No. 18-1104

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MARK HORTON,

Appellant,

v.

MIDWEST GERIATRIC MANAGEMENT, LLC,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
THE HONORABLE JEAN C. HAMILTON, UNITED STATES DISTRICT JUDGE

BRIEF OF APPELLEE MIDWEST GERIATRIC MANAGEMENT, LLC

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SUMMARY OF THE CASE

Appellant/Plaintiff Mark Horton ("Horton") was offered a position as Vice President of Sales and Marketing of Appellee/Defendant Midwest Geriatric Management, LLC ("MGM"). This offer of employment was expressly contingent on successful completion of a background check. After repeated, unsuccessful efforts to confirm Horton's education, the offer was rescinded. Horton does not dispute that, despite efforts spanning the course of nearly a month, attempts to verify his education failed. He alleges as much.

Instead, Horton attempts to rely on a vague, passing comment he made in an e-mail about his "partner," to whom Horton ascribed the pronoun "he," to assert Title VII claims based solely on his sexual orientation. To be clear: Horton's allegations of discrimination based on his sexual orientation are entirely untrue. More fundamentally, however, Horton's legal theories—Title VII claims based solely on sexual orientation—fail as a matter of law.

The District Court carefully reviewed Horton's Complaint and binding precedent of the Supreme Court and this Court. Accepting Horton's allegations as true, the District Court properly concluded that Horton failed to state a claim.

MGM respectfully submits that oral argument is not necessary given the District Court's decision and the governing law. Should the Court permit oral argument, however, MGM submits that fifteen (15) minutes is sufficient.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eighth Circuit Rule 26.1A, Midwest Geriatric Management, LLC is a non-governmental, non-publicly held limited liability company. Midwest Geriatric Management, LLC has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

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- Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*
- *Williamson v. A.G. Edwards and Sons, Inc.*, 876 F.2d 69 (8th Cir. 1989) (per curiam), *cert. denied*, 493 U.S. 1089 (1990)
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- Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*
- *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285 (3d Cir. 2009)
- *Pedreira v. Ky. Baptist Homes for Children, Inc.*, 579 F.3d 722 (6th Cir. 2009)

INTRODUCTION

Title VII of the Civil Rights Act of 1964 provides, in pertinent part, that "[i]t shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of such individual's* race, color, *religion*, *sex*, or national origin[.]" 42 U.S.C. § 2000e-2(a)(1) (emphasis added). Title VII does not include "sexual orientation" among its enumerated protected characteristics. *See id.*

In this case, Horton asks this Court to do what Congress did not, and in the subsequent decades has not done: amend Title VII to include "sexual orientation" as a protected characteristic. Promulgating laws is exclusively the province of the legislature—not the judiciary. U.S. CONST. ART. I, § 7 (enumerating the process of bicameralism and presentment); *Stern v. Marshall*, 564 U.S. 462, 483 (2011) ("In establishing the system of divided power in the Constitution, the Framers considered it essential that 'the judiciary remain truly distinct from both the legislature and the executive.' " (quoting THE FEDERALIST NO. 78, at 466 (Alexander Hamilton) (C. Rossiter ed. 1961))); *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 384 (2001) (Kennedy, J., concurring) ("[T]he courts[] do not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations." (internal quotation marks omitted)); *Stanard v. Olesen*, 74 S. Ct. 768, 771 (1954) (Douglas, Circuit Justice) ("[I]t is for Congress, not the courts, to write the law.").

Accordingly, this Court should, as it has done previously and as the vast majority of other courts have done, decline Horton's invitation to judicially amend Title VII to include "sexual orientation" among its enumerated, protected characteristics. "[T]o hold otherwise would accomplish by judicial fiat what Congress refrained from doing legislatively[.]" *United States v. Doe*, 859 F.2d 1334, 1336 (8th Cir. 1988) (citation omitted).

STATEMENT OF THE CASE

In his Complaint, Horton alleges the following, which the District Court accepted as true for purposes of MGM's Motion to Dismiss. *See, e.g.*, *Schaefer v. Putnam*, 827 F.3d 766, 769 (8th Cir. 2016), *reh'g denied* (Aug. 25, 2016) ("We accept the non-moving party's factual allegations as true and construe all reasonable inferences in favor of the nonmovant.").

A. Conditional Offer and Acceptance of At-Will Employment

Horton is a homosexual male who has been legally married under the laws of Illinois to his male partner since November 14, 2014. (JA-007). In February of 2016, while employed by Celtic Healthcare ("Celtic"), Horton received an e-mail from a headhunter, Jobplex, regarding a Vice President of Sales and Marketing position with MGM. (*Id.*) Horton agreed to undergo the application process,

including one or more interviews with MGM's President and CEO, Judah Bienstock, and his wife, Faye Bienstock, both of whom are of the Jewish faith.[1] (*Id.*)

By letter dated April 21, 2016, Horton was conditionally offered the position with MGM. (JA-008, JA-026). The offer of at-will employment was expressly contingent on, among other things, successful completion of a background check:

> Dear Mark:
>
> We are pleased to offer you the position of VP of Sales and Marketing at MGM Healthcare. This letter confirms an offer of employment with MGM Healthcare.
>
> . . . .
>
> This offer is also contingent upon successful completion of background checks and references.
>
> . . . .
>
> We look forward to developing our relationship with you and hope you view this opportunity as a chance to have a long term positive impact on our business. Nevertheless, please understand that MGM Healthcare is an at-will employer. That means that either you or MGM are free to end the employment relationship at any time, with or without notice or cause.
>
> . . . .

[1] Horton further alleged that "[u]pon information and belief, Judah and Faye Bienstock's Jewish faith plays a large part in their professional lives, and they have made their faith and its influence on their business known." (JA-008).

(*Id.*). Horton accepted the conditional offer of employment on May 4, 2016. (JA-008 – JA-009, JA-026). His anticipated start date was May 31, 2016. (JA-011).

