No. 18-1104

In the United States Court of Appeals *for the* Eighth Circuit

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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, THE HON. JEAN C. HAMILTON

BRIEF OF AMICI CURIAE NATIONAL CENTER FOR LESBIAN RIGHTS AND GLBTQ LEGAL ADVOCATES & DEFENDERS IN SUPPORT OF PLAINTIFF-APPELLANT

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INTEREST OF *AMICI CURIAE*[1]

The National Center for Lesbian Rights ("NCLR") is a national non-profit legal organization dedicated to protecting and advancing the civil rights of lesbian, gay, bisexual, and transgender people and their families through litigation, public policy advocacy, and public education. Since its founding in 1977, NCLR has played a leading role in securing fair and equal treatment for LGBT people and their families in cases across the country involving constitutional and civil rights. NCLR has a particular interest in promoting equal opportunity for LGBT people in the workplace through legislation, policy, and litigation, and represents LGBT people in employment and other cases in courts throughout the country.

Through strategic litigation, public policy advocacy, and education, GLBTQ Legal Advocates & Defenders ("GLAD") works in New England and nationally to create a just society free of discrimination based on gender identity and expression, HIV status, and sexual orientation. GLAD has litigated widely in both state and federal courts in all areas of the law in order to protect and advance the rights of lesbians, gay men, bisexuals, transgender individuals, and people living with HIV

[1] The parties and counsel for the parties have not authored or contributed money that was intended to fund preparing or submitting the brief. No person other than the amici curiae contributed money that was intended to fund preparing or submitting this brief.

and AIDS. GLAD has an enduring interest in ensuring that employees receive full and complete redress for violation of their civil rights in the workplace.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Williamson v. A.G. Edwards and Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989), a race discrimination case, this Court stated in *dicta* that "Title VII does not prohibit discrimination against homosexuals." Subsequently, however, the Court held that an employee could state a claim for sex discrimination where he faced workplace harassment "that labeled him as homosexual in an effort to debase his masculinity." *Schmedding v. Tnemec Co.*, 187 F.3d 862, 865 (8th Cir. 1999). Citing these cases, as well as precedents from other circuits, district courts in this Circuit have generally concluded that plaintiffs may bring sex discrimination claims where they face discrimination based on their nonconformity to masculine or feminine stereotypes, but may not "use a sex-stereotyping theory to bring under Title VII what is in essence a claim for discrimination on the basis of sexual orientation." *Pambianchi v. Arkansas Tech Univ.*, No. 4:13-cv-00046-KGB, 2014 WL 11498236, at *5 (E.D. Ark. Mar. 14, 2014). Such a distinction is not rooted in the text of the statute, however, nor does it account for well-established Title VII doctrine.

In effect, *Williamson*'s *dicta* led to the creation of a *sui generis* set of rules that apply only to sex discrimination claims brought by lesbian, gay, and bisexual

employees and not to claims brought by other employees. As numerous courts across the country have observed, that standard is impossible to apply with any degree of consistency or fairness.

The Court should avail itself of this opportunity to revisit *Williamson*'s unworkable *dicta* and clarify that because sexual orientation is a sex-based characteristic, discrimination based on sexual orientation is prohibited by Title VII. That conclusion follows for the straightforward reason that, but for the plaintiff's sex, discrimination based on sexual orientation would not occur. For example, if a man is treated adversely because he is attracted to men, then he has been discriminated against because of his sex—if he were instead a woman who was attracted to men, he would not have faced discrimination. Recognition of such claims does not require a view that the statute's meaning has evolved since its enactment in 1964. It merely requires the application of Title VII in accordance with its text and established doctrines.

This brief proceeds in two parts. *Amici* first describe the confusion *Williamson* has sown, as it has required judges to parse a nonexistent line between discrimination claims based on "pure" sex stereotypes and those based on sex stereotypes related to being lesbian, gay, or bisexual. In Part II, *amici* show how *Williamson*'s *dicta* depart from settled Title VII case law and that bringing sexual orientation cases into line with established Title VII case law requires revisiting

Williamson's *dicta* and clarifying that claims of sexual orientation discrimination are cognizable.

