA”) is a national non-profit legal organization dedicated to protecting and expanding economic and educational access and opportunities for women and girls. Since its founding in 1974, ERA has litigated numerous class actions and other high-impact cases on issues of gender discrimination and civil rights. ERA has appeared as *amicus curiae* in numerous Supreme Court cases involving the interpretation of anti-discrimination laws, including *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006); *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998); *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993); and *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986).

10. Founded in 1987, the **Feminist Majority Foundation** (“FMF”) is a cutting-edge organization devoted to women’s equality, reproductive health, and non-violence. FMF uses research and action to empower women economically, socially, and politically through public policy development, public education programs, grassroots organizing, and leadership development. Through all of its programs, FMF works to end sex discrimination and achieve civil rights for all people, including people of color and LGBTQ individuals.

11. **Gender Justice** is a nonprofit advocacy organization based in the Midwest that works to eliminate gender barriers through impact litigation, policy advocacy, and education. As part of its mission, Gender Justice helps courts, employers, schools, and the public better understand the root causes of gender discrimination and to eliminate its harmful effects to ensure equality of opportunity for all. The organization has an interest in protecting and enforcing the legal rights of LGBTQ people in the workplace under both federal and state anti-discrimination laws. As part of its impact litigation program, Gender Justice acts as counsel in cases enforcing federal laws such as Title VII and state anti-discrimination laws in the Midwest region. The organization provides direct representation to individuals facing discrimination in the workplace and participates as *amicus curiae* in cases that have an impact in the region.

12. **Legal Momentum**, *The Women's Legal Defense and Education Fund*, is a leading national non-profit civil rights organization that for nearly fifty years has used the power of the law to define and defend the rights of girls and women. Legal Momentum consistently supported the rights of the LGBT community to be free from discrimination on the basis of sexual orientation and gender identity. Legal Momentum has developed numerous resources and appeared before courts in many cases concerning the right to be free from sex discrimination and gender stereotypes, including appearing as counsel in *Nguyen v.*

INS, 533 U.S. 53 (2001), and *Miller v. Albright*, 523 U.S. 420 (1998), and as *amicus curiae* in *U.S. v. Virginia*, 518 U.S. 515 (1996), *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), and *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982).

13. **Legal Voice** is a nonprofit public interest organization in the Pacific Northwest that works to advance the legal rights of women and girls through litigation, legislation, and public education on legal rights. Since its founding in 1978, Legal Voice has been at the forefront of efforts to combat sex discrimination in the workplace, in schools, and in public accommodations. We have served as counsel and as *amicus curiae* in numerous cases involving workplace gender discrimination throughout the Northwest and the country. Legal Voice serves as a regional expert advocating for legislation and for robust interpretation and enforcement of anti-discrimination laws to protect women and LGBTQ people. Legal Voice has a strong interest in ensuring that Title VII is interpreted to cover discrimination based on sexual orientation and sex stereotyping.

14. The **National Organization for Women Foundation** (“NOW Foundation”) is a 501(c)(3) entity affiliated with the National Organization for Women, the largest grassroots feminist activist organization in the United States with chapters in every state and the District of Columbia. NOW Foundation is committed to advancing equal opportunity, among other objectives, and works to

assure that women and LGBTQIA persons are treated fairly and equally under the law. As an education and litigation organization, NOW Foundation is also dedicated to eradicating sex-based discrimination – we believe pertains to discrimination against LGBTQIA persons.

15. The **National Partnership for Women & Families** (formerly the Women’s Legal Defense Fund) is a national advocacy organization that develops and promotes policies to help achieve fairness in the workplace, reproductive health and rights, quality health care for all, and policies that help women and men meet the dual demands of their jobs and families. Since its founding in 1971, the National Partnership has worked to advance women’s equal employment opportunities and health through several means, including by challenging discriminatory employment practices in the courts. The National Partnership has fought for decades to combat sex discrimination, including on the basis of sex stereotypes, and to ensure that all people are afforded protections against discrimination under federal law.

16. The **National Women’s Law Center** is a nonprofit legal advocacy organization dedicated to the advancement and protection of women’s legal rights and opportunities since its founding in 1972. The Center focuses on issues of key importance to women and their families, including economic security, employment, education, health, and reproductive rights, with special attention to

the needs of low-income women and women of color, and has participated as counsel or *amicus curiae* in a range of cases before the Supreme Court and the federal Courts of Appeals to secure the equal treatment of women under the law, including numerous cases addressing the scope of Title VII's protection. The Center has long sought to ensure that rights and opportunities are not restricted on the basis of gender stereotypes and that all individuals enjoy the protection against such discrimination promised by federal law.

17. The **Southwest Women's Law Center** is a legal, policy and advocacy law center that utilizes law, research and creative collaborations to create opportunities for women and girls in New Mexico to fulfill their personal and economic potential. Our mission is: (1) to eliminate gender bias; and (2) to utilize the provisions of Title IX to protect women against violence in schools and on college campuses and to protect the rights of LGTB individuals. We collaborate with community members, organizations, attorneys and public officials to ensure that the interests of all individuals are protected.

18. **Women Employed's** mission is to improve the economic status of women and remove barriers to economic equity. Since 1973, the organization has assisted thousands of working women with problems of discrimination and harassment, monitored the performance of equal opportunity enforcement agencies, and developed specific, detailed proposals for improving enforcement

efforts, particularly on the systemic level. Women Employed believes that barring discrimination “because of sex” encompasses discrimination against an employee because of his/her sexual orientation because women’s rights and LGBT rights are inextricable.

19. The **Women’s Law Center of Maryland, Inc.** is a non-profit, membership organization established in 1971 with a mission of improving and protecting the legal rights of women, particularly regarding gender discrimination, employment law, family law and reproductive rights. Through its direct services and advocacy, the Women’s Law Center seeks to protect women’s legal rights and ensure equal access to resources and remedies under the law. The Women’s Law Center is participating as an *amicus* in this case because we agree with the proposition that sex, gender, and sexual orientation are intrinsically intertwined, particularly in the realm of discrimination. The concerns and struggles of the LGBT community impact all women, regardless of sexual orientation.

20. The **Women’s Law Project** (“WLP”) is a non-profit women’s legal advocacy organization with offices in Philadelphia and Pittsburgh, Pennsylvania. Founded in 1974, WLP’s mission is to create a more just and equitable society by advancing the rights and status of all women throughout their lives. To this end, we engage in high impact litigation, policy advocacy, and public education. For

over forty years, WLP has challenged discrimination rooted in gender stereotyping and based on sex.

21. The proposed brief would aid this Court by supplementing Plaintiff-Appellant's argument that Title VII prohibits discrimination on the basis of sexual orientation by situating the issue within the history of the Supreme Court's expansive interpretation of what constitutes discrimination "because of sex."

22. Proposed *amici curiae* have contacted the parties' counsel to request consent to the filing of the attached *amici curiae* brief. Plaintiff-Appellant consents.

WHEREFORE, proposed *amici curiae* respectfully request that this Court grant this motion for leave to file the attached brief in support of Plaintiff-Appellant and reversal.

Dated: March 14, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This motion complies with the length limitation of Rule 27(d)(2) of the Federal Rules of Appellate Procedure because it contains 2,345 words.

2. This motion complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman type style.

Dated: March 14, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE FOR ELECTRONIC FILINGS

I hereby certify that on March 14, 2018, I electronically filed the foregoing motion with the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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