B. Failure to Successfully Complete Background Check

On or about April 21, 2016, Horton was informed that the third-party company engaged to complete his background check, HireRight, was having difficulty verifying his education. (JA-008). Horton investigated the issue, learned that it could take four-to-six weeks to obtain the requested information, and conveyed this information to Jobplex, HireRight, and MGM. (*Id.*) None of Jobplex, HireRight, or MGM "voiced any concern over the potential delay." (*Id.*)

Horton eventually resigned his position at Celtic. (JA-009). On May 10, 2016, he e-mailed Faye Bienstock to inform her that Celtic had agreed to release him from his employment early so that he could begin working for MGM. (*Id.*) Faye Bienstock responded to Horton that MGM was ready for him to begin whenever worked for him. (*Id.*)

On May 13, 2016, Faye Bienstock e-mailed Horton again stating that he needed to complete documentation regarding his education, as well as a pre-hire assessment, before attending orientation the following week, and that once these two items were complete, they could pick a new start date. (JA-009 – JA-010). Horton responded by stating that he had been working with HireRight and visited one of his colleges to request a copy of his transcript for verification. (JA-010).

On May 17, 2016, Horton e-mailed Faye Bienstock to update her on the status of obtaining his educational records. (*Id.*). In this e-mail, Horton made a passing comment that: "My partner has been on me about [my MBA] since he completed his PHD a while back." (*Id.* (emphasis omitted)).

C. Withdrawal of the Conditional Employment Offer

On May 20, 2016, Faye Bienstock e-mailed Horton asking if he was able to come in that afternoon to discuss the status of his employment. (*Id.*) Horton said that he was not able to come in, as he was out of town, but that he would be available on a different date. (*Id.*)

On May 22, 2016, via e-mail from Faye Bienstock, MGM withdrew its conditional offer of employment "due to the incompletion of the background check of supportive documentation[.]" (JA-011).

Apparently weeks later, Horton obtained the requested college records.[2] (*Id.*) On June 21, 2016, upon learning that the position with MGM was still open, Horton e-mailed Judah and Faye Bienstock to discuss proceeding with his employment. (*Id.*) Faye Bienstock responded that MGM was considering other candidates and would contact him if MGM desired to pursue a relationship. (*Id.*)

[2] Specifically, Horton alleged that "*he* successfully obtained the requested college records himself[.]" (JA-011 (emphasis added)). Horton did not allege that HireRight obtained these records or otherwise completed his background check, as was required in the conditional offer of employment. (JA-008, JA-026).

D. Charge of Discrimination

Over five months later, on November 29, 2016, Horton filed a Charge of Discrimination with the Equal Employment Opportunity Commission ("EEOC"), alleging discrimination on the basis of "sex," "religion," and "sexual orientation." (JA-022). The EEOC issued a Notice of Right to Sue letter on August 23, 2017. (JA-025).

E. District Court Proceedings

On August 28, 2017, Horton filed his Complaint against MGM in the United States District Court for the Eastern District of Missouri. (JA-002, JA-005 – JA-026). In his Complaint, Horton alleged three claims: (1) Title VII sex discrimination; (2) Title VII religious discrimination; and (3) Missouri state law fraudulent inducement. (JA-012 – JA-020). MGM filed a Motion to Dismiss, challenging the viability of Horton's two Title VII claims because each was premised solely on Horton's sexual orientation.[3] (JA-027 – JA-045).

The District Court agreed, concluding that Horton's sex-based Title VII claim failed to state a claim as a matter of law because, as this Court held in *Williamson v.*

[3] MGM also moved to dismiss Horton's Missouri state law fraudulent inducement claim, which, like Horton's Title VII claims, the District Court dismissed for failure to state a claim. (Addendum at 10-13; JA-086 – JA-089). Horton has abandoned his appeal of the dismissal of his Missouri state law fraudulent inducement claim. (*See* Appellant's Brief ("App. Br.") at ii, n.1 & 1, n.2). As such, MGM does not address it further herein.

A.G. Edwards and Sons, Inc., 876 F.2d 69, 70 (8th Cir. 1989) (per curiam), *cert. denied*, 493 U.S. 1089 (1990), "Title VII does not prohibit discrimination against homosexuals." (Addendum at 6; JA-082). The District Court also held that, to the extent premised on a sex stereotyping theory under *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), Horton's Title VII sex discrimination claim nonetheless failed as a matter of law because Horton's only allegation of sex stereotyping was his sexual orientation, which is not a protected characteristic under Title VII. (Addendum at 7-9; JA-083 – JA-085). The District Court further held that, to the extent premised on an associational theory, Horton's Title VII sex discrimination claim based on his sexual orientation was precluded by *Williamson*. (Addendum at 7; JA-083). As to Horton's Title VII religious discrimination claim, the District Court held that Horton's claim was premised solely on his allegation of holding certain unspecified religious beliefs regarding homosexual marriage and relationships that failed to conform with MGM's purported religious beliefs, and thus was a non-cognizable, repackaged Title VII claim alleging sexual orientation discrimination. (Addendum at 9-10; JA-085 – JA-086).

After Horton elected to stand on his original Complaint, the District Court entered an Order dismissing the entirety of Horton's Complaint, with prejudice. (JA-091 – JA-093). On January 9, 2018, Horton timely filed his Notice of Appeal. (JA-094 – JA-095).

SUMMARY OF THE ARGUMENT

The District Court correctly dismissed Horton's Title VII claims alleging sexual orientation discrimination despite being raised under the guise of "sex" and "religious" discrimination theories because, even accepting his allegations as true, Horton's sole basis for alleging discrimination—MGM's purported knowledge of his sexual orientation—does not fall within the ambit of Title VII's protections. As this Court expressly held in *Williamson*, "Title VII does not prohibit discrimination against homosexuals." 876 F.2d at 70. This Court's holding in *Williamson* (and subsequent affirmation and application thereof in *Schmedding v. Tnemec Co.*, 187 F.3d 862 (8th Cir. 1999)) is controlling law in this Circuit. *See Gaitan v. Holder*, 671 F.3d 678, 681 (8th Cir. 2012) ("It is a cardinal rule in [the Eighth Circuit] that one panel is bound by the decision of a prior panel." (citation omitted)) (holding that the panel was bound by a prior *per curiam* decision). This ends the analysis.