ARGUMENT

I. A CATEGORICAL RULE THAT SEXUAL ORIENTATION DISCRIMINATION DOES NOT VIOLATE TITLE VII'S PROHIBITION ON SEX DISCRIMINATION HAS PROVED TO BE AN UNWORKABLE STANDARD AND SHOULD NOT BE ADOPTED BY THIS COURT

Relying on *Williamson, Schmedding*, and cases from other circuits, district courts in this Circuit have concluded that Title VII's prohibition against sex discrimination permits litigants to bring claims premised upon sex stereotype discrimination, but not sexual orientation discrimination. These courts have ruled that sex stereotype discrimination, deemed actionable under Title VII by the Supreme Court in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), cannot be applied to cover discrimination based on sexual orientation. *See, e.g., Pambianchi,* 2014 WL 11498236, at *5 (holding 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"). Accordingly, lower courts have barred plaintiffs from bringing sex discrimination claims based on sexual orientation discrimination, but permitted claims by plaintiffs who face discrimination "based on stereotypical notions of femininity and masculinity." *Id.*; *see, e.g., Montgomery v. Independent School Dist. No. 709*, 109 F. Supp. 2d 1081, 1090 (D. Minn. 2000) (holding plaintiff stated a sex discrimination claim under Title IX where he faced

harassment from other students "not only because they believed him to be gay, but also because he did not meet their stereotyped expectations of masculinity").

Based on *Williamson,* courts have required plaintiffs to try to thread the needle between a claim based on purportedly "pure" sex stereotyping and a claim based on sex stereotypes relating to the plaintiff's actual or perceived sexual orientation, which may be seen as improperly "bootstrapping" a sexual orientation claim. That has saddled district judges with what two federal Courts of Appeals and other courts across the country have come to recognize is the futile task of discerning on which side of a nonexistent line a particular claim falls.

The en banc Seventh Circuit noted the "confused hodge-podge of cases" that have attempted to extricate gender nonconformity claims from sexual orientation claims. *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 342 (7th Cir. 2017) (en banc). The en banc Second Circuit likewise recently discussed the "unworkability" of a rule that forces courts to "labor[] to distinguish between gender stereotypes that support an inference of impermissible sex discrimination and those that are indicative of sexual orientation discrimination." *Zarda v. Altitude Express, Inc.*, --- F.3d ---, No. 15-3775, 2018 WL 1040820, at *12 (2d Cir. Feb. 26, 2018) (en banc); *see also, e.g.*, *Philpott v. New York*, No. 16-6788, 2017 WL 1750398, at *2 (S.D.N.Y. May 3, 2017) (commenting on the "'illogical' artificial distinction between gender-stereotyping discrimination and sexual-

orientation discrimination"); *Christiansen v. Omnicom Grp., Inc.*, 167 F. Supp. 3d 598, 620 (S.D.N.Y. 2016) ("The lesson imparted by the body of Title VII litigation concerning sexual orientation discrimination and sexual stereotyping seems to be that no coherent line can be drawn between these two sorts of claims"), *aff'd in part, rev'd in part*, 852 F.3d 195 (2d Cir. 2017) (per curiam); *Videckis v. Pepperdine Univ.*, 150 F. Supp. 3d 1151, 1159-1160 (C.D. Cal. 2015) ("Simply put, the 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. . . . It is impossible to categorically separate 'sexual orientation discrimination' from discrimination on the basis of sex or from gender stereotypes.").

Courts adhering to this dichotomy are forced to engage in an artificial and ultimately futile analysis to try to distinguish homophobic slurs or other anti-gay workplace conduct from sex-based discrimination. *See Fabian v. Hosp. of Cent. Conn.*, 172 F. Supp. 3d 509, 524 n.8 (D. Conn. Mar. 18, 2016) (stating that "a woman might have a Title VII claim if she was harassed or fired for being perceived as too 'macho,' but not if she was harassed or fired for being perceived as a lesbian, and courts and juries have to sort out the difference on a case-by-case basis"). For instance, one court dismissed a sexual stereotyping claim because the complaint was "rife with references to sexual orientation, homophobia, and

accusations of discrimination based on homosexuality," including allegations that a superior had called the plaintiff a "fag[g]ot … faggot ass … sissy"—as if such epithets did not play on the victim's deviation from masculine stereotypes. *Trigg v. N.Y. City Transit Auth.*, No. 99-4730, 2001 WL 868336, at *5-6 (E.D.N.Y. July 26, 2001). A district court in this Circuit held that a plaintiff could not maintain a sexual harassment claim based on incidents such as a "co-worker's statement that Plaintiff was a 'homo' and another co-worker's remark that Plaintiff 'knows all about [Vaseline].'" *Klein v. McGowan*, 36 F. Supp. 2d 885, 890 (D. Minn. 1999), *aff'd on other grounds,* 198 F.3d 705 (8th Cir. 1999); *cf. Kay v. Indep. Blue Cross*, 142 F. App'x 48, 51 (3d Cir. 2005) (comparing the relative frequency of comments such as "ass wipe," "fag," "gay," "queer," "real man" and "fem" to conclude that it was "clear that Kay's claim is based upon discrimination that is motivated by perceived sexual orientation").

The result of this "lexical bean counting," *Zarda*, 2018 WL 1040820, at *12, is that courts find it difficult to assess—much less reach a proper conclusion in—discrimination cases brought by plaintiffs who are, or are perceived to be, lesbian, gay, or bisexual. As a result of this confusion, discrimination claims have been "especially difficult for gay plaintiffs to bring." *Maroney v. Waterbury Hosp.*, No. 10-1415, 2011 WL 1085633, at *2 n.2 (D. Conn. Mar. 18, 2011). Indeed, cases presenting nearly identical facts have reached inconsistent results as district courts

struggle to distinguish between "pure" sex-based stereotypes and those based on sexual orientation. *Compare Klein*, 36 F.Supp.2d at 890 (rejecting homophobic slurs by co-workers as evidence of gender-based harassment) *and Miller v. Kellogg USA, Inc.*, No. 8:04CV500, 2006 WL 1314330, at *2, *6 (D. Neb. May 11, 2006) (questioning whether graffiti that depicted male worker having sex with male co-worker and referred to him as co-worker's "bitch" could support claim for harassment based on sex stereotypes), *with Montgomery*, 109 F.Supp.2d. at 1084 (holding that taunts such as "faggott," "fag," "gay," "Jessica," "girl," "princess," "fairy," "homo," "freak," "lesbian," "femme boy," "gay boy," "bitch," "queer," "pansy," and "queen" supported sex stereotyping claim) *and Theno v. Tonganoxie Unified School Dist. No. 464*, 377 F. Supp. 2d 952, 972-73 (D. Kan. 2005) (holding that taunts such as "he's a fag" and "likes to suck cock" supported sex stereotyping claim).

As Chief Judge Katzmann of the Second Circuit has explained, a rule requiring plaintiffs to distinguish between discrimination based on sex stereotypes and discrimination based on sexual orientation creates unique challenges for gay men, lesbians, and bisexual people. They alone bear the burden of showing that their discrimination was motivated by their perceived gender non-conformity rather than their sexual orientation; heterosexual plaintiffs bear no such burden.

See Christiansen v. Omnicom Grp., Inc., 852 F.3d 195, 205 (2d Cir. 2017) (Katzman, C.J., concurring).

Litigants predictably have responded to this artificial distinction by omitting references to sexual orientation from their complaints, even where homophobic slurs or other orientation-related facts are highly relevant to their discrimination claim. This Court's decision in *Schmedding* is illustrative. There, the plaintiff was asked to perform sexual acts; given derogatory notes referring to his anatomy; called names such as "homo" and "jerk off"; and subjected to the exhibition of sexually inappropriate behavior by others. *Id*. at 865. The district court dismissed the complaint, holding the claim noncognizable because it alleged that the plaintiff was taunted due to his "perceived sexual preference." *Id*. This Court reversed, explaining that "simply because … the harassment alleged by Schmedding includes taunts of being homosexual … [does not] thereby transform[] [the complaint] from one alleging harassment based on sex to one alleging harassment based on sexual orientation." *Id*. In other words, it was plausible the plaintiff was subjected to homophobic taunts in "an effort to debase his masculinity, not … because he is homosexual or perceived as homosexual." *Id*. Nonetheless, the Court acknowledged that the references to the plaintiff's sexual orientation confused the issue and that the complaint was "not a model of clarity." *Id*. The Court concluded that "the best recourse is to remand the case to the district court