For decades, this Court's holdings in *Williamson* and *Schmedding* were in line with the holdings of every circuit court of appeals in the nation. In the past two years, however, two other circuit courts of appeals reversed decades of their own precedent to expand the reach of Title VII to include sexual orientation. *See Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018) (en banc); *Hively v. Ivy Tech Cmty. Coll. of Indiana*, 853 F.3d 339 (7th Cir. 2017) (en banc). Of course, neither *Zarda* nor *Hively* is controlling here, nor do they overrule this Court's holdings in

Williamson and *Schmedding*. More fundamentally, the majority decisions reached in *Zarda* and *Hively* both suffer from the same affliction: judicial amendment of a decades-old statute. Respectfully, and even if *Williamson* and *Schmedding* were not the law in this Circuit (they are), this Court should in any case construe Title VII as written by Congress and affirm the District Court's Judgment.

As to Horton's Title VII religious discrimination claim, the District Court properly analyzed it for what it was: a non-cognizable, "repackaged claim for sexual orientation discrimination." (Addendum at 10; JA-086). Moreover, despite premising his Title VII religious discrimination claim on his own beliefs (and alleging that these beliefs conflicted with MGM's alleged beliefs), Horton identified no aspect of his religion other than as it supposedly relates to homosexual marriage and relationships. Horton also did not plausibly allege that he made MGM aware of, or that MGM had any reason to suspect, his purported "differing religious beliefs." Even if Horton had alleged religious discrimination based on his sexual orientation (as opposed to his alleged religious beliefs regarding sexual orientation), such allegations would not state a colorable Title VII religious discrimination claim.

Accordingly, the Court must apply the longstanding precedent in this Circuit and a majority of other circuits, and thereby affirm the District Court's Judgment rejecting Horton's Title VII sexual orientation discrimination claims, which fail as a matter of law.

ARGUMENT

I. Standard of Review.

This Court "review[s] the grant of a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) *de novo*." *Whitney v. City of St. Louis, Missouri*, 887 F.3d 857, 859–60 (8th Cir. 2018). "To survive a 12(b)(6) motion, 'a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.' " *Id.* at 860 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)) (internal quotation marks omitted). This Court "may affirm the district court's dismissal on any basis supported by the record." *Phipps v. FDIC*, 417 F.3d 1006, 1010 (8th Cir. 2005).

II. The District Court Properly Dismissed Horton's Title VII Claim Alleging Discrimination "Because of . . . Sex" because Title VII's Prohibition of Discrimination "Because of . . . Sex" Does Not Extend to Sexual Orientation.

A. This Court's Holding in *Williamson*, as Affirmed and Applied in *Schmedding*, is Dispositive.

In analyzing Horton's sex-based Title VII sexual orientation claim, the District Court properly concluded that Horton's claim was precluded by *Williamson v. A.G. Edwards and Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989) (per curiam), *cert. denied*, 493 U.S. 1089 (1990), in which this Court held that "Title VII does not prohibit discrimination against homosexuals." (Addendum at 6; JA-082). While the District Court recognized that certain other courts outside of the Eighth Circuit

recently held otherwise, the District Court correctly concluded that it was bound by this Court's holding in *Williamson*, such that further analysis was not warranted. (Addendum at 6-7; JA-082 – JA-083). The analysis is no different here, and must yield the same result.

Horton contends, as he did before the District Court, that the *Williamson* Court's holding—that "Title VII does not prohibit discrimination against homosexuals"—is not binding law in this Circuit, but is instead "non-binding *dicta*." (App. Br. at 44). An examination of *Williamson*, however, reveals what numerous district courts within and courts of appeals outside this Circuit have concluded: *Williamson* is controlling law in this Circuit as to whether Title VII extends to sexual orientation.

1. *Williamson's Holding Was just that—a Holding—Not* Dicta.

"Whenever a question fairly arises in the course of a trial, and there is a distinct decision of that question, the ruling of the court in respect thereto can, in no just sense, be called mere *dictum*." *Union Pacific R. Co. v. Mason City & Ft. D.R. Co.*, 199 U.S. 160, 166 (1905). Subsequent courts are bound not just by the precise result of a prior decision, but by all of those portions of the prior court's decision that led to the result. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 67 (1996) ("When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound."). "A

statement is not dictum if it is necessary to the result or constitutes an explication of the governing rules of law." *Int'l Truck and Engine Corp. v. Bray*, 372 F.3d 717, 721 (5th Cir. 2005); *accord Cty. of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 668 (1989) (Kennedy, J., concurring in part and dissenting in part); *see also* Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953, 1065 (2005) ("A holding consists of those propositions along the chosen decisional path or paths of reasoning that (1) are actually decided, (2) are based upon the facts of the case, and (3) lead to the judgment.").

In *Williamson*, the plaintiff, Darrell Williamson, a homosexual, African-American male, alleged that his former employer and supervisor unlawfully discriminated against him based on his race, in violation of Title VII and 42 U.S.C. § 1981.[4] 876 F.2d at 70. Specifically, Williamson alleged that his former supervisor "falsely accused him of disrupting the workflow by continuing to discuss the details of his homosexual lifestyle in the workplace and harassing another employee." *Id.* Williamson also alleged that "white employees who behaved as [he] did were not disciplined." *Id.* Williamson, however, testified in his deposition "that he was discharged due to his homosexuality"; the defendants argued that "neither Title VII

[4] Significantly, in his Charge of Discrimination, Williamson alleged discrimination based upon both race *and sex*. (*Williamson* Appellant's Addendum, at 5). Copies of the *Williamson* Appellant's Brief and Addendum and the Appellee's Brief are attached hereto as Exhibit 1 and Exhibit 2, respectively, for the convenience of the Court and the parties.

nor Section 1981 prohibits discrimination against homosexuals," such that summary judgment was appropriate. (*Williamson* Appellees' Br., attached hereto as Exhibit 2, at i); (*see also id.* at iv (referencing, in the statement of the issue, that Williamson "testified he was discharged due to his homosexuality[]")).

Considering the admissible evidence offered by the parties, and in the context of Federal Rule of Civil Procedure 56, the district court granted the defendants' motion for summary judgment, holding that Williamson "failed to produce any proof to establish an essential element to his case and upon which he will bear the burden of proof at trial: that his allegedly disparate treatment and discharge by defendants were based in any manner upon his race *rather than his sexual orientation*." (*Williamson* Appellant's Addendum at 2) (emphasis added).