with instructions that plaintiff be allowed to amend his complaint" "so as to delete" a reference to the phrase "perceived sexual preference." *Id.*[2] By causing plaintiffs to disavow reliance upon facts that may be probative of sex discrimination, the *dicta* in *Williamson* denies courts highly relevant evidence, inevitably leading to the rejection of many meritorious discrimination claims solely because the plaintiff is lesbian, gay, or bisexual.

Given the lack of clarity and coherence arising from *Williamson*'s statement concerning Title VII's treatment of sexual orientation, *Williamson*'s *dicta* should be revisited in favor of a clear rule that accords with Title VII's text and case law.

II. RECOGNIZING THAT SEXUAL ORIENTATION DISCRIMINATION IS A FORM OF SEX DISCRIMINATION IS COMPELLED BY TITLE VII'S TEXT AND DOCTRINE

The result of the *Williamson dicta* is that a gay plaintiff is allowed to bring a claim of sex-stereotyping discrimination involving his or her sexual orientation only if the plaintiff does not explicitly identify as lesbian, gay, or bisexual or

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[2] As one commentator has noted, this Court's observation that a homophobic slur may be animated by a desire to both demean another person's sexual orientation and gender conformity reveals the fundamental futility of attempting to separate sexual orientation from sex stereotype. *See* Kanazawa, *Schwenk and the Ambiguity in Federal "Sex" Discrimination Jurisprudence: Defining Sex Discrimination Dynamically Under Title VII*, 25 Seattle U. L. Rev. 255, 284-285 (2001) (arguing that *Schmedding* suggests the "sex/sexual orientation dichotomy is inherently unworkable" and that "Courts should stop making mechanical and futile inquiries into what stereotypes are attached to masculinity or femininity on the one hand and what stereotypes are attached to sexual orientation on the other").

invoke stereotypes related to sexual orientation as the basis of the claim. As discussed above, that rule is untenable—so much so that two circuits sitting en banc recently have overruled longstanding precedent resting on that dubious distinction. This Court is not burdened by such flawed precedent, and can put its Title VII jurisprudence on sound footing by revisiting *Williamson*'s *dicta* and clarifying that discrimination on the basis of sexual orientation is a form of sex discrimination.

That conclusion follows for several reasons. First, as both the Second and Seventh Circuits have concluded, Title VII's plain text and traditional doctrines compel the conclusion that discrimination based on sexual orientation is discrimination "because of … sex." *Zarda*, 2018 WL 1040820, at *5. Those decisions were based on "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*, 853 F.3d at 351. "Because one cannot fully define a person's sexual orientation without identifying his or her sex, sexual orientation is a function of sex." *Zarda*, 2018 WL 1040820, at *5. For this reason, "discrimination on the basis of sexual orientation is a form of sex discrimination." *Hively*, 853 F.3d at 341.

Second, contrary to *Williamson*'s dicta, sexual orientation discrimination is a paradigmatic instance of gender stereotyping. *Zarda*, 2018 WL 1040820, at *13.

After all, "stereotypes concerning sexual orientation are probably the most prominent of all sex related stereotypes." *Boutillier*, 221 F. Supp. 3d at 269; *see also EEOC v. Scott Med. Health Ctr., P.C.*, 217 F. Supp. 3d 834, 841 (W.D. Pa. 2016); *Howell v. N. Cent. Coll.*, 320 F. Supp. 2d 717, 723 (N.D. Ill. 2004); *Centola v. Potter*, 183 F.Supp.2d 403, 410 (D. Mass. 2002).