On appeal in this Court, Williamson contended that his "case rest[ed] on the discrimination he suffered because he was black, ***and*** *because he was homosexual*." (*Williamson* Appellant's Br., attached hereto as Exhibit 1, at 7) (emphasis added). As to the sexual orientation-based discrimination, this Court affirmed the district court's ruling, holding that "Title VII does not prohibit discrimination against homosexuals." 876 F.2d at 70 (citing *DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327 (9th Cir. 1979)[5] and *Sommers v. Budget Mktg., Inc.*, 667 F.2d 746 (8th Cir. 1982)

[5] *Abrogated in part on other grounds, Nichols v. Azteca Rest. Enter., Inc.*, 256 F.3d 864 (9th Cir. 2001).

(per curiam)). As to the race-based discrimination, Williamson argued that the district court erred "in failing to consider his allegations that similarly situated white homosexual employees, working in the same department . . . , were not harassed or terminated as he had been." *Id.* Given Williamson's "fail[ure] to allege facts sufficient to establish that other similarly situated white employees were treated differently," this Court rejected Williamson's contention.[6] *Id.* (emphasis omitted).

The *Williamson* Court's decision, that Title VII does not prohibit discrimination on the basis of sexual orientation, is a holding that this Court is bound to follow. Williamson, both in the district court and on appeal, raised the issue of his sexual orientation in connection with his Title VII claim. The *Williamson* district court concluded that Williamson had shown evidence only of discrimination based on sexual orientation, not race, and thus could not maintain his Title VII claim. On appeal, a decision regarding Title VII's coverage of sexual orientation was both *necessary and pivotal*; if the district court were incorrect, and Title VII was construed to protect against discrimination based on sexual orientation, then the district court's grant of summary judgment would have been in error. In other words,

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[6] Specifically, Williamson "did not claim that the other white, alleged homosexuals behaved as he did (openly discussed their sex lives while at work)"; Williamson instead "only compared his behavior in that regard to the behavior of other heterosexuals." 876 F.2d at 70. As to being "reprimanded for wearing makeup at work while the two other alleged white homosexuals were only reprimanded for wearing jewelry," there was "no indication in the record that the other two men wore any makeup." *Id.*

if Title VII prohibited discrimination on the basis of sexual orientation, then the basis for the District Court's conclusion would have been erroneous. This Court's holding on the scope of Title VII was thus necessary in its review of the district court's ruling.

Horton's *dicta* challenge here is not the first such challenge on this particular issue. In *Evans v. Georgia Regional Hospital*, the same argument was attempted: that the court's prior determination that sexual orientation is not protected by Title VII was non-binding *dicta*. *See* 850 F.3d 1248, 1255 (11th Cir. 2017), *cert. denied,* 138 S. Ct. 557 (2017) (discussing *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979) ("Discharge for homosexuality is not prohibited by Title VII . . . ."). The Eleventh Circuit rejected this argument, explaining that the court's statement in *Blum* was made because the issue was "raised on appeal." *Id.* Again, the same is true with respect to this Court's holding in *Williamson*. That this issue was raised on appeal cannot be disputed. (*See Williamson* Appellant's Br. at 7 (contending, in the third sentence of the "Argument" section of his Brief, that his "case rest[ed] on the discrimination he suffered because he was black, ***and*** *because he was homosexual*" (emphasis added))); (*see also Williamson* Appellee's Br. at iv (describing the "Statement of the Issue" as, "Did the Trial Court err in granting Defendants' Motion for Summary Judgment on Plaintiff's Title VII and Section 1981 claims, *where Plaintiff testified he was discharged due to his homosexuality[]*?" (emphasis added))).

The *Williamson* Court's holding on Title VII's inapplicability to sexual orientation was a precise ruling on the law governing a particular question raised by the parties and demanding an answer in that case. The Court did not make its ruling subject to any caveats or exceptions. It was not *dicta*. Rather, the Court made a clear determination on a legal issue necessary to resolve the case in light of the evidence adduced and arguments raised. Put simply, the *Williamson* Court *held*, as the law defines a holding, that Title VII does not prohibit discrimination on the basis of sexual orientation.

2. *This Court's Holding in* Schmedding *Affirms the Force of* Williamson.

Ten years after issuing its decision in *Williamson*, this Court unmistakably reaffirmed *Williamson* in holding that sexual orientation (perceived or actual) is not itself a protected characteristic under Title VII. In *Schmedding v. Tnemec Co.*, the plaintiff brought a Title VII claim (among other claims) against his former employer and former co-workers, alleging sexual harassment by his former male supervisor and at least one female co-worker. 187 F.3d 862, 863 (8th Cir. 1999). The district court construed the plaintiff's complaint as alleging harassment "because of his perceived sexual orientation rather than because of his sex," and dismissed his Title VII claim pursuant to Federal Rule of Civil Procedure 12(b)(6). *Id.* On appeal, this Court remanded the case for further consideration in light of the Supreme Court's intervening decision in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75

(1998), which recognized same-sex harassment as actionable under Title VII.[7] 187 F.3d at 864. On remand, the district court again ordered dismissal, after which the plaintiff again appealed. *Id.* As this Court explained, in ordering dismissal for a second time,

> The district court relied on our decision in *Williamson v. A.G. Edwards and Sons, Inc.*, for its conclusion that harassment based on sexual orientation was not cognizable under Title VII. In *Williamson*, a pre-*Oncale* case, **we held that Title VII does not afford a cause of action for discrimination against homosexuals.**

Id. at 864 n.3 (emphasis added) (internal citation omitted). On appeal, this Court reversed the district court's dismissal order, concluding that the district court erroneously focused solely on the plaintiff's non-actionable allegations of being taunted for being homosexual and subjected to rumors regarding his perceived sexual preference, to the exclusion of the plaintiff's actionable allegations of being patted on the buttocks, asked to performed sexual acts, and the like. *Id.* at 864-65. Considering the presence of non-actionable allegations (perceived sexual

[7] Specifically, the *Oncale* Court held that "nothing in Title VII necessarily bars a claim of discrimination 'because of . . . sex' merely because the plaintiff and the defendant (or the person charged with acting on behalf of the defendant) are of the same sex." 523 U.S. at 79. In *Oncale*, the plaintiff "was forcibly subjected to sex-related, humiliating actions," "physically assaulted . . . in a sexual manner," and "threatened . . . with rape" by male supervisors and/or a male co-worker. *Id.* at 77. The holding of *Oncale*—that Title VII protects employees from sex-based discrimination at the hands of an individual of the same sex—has no application to Horton's claims premised solely on his sexual orientation.

orientation) and potentially actionable allegations (being patted on the buttocks, asked to perform sexual acts, and the like), this Court explained: "We do not think that, simply because some of the harassment alleged by Schmedding includes taunts of being homosexual or other epithets connoting homosexuality, the complaint is thereby transformed from one alleging harassment based on sex [*i.e.*, actionable] to one alleging harassment based on sexual orientation [*i.e.*, not actionable]." *Id.* at 865 (alterations added).

Horton and certain *amici* suggest that *Schmedding* somehow "open[ly] question[ed] . . . the meaning of *Williamson*" post-*Oncale*, "recogni[zed] . . . the inherent limitations of *Williamson*," "was intended to cabin *Williamson*," or "was a 'drive-by' labeling of the *Williamson* sentence as a holding."[8] (App. Br. at 47-48);

[8] One *amicus* faults the *Schmedding* Court for "describe[ing] the *Williamson* sentence as a holding without engaging in any analysis of whether the statement should be understood as a holding or dicta." (*Amicus* Br. of Columbia Law School Sexuality and Gender Law Clinic at 11). Another *amicus* contends that the *Schmedding* Court erred in "allowing the plaintiff to amend his complaint to delete any reference to his 'perceived sexual preference,' thereby drawing a line between discrimination based on sexual orientation and discrimination incorporating taunts regarding homosexuality." (*Amicus* Br. of the EEOC at 27). The inescapable conclusion, as tacitly acknowledged by these arguments, is that *Williamson*'s holding, as recognized and applied in *Schmedding*, was just that: a holding. *See, e.g.*, *Hageman v. Barton*, 817 F.3d 611, 616 (8th Cir. 2016) (explaining that a panel's duty to follow a prior panel's decision "is not governed by the length or depth of the prior panel's treatment of the issue" but is instead "governed by whether the cases are materially distinguishable and whether the prior panel's treatment of the issue resulted in a holding or mere dicta").

(*Amicus* Br. of Columbia Law School Sexuality and Gender Law Clinic at 11-12). To the contrary, in *Schmedding*, this Court made clear that, based on *Williamson*, the plaintiff's sexual orientation-based allegations were non-actionable: Because the plaintiff also alleged sex-based discrimination (being patted on the buttocks, asked to perform sexual acts, and the like), however, his Title VII claim should have been allowed to proceed, even to the extent such acts were done by his male supervisor (*i.e.*, post-*Oncale*). 187 F.3d at 864-65. Thus, any suggestion that *Schmedding i*s somehow inconsistent with, or limited, *Williamson* is belied not only by this Court's characterization of *Williamson* as a ***holding***, but also by this Court's holding in *Schmedding*. *See, e.g.*, *Johnson v. Shinseki*, No. 1:12-CV-00187SNLJ, 2013 WL 1987352, at *2 (E.D. Mo. May 13, 2013) (recognizing that "*Oncale* did not change the requirement that plaintiffs demonstrate that the discrimination or harassment took place 'because . . . of sex' " and, ultimately, "claims may not be made on the basis of sexual orientation").[9]

[9] Unlike Schmedding's citation to *Oncale*, Horton fails to identify any intervening Supreme Court decision on Title VII that would call into question *Williamson*. Citations to *Lawrence v. Texas*, 539 U.S. 558 (2003) and *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015) are inapposite. (*See* App. Br. at 51). Those cases dealt with fundamental questions of personal liberty as embodied in the Constitution. This case is one of statutory interpretation. *See Hively*, 853 F.3d at 372 (Sykes, J., dissenting) ("The Due Process and Equal Protection Clauses are constitutional restraints on government. Title VII is a statutory restraint on employers. The legal regimes differ accordingly. Any discrepancy is a matter for legislative, not judicial, correction."); *see also id.* at 356 (Posner, J., concurring) ("Another decision we should avoid in ascribing present meaning to Title VII is *Loving v. Virginia*, which

Within this Circuit alone, district courts (in addition to the District Court below) have held on no less than eleven occasions that *Williamson* is binding precedent in this Circuit.[10] This is in addition to the comparably voluminous decisions of other courts of appeals that have construed *Williamson* similarly.[11]

Hively argues protects her right to associate intimately with a person of the same sex. That was a constitutional case, based on race. It outlawed state prohibitions of interracial marriage. It had nothing to do with the recently enacted Title VII." (internal citation omitted)). The EEOC takes the position that "*Williamson* is no longer good law" post-*Price Waterhouse*, even though *Price Waterhouse* was decided before *Williamson*. (*Amicus* Br. of the EEOC at 24-26 (bold font omitted)). As discussed *infra* § II(B)(3), *Price Waterhouse* did not overrule, and is not inconsistent with, *Williamson*.

[10] *See Miller v. Bd. of Regents of Univ. of Minn.*, No. 15-CV-3740 (PJS/LIB), 2018 WL 659851, at *2 (D. Minn. Feb. 1, 2018); *Bland v. Burwell*, No. 14-0226-CV-W-ODS, 2016 WL 110597, at *1 (W.D. Mo. Jan. 8, 2016); *Pambianchi v. Ark. Tech Univ.*, 95 F. Supp. 3d 1101, 1112 (E.D. Ark. 2015); *Pambianchi v. Ark. Tech Univ.*, No. 4:13-CV-00046-KGB, 2014 WL 11498236, at *4 (E.D. Ark. Mar. 14, 2014); *Johnson v. Shinseki*, No. 1:12-CV-00187SNLJ, 2013 WL 1987352, at *2 (E.D. Mo. May 13, 2013); *Robertson v. Siouxland Cmty. Health Ctr.*, 938 F. Supp. 2d 831, 841 (N.D. Iowa 2013); *Logan v. Chertoff*, No. 4:07-CV-1948 CAS, 2009 WL 3064882, at *1 n.3 (E.D. Mo. Sept. 22, 2009), *aff'd sub nom. Logan v. Napolitano*, 376 F. App'x 660 (8th Cir. 2010); *Campbell v. Rock Tenn Co.*, No. 06-CV-4272(JMR-FLN), 2008 WL 4951464, at *5 n.3 (D. Minn. Nov. 18, 2008); *Harmon v. Dep't of Veterans Affairs*, No. 4:06CV1674SWW, 2008 WL 495876, at *2 (E.D. Ark. Feb. 20, 2008), *aff'd,* 301 F. App'x 569 (8th Cir. 2008); *Klein v. McGowan*, 36 F. Supp. 2d 885, 889 (D. Minn.), *aff'd,* 198 F.3d 705 (8th Cir. 1999); *Kelley v. Vaughn*, 760 F. Supp. 161, 163 (W.D. Mo. 1991).