Third, recognizing that sexual orientation discrimination is a form of sex discrimination follows from longstanding jurisprudence concerning associational discrimination. *Zarda*, 2018 WL 1040820, at *14-*17.

Any of these three theories is sufficient to establish sexual orientation discrimination as a cognizable form of sex discrimination under Title VII. As explained below, the conclusion that sexual orientation discrimination is discrimination "because of … sex" is particularly straightforward and consonant with established Title VII doctrines. That theory therefore provides a compelling basis—though not the only one—to recognize sexual orientation claims as cognizable under Title VII.

A. Sexual Orientation Discrimination Is Discrimination "Because of … Sex" Because *But For* The Plaintiff's Sex, The Treatment Would Have Been Different

Title VII makes it unlawful for an employer to "discriminate against any individual … because of such individual's … sex." 42 U.S.C. § 2000e-2(a). As the majority in *Hively* explained, the "tried and true" method in Title VII cases is

"to isolate the significance of the plaintiff's sex to the employer's decision: has she described a situation in which, holding all other things constant and changing only her sex, she would have been treated the same way?" *Hively*, 853 F.3d at 345; *City of L.A., Dep't of Water and Power v. Manhart*, 435 U.S. 702, 711 (1978) (under Title VII, applying "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'"). In applying this method in cases of sex discrimination, "[i]t is critical … to be sure that only the variable of the plaintiff's sex is allowed to change." *Hively*, 853 F.3d at 345; *accord Zarda*, 2018 WL 1040820, at *8-*10.

Application of this "comparative method" shows that sexual orientation discrimination is discrimination *because of sex*. Where a woman is fired or harassed because of her attraction to other women, changing the single variable of sex—a man would not have been fired because of his attraction to women—reveals that the discrimination is *because of sex*, *i.e.*, because of the victim's membership in the class *woman*. Such a scenario "describes paradigmatic sex discrimination." *Hively*, 853 F.3d at 345.

This analysis betrays the error that underlies a rule that attempts to distinguish between sexual orientation discrimination and sex discrimination. A male employee who is fired for being in a relationship with a man would not have faced such treatment if, all else constant, he had been a *woman* in a relationship

with a man. "[S]exual orientation discrimination is sex discrimination for the simple reason that such discrimination treats otherwise similarly-situated people differently solely because of their sex … [B]ut for the employee's sex, the employee's treatment would have been different. Because this situation meets the statutory requirements of Title VII, the statute must extend to prohibit it." *Christiansen*, 852 F.3d at 202-203 (Katzmann, C.J., concurring) (citations omitted); *see also Hively*, 853 F.3d at 357 (Flaum, J., concurring) ("[T]he statute's text commands" the conclusion that "discriminating against an employee for being homosexual violates Title VII's prohibition against discriminating against that employee because of their sex"). This comparative analysis does not alter or expand the meaning of Title VII; it simply lays bare the reality that treating someone differently because of his sexual orientation is in fact treating him differently because of his sex. *See Baldwin v. Foxx*, No. 2012-24738-FAA-03, 2015 WL 4397641 at *5 (EEOC July 15, 2015) ("'Sexual orientation' as a concept cannot be defined or understood without reference to sex.").

B. Concluding That Sexual Orientation Discrimination Is "Because Of … Sex" Accords With Settled Title VII Doctrine

Although the comparative analysis described above suffices to show that sexual orientation discrimination is discrimination "because of … sex" and thus is actionable under Title VII, that conclusion is underscored by well-established Title

VII doctrine. Indeed, only recognition of sexual orientation discrimination as a form of sex discrimination can be reconciled with settled Title VII case law.

First, one might object that sexual orientation discrimination is not because of sex because it does not entail discrimination against all members of a given sex but rather requires that the victim also possess another defining trait—namely, attraction to members of the same sex. Those features, however, have not precluded sex discrimination claims in other situations, and therefore they should not preclude sex discrimination claims based on sexual orientation. "Title VII does not permit the victim of [discrimination] to be told that he [or she] has not been wronged because other persons of his or her race or sex were hired." *Connecticut v. Teal*, 457 U.S. 440, 455 (1982).