[11] *See Zarda*, 883 F.3d at 107; *Hively*, 853 F.3d at 342; *Evans*, 850 F.3d at 1256; *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1075 (9th Cir. 2002); *Bibby v. Philadelphia 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.*

Indeed, recognition of *Williamson* as controlling Eighth Circuit precedent is universal; not a single court has suggested—much less held—that it is somehow non-binding *dicta*. It is not.

Because *Williamson* is the law of the Eighth Circuit, the District Court correctly held that Horton's sex-based Title VII claim, premised solely on sexual orientation, failed as a matter of law. As such, this Court, too, must apply *Williamson* and thereby affirm the District Court's Judgment.

B. This Court's Decision in *Williamson* Was Correct, and Horton's Theories to Expand Title VII's Reach Fail.

Because this Court is bound to apply *Williamson* (and, for that matter, *Schmedding*), further analysis regarding Title VII's inapplicability to sexual orientation is unnecessary. No other arguments proposed by Horton and *amici* change the necessary result. That said, were the Court to engage in further analysis, such analysis would reveal that *Williamson* was decided correctly: Title VII does not enumerate sexual orientation as a protected characteristic, as a function of "sex" or otherwise. Horton and *amici* propose, as was proposed in other, recent cases (most notably *Hively* and *Zarda*), three intersecting theories as to how Title VII's use of

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Pizza Hut of Am., Inc., 99 F.3d 138, 143 (4th Cir. 1996); *Dillon v. Frank*, 952 F.2d 403 (6th Cir. 1992); *Ruth v. Children's Med. Ctr.*, 940 F.2d 662 (6th Cir. 1991).

"sex" might be construed to include or otherwise encompass "sexual orientation."[12] Each of these theories fails, however, because each is built on a faulty premise: "sexual orientation" is not a function of "sex" vis-à-vis Title VII's prohibition on discrimination "because of . . . sex."

1. *"Sex" Does Not Encompass "Sexual Orientation" under Title VII.*

i. The Plain Text of Title VII, When Given Its Ordinary, Contemporary, and Common Meaning, Reveals that Sexual Orientation Is Not Protected under the Guise of "Sex."

Because Title VII does not define discrimination "because of . . . sex," statutory construction principles apply.[13] "It is a fundamental canon of statutory

[12] These theories were first espoused by the EEOC in *Baldwin v. Foxx*, EEOC DOC 0120133080, 2015 WL 4397641, at *6-7 (July 16, 2015), reversing decades of contrary interpretation, after the agency "took a hard look" at the issue. (*See Amicus* Br. of the EEOC at 7). Notably, the EEOC has previously taken the position that its interpretation of Title VII on this issue is not entitled to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), *see Zarda* Oral Argument 26:45-28:48 (Sept. 26, 2017), and the EEOC does not contend otherwise in its *Amicus* Brief in this case. (*See Amicus* Br. of the EEOC, *passim*).

[13] Although, as discussed *infra* § II(B)(1)(iii), Title VII was amended by the Pregnancy Discrimination Act of 1978, to include a non-exhaustive definition of "because of sex," this definition, which was *legislatively* enacted in response to the holding in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), is specific to pregnancy-related sex discrimination. *See* 42 U.S.C. § 2000e(k) ("The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . .").

construction that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning."[14] *Sandifer v. U.S. Steel Corp.*, 134 S.Ct. 870, 876 (2014) (internal quotation marks omitted); *see also Hennepin Cty. v. Fed. Nat. Mortg. Ass'n,* 742 F.3d 818, 821 (8th Cir. 2014) ("When interpreting a statute, we look to its plain language, and give words their ordinary, contemporary, common meaning unless they are otherwise defined in the statute itself." (internal quotation marks omitted)); *Owner-Operator Indep. Drivers Ass'n, Inc. v. Supervalu, Inc.*, 651 F.3d 857, 862 (8th Cir. 2011) ("Still, as with any question of statutory interpretation, the court begins its analysis with the plain language of the statute.").

"[T]he most relevant time period for determining a statutory term's meaning is the time when the statute was enacted." *Wells Fargo Bank, N.A. v. WMR e-PIN, LLC*, 653 F.3d 702, 708 (8th Cir. 2011) (internal quotation marks omitted); *see also Sandifer*, 134 S.Ct. at 876-77 (looking to dictionary definitions at the time of the statute's enactment to interpret statutory term); *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 228 (1994) (stating that the year when the statute becomes

[14] Horton takes exception to this statutory interpretation principle, suggesting that it is not a "simple exercise" and, instead, is "little more than a roundabout search for legislative history." (App. Br. at 21) (second quotation to *Zarda*, 883 F.3d at 137 (Lohier, J., concurring)). Ascribing words their "ordinary, contemporary, and common reading," as the Supreme Court has directed, may not always be a "simple exercise," but here, it is. Moreover, this statutory interpretation technique is only a search for legislative history inasmuch as the legislature used the then-common understanding of the English language in drafting the statute.

law is "the most relevant time for determining a statutory term's meaning"); *Perrin v. United States*, 444 U.S. 37, 42 (1979) ("Therefore, we look to the ordinary meaning of the term 'bribery' at the time Congress enacted the statute in 1961.").

"In common, ordinary usage in 1964—and now, for that matter—the word 'sex' means biologically *male* or *female*; it does not also refer to sexual orientation."[15] *Hively*, 853 F.3d at 362–63 (Sykes, J., dissenting) (emphasis in original) (collecting dictionaries); *Zarda*, 883 F.3d at 145 (Lynch, J., dissenting) (emphasis in original) (quoting *Hively*, 853 F.3d at 362-63). Horton appears to concede this point (App. Br. at 20), but nonetheless contends that "sexual orientation discrimination is a form of sex discrimination" because "one cannot fully define a person's sexual orientation without identifying his or her sex[.]" (App. Br. at 10 & 13 (quotation omitted)). Setting aside that sex (*i.e.*, male or female) can be defined with no reference to sexual orientation and that sexual orientation can be defined with no reference to sex, whether one *could* define sexual orientation by referencing sex does not bring sexual orientation within the meaning of "sex" any more than any other unprotected characteristic would. In any event, as Judge Sykes succinctly

[15] Notably, the *Zarda* majority conceded as much, at least *arguendo*. *Zarda*, 883 F.3d at 107 n.2 (majority), 145 n.9 (Lynch, J., dissenting) (recognizing such concession). The *Hively* majority appeared to as well, at least to some degree. *See Hively*, 853 F.3d at 341 (recognizing as a "truism" that Title VII's prohibition against sex discrimination "implies that it is unlawful to discriminate against women because they are women and against men because they are men" (citation omitted)).

explained in her dissenting opinion in *Hively*, the common meaning of "sex" when Title VII was enacted did not encompass "sexual orientation":

> [T]he analysis must begin with the statutory text; it largely ends there too. Is it even remotely plausible that in 1964, when Title VII was adopted, a reasonable person competent in the English language would have understood that a law banning employment discrimination "because of sex" also banned discrimination because of sexual orientation? The answer is no, of course not.

853 F.3d at 362.

While Horton responds that "sexual orientation" need not be synonymous with "sex" to fall within its ambit (App. Br. at 20-21), this argument misses the mark. As Judge Sykes observed in her dissent, "The two terms ["sexual orientation" and "sex"] are never used interchangeably, and the latter is not subsumed within the former; *there is no overlap in meaning*." 853 F.3d at 363 (emphasis added). Phrased differently, the two terms "are categorically distinct and widely recognized as such." *Id.* Simply put, sexual orientation is not a function of sex. Sex is determinable without any reference to sexual orientation. Sexual orientation is determinable without any reference to sex.

ii. A Comparator Analysis Is an Inapt Mechanism for Interpreting Title VII.

Horton next proposes using a comparator analysis to interpret Title VII's "because of . . . sex" prohibition. (App. Br. at 22-23). To this end, Horton asserts that "the relevant inquiry is whether the employer treats a man attracted to men

differently than it treats a woman attracted to men." (App. Br. at 22). In other words, Horton proposes changing both the sex of the individual *and* his or her sexual orientation to inquire whether the individual was subject to "sex" discrimination.

As this Court has recognized, a comparator analysis can be used as an evidentiary tool to ascertain the true motive behind an adverse employment action. *See, e.g.*, *Schaffhauser v. United Parcel Serv., Inc.,* 794 F.3d 899, 904 (8th Cir. 2015) ("Schaffhauser also claims that UPS treated similarly situated employees differently, showing a discriminatory animus."); *Amini v. City of Minneapolis,* 643 F.3d 1068, 1076 (8th Cir. 2011) ("Amini contends that he was treated less favorably than similarly situated Caucasian candidates and that the disparate treatment is evidence of the City's discriminatory motive."); *EEOC v. Kohler Co.,* 335 F.3d 766, 776 (8th Cir. 2003) ("A plaintiff may prove allegations of disparate treatment by demonstrating that he was treated less favorably than similarly situated employees outside the plaintiff's protected class."); *see also Edwards v. Hiland Roberts Dairy, Co*., 860 F.3d 1121, 1125–26 (8th Cir. 2017) ("A plaintiff may show pretext, among other ways, by showing that an employer . . . treated similarly-situated employees in a disparate manner . . . ." (quotation omitted)). However helpful this device may be from an evidentiary standpoint, such as in the summary judgment context when engaging in a burden-shifting analysis pursuant to *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973), "it is not an interpretive tool." *Hively*, 853

F.3d at 366 (Sykes, J., dissenting). As such, it says "*nothing* about the meaning or scope of Title VII." *Id.* (emphasis in original); *see also id.* at 367 (explaining that "the point of 'looking at comparators' in Title VII cases is to see if the evidentiary record permits a *factual* inference of *actual* discriminatory motive; the comparative method has no *interpretive* function" (emphasis in original)). Therefore, Horton's proposed comparator analysis, in this statutory interpretation endeavor, is a red herring.

Even if the Court were to find a comparator analysis probative of the original, contemporary, and common meaning of "sex," Horton's proposed comparator analysis—comparing a male married to another male with a female married to a male—"load[s] the dice by changing *two* variables—the plaintiff's sex *and* sexual orientation—to arrive at the hypothetical comparator."[16] *Hively*, 853 F.3d at 366 (Sykes, J., dissenting). In other words, Horton's proposed comparator is not an accurate comparator at all—even from an evidentiary perspective.[17] Instead, a

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[16] Horton similarly asks, "Consider this scenario: if you start with vodka and orange juice, and then replace the orange juice with grapefruit juice, have two things changed, or just one thing? The answer is 'one thing.' " (App. Br. at 23). Even if a comparator analysis were apt to interpret the language of Title VII, this hypothetical would not be; it is not the protected characteristic of the vodka or the juice for which Horton advocates Title VII's expansion (*i.e.*, sex, male or female), but rather, the nature of the relationship between the vodka and the juice (*i.e.*, sexual orientation, heterosexual or homosexual).

[17] In a similar vein, one *amicus* posits that whether sexual orientation-based discrimination can constitute discrimination "because of . . . sex" is a question for

proper comparator analysis would be to compare qualified homosexual men to qualified homosexual women; "[i]f an employer is willing to hire gay men but not lesbians, then the comparative method has exposed an actual case of sex discrimination." *Hively*, 853 F.3d at 366 (Sykes, J., dissenting). Conversely, if "an employer hires only heterosexual men and women and rejects all homosexual applicants, then no inference of sex discrimination is possible"; this comparator analysis would yield evidence of *sexual orientation*-based animus, not *sex*-based animus. *Id.* at 366-67.

Ultimately, as interesting as the "abstract thought experiment[]" proposed by Horton might be, it serves "no *interpretive* function." *Id.* at 367 (emphasis in original). Unless and until Congress amends Title VII to enumerate sexual orientation as a protected characteristic, which is within its sole province, Horton's proposed, hypothetical comparator analysis has no application in the Title VII context.