Second, federal courts have repeatedly recognized that "an employer may violate Title VII if it takes action against an employee because of the employee's association with a person of another race." *Holcomb v. Iona Coll.*, 521 F.3d 130, 132 (2d Cir. 2008). That interracial discrimination is discrimination *because of race* confirms that sexual orientation discrimination is discrimination *because of sex*. *See Zarda*, 2018 WL 1040820, at *14-*17; *Hively*, 853 F.3d at 347-48.

In *Holcomb*, for example, a white male plaintiff alleged that he had been discriminated against by his employer because he was married to a black woman. *Id*. at 132. The employer sought summary judgment on the basis that the plaintiff

was not fired "because of [his] race," as the adverse employment action was not animated by his status as a white person. The Second Circuit rejected that argument and concluded the plaintiff was penalized by his class membership. "The reason is simple: where an employee is subjected to adverse action because an employer disapproves of interracial association, the employee suffers discrimination because of the employee's *own* race." *Id*. at 139. The court reached this conclusion because such discrimination could only be understood by reference to the *plaintiff's* race—a black employee married to another black person would not have been treated adversely in the way that the white employee married to a black person was.

A decision from the Sixth Circuit further illustrates the point. In *Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick, & GMC Trucks, Inc.*, a white employee alleged he was discriminated against because he had fathered a biracial child. The court concluded that such an allegation stated a claim of discrimination "because of race" under Title VII because "the alleged discrimination … was *due to* Tetro's race being different from his daughter's." 173 F.3d 988, 994-995 (6th Cir. 1999). As the Court explained, "If [the employee] had been African-American, presumably the dealership would not have discriminated because his daughter would also have been African-American." *Id.*; *see also Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 892 (11th Cir. 1986) ("Where a plaintiff

claims discrimination based upon an interracial marriage or association, he alleges, by definition, that he has been discriminated against because of *his* race.").

These cases show instances of discrimination where, but for the plaintiff's race, she or he would not have been discriminated against—and the claim therefore is cognizable under Title VII—regardless of the discriminator's animus towards the plaintiff's specific class in isolation. The same analysis should apply to claims of sex discrimination based on same-sex relationships or associations, because Title VII "on its face treats each of the enumerated categories exactly the same" such that "principles . . . announce[d]" with respect to sex discrimination "apply with equal force to discrimination based on race, religion, or national origin," and vice versa. *Price Waterhouse*, 490 U.S. at 243 n.9; *accord Hively*, 853 F.3d at 349; *Zarda*, 2018 WL 1040820, at *15. Judge Flaum's concurrence in *Hively* makes the connection well:

> Interracial relationships are comprised of (A) an individual of one race, and (B) another individual of a *different race*. Without considering the first individual's race, the word 'different' is meaningless. Consequently, employment discrimination based on an employee's interracial relationship is, in part, tied to an enumerated trait: the employee's race . . . The same principle applies here. Ivy Tech allegedly refused to promote Professor Hively because she was homosexual—or (A) a woman who is (B) sexually attracted to women.

853 F.3d at 359. As Judge Flaum recognized, the long line of cases upholding claims of discrimination based on interracial associations is fundamentally

incompatible with a rule that excludes sexual orientation from the definition of "sex" under Title VII. *See also Christiansen*, 852 F.3d at 204 (Katzmann, C.J., concurring); *Boutillier*, 221 F. Supp. 3d at 268 ("The logic is inescapable: [i]f interracial association discrimination is held to be 'because of the employee's *own* race,' so ought sexual orientation discrimination be held to be because of the employee's *own* sex.").

CONCLUSION

This Court should revisit the *dicta* in *Williamson* and clarify that discrimination on the basis of sexual orientation is actionable discrimination because of sex under Title VII.

Respectfully submitted,

/s/ Christopher F. Stoll

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March 14, 2018

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Dated: March 14, 2018

s/ Christopher F. Stoll
Attorney for *Amici Curiae*

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I hereby certify that on March 14, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

s/ Christopher F. Stoll
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