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the jury—not a court—to decide. (*Amicus* Br. of the St. Louis and Kansas City, Missouri Chapters of the National Employment Lawyers Association at 2-3). Much like Horton's attempt to repurpose an evidentiary tool—comparator evidence—into a statutory interpretation mechanism, this argument is inapposite. If a jury found Title VII sex discrimination based solely upon sexual orientation, the verdict could not stand as a matter of law. Judges, not juries, interpret statutes. *See, e.g.*, *In re Racing Servs., Inc.*, 779 F.3d 498, 502 (8th Cir. 2015) ("The interpretation of a statute is a question of law for the trial court, subject to *de novo* review on appeal." (quoting *In re Graven*, 936 F.2d 378, 384-85 (8th Cir. 1991)).

iii. Congressional Inaction in Amending Title VII, Coupled with Congressional Action Elsewhere and State Legislatures' Enactments, Reveal the Ordinary, Public Meaning of "Sex" in 1964.

Because Congress added "sex" as a protected trait in a floor amendment "at the last minute" before the House passed the bill, there is virtually no legislative history contemporaneous with its enactment. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 63-64 (1986); *accord Sommers*, 667 F.2d at 750. Every Congress since 1974, however, has considered a proposed bill to add "sexual orientation" as a protected Title VII classification. *See Zarda*, 883 F.3d at 153 & n.23 (Lynch, J., dissenting) (listing them). Not one such bill has passed. *See id.* Indeed, despite amending Title VII in 1972 (to extend to federal, state, and local government employees (the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103), in 1978 (the Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076, which abrogated *General Electric Co. v. Gilbert*, 429 U.S. 125, 135-40 (1976)), and in 1991 (the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991)), Congress never added "sexual orientation" to Title VII's list of protected characteristics. While care must be given when attempting to divine congressional intent by inaction, *see Pension Ben. Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) (cautioning that "subsequent legislative history is a hazardous basis for inferring the intent of an earlier Congress" (internal quotation marks omitted)), when, as here, Congress rejects "repeated demands" to amend a statute, such inaction indicates a

"clear expression of congressional intent."[18] *Heckler v. Day*, 467 U.S. 104, 118 n.30 (1984). As this Court has explained, "the fact that the proposals [to amend Title VII to prohibit discrimination on the basis of 'sexual preference'] were defeated indicates that the word 'sex' in Title VII is to be given its traditional definition, rather than an expansive interpretation." *Sommers*, 667 F.2d at 750; *see also Zarda*, 883 F.3d at 155 (Lynch, J., dissenting) (explaining that "the proposal and rejection of over fifty amendments to add sexual orientation to Title VII means something" and that this "something" does "*not* mean . . . that Congress . . . believed that Title VII 'already incorporated the change.' " (emphasis in original) (quoting *Pension Ben. Guar. Corp.*, 496 U.S. at 650)).

[18] While application of Title VII, as written and properly understood, may result in effects Congress did not intend, *see Lewis v. City of Chicago*, 560 U.S. 205, 217 (2010); (App. Br. at 35-37), the history of Title VII and the civil rights movement, as detailed at length by Judge Lynch in his dissenting opinion in *Zarda*, provides valuable insight into the common, contemporary, and ordinary meaning of the words used by Congress. *See Zarda*, 883 F.3d at 143 ("[This] history makes it obvious to me . . . that the majority misconceives the fundamental *public* meaning of the language of the Civil Rights Act. . . . By prohibiting discrimination against people based on their sex, it did not, and does not, prohibit discrimination against people based on their sexual orientation." (emphasis in original)). And, as to Horton's precise argument regarding unintended effects, "the fact that a prohibition on discrimination against members of one sex may have unanticipated consequences when courts are asked to consider carefully whether a given practice does, in fact, discriminate against members of one sex in the workplace does not support extending Title VII by judicial construction to protect an entirely different category of people." *Id.* at 145.

In sum, given the volume of proposed amendments and enactments and the fact that at least three circuit courts of appeals (including this Court), *see Williamson*, 876 F.2d at 70; *Uulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984); *DeSantis*, 608 F.2d at 329-30, and the EEOC, *see, e.g.*, *Dillon v. Frank*, EEOC Doc. 01900157, 1990 WL 1111074, at *3 (Feb. 14, 1990); *Tyler v. Marsh*, EEOC Doc. 05890720, 1989 WL 1007268, at *1 (Aug. 10, 1989), had concluded that sexual orientation was outside the ambit of Title VII's protections, it is fair to conclude that "Congress was unquestionably aware, in 1991 [when it passed the Civil Rights Act], of a general consensus about the meaning of 'because of . . . sex[.]"[19] *Zarda*, 883 F.3d at 154 (Lynch, J., dissenting).

Importantly, "Title VII does not adopt a broad principle of equal protection in the workplace; rather, its language singles out for prohibition discrimination based on particular categories and classifications that have been used to perpetuate injustice—but not all such categories and classifications." *Id.* For example, Title

[19] While Congress did not explicitly acknowledge these judicial decisions or the EEOC's position on this issue in enacting the Civil Rights Act of 1991, in *Lorillard v. Pons*, the Supreme Court held that Congress "was presumed to be aware" of certain courts of appeals and district court decisions holding that there was a right to a jury trial in the Fair Labor Standards Act of 1938 ("FLSA") context when it enacted the Age Discrimination in Employment Act of 1967 ("ADEA"), which was modeled after and incorporated various provisions of the FLSA, particularly given that in fashioning the ADEA, Congress addressed other lower court decisions regarding other aspects of the FLSA. 434 U.S. 575, 580 & n.7 (1978).

VII does not prohibit discrimination based upon age. *See, e.g.*, 42 U.S.C. § 2000e-2(a)(1). (Congress addressed this by passing the Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602.) Nor does Title VII prohibit discrimination based upon disability. *See, e.g.*, 42 U.S.C. § 2000e-2(a)(1). (Again, Congress addressed this by subsequent legislative enactment. *See* Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327.) Indeed, Title VII did not protect against pregnancy-based discrimination, which of course affected women, until Congress took action in 1978. *See* Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k). As this Court has explained, federal private employment statutes "serve the narrow purpose of prohibiting discrimination based on certain, discreet classifications such as age, gender, or race." *Hill v. St. Louis Univ.*, 123 F.3d 1114, 1120 (8th Cir. 1997). Sexual orientation is not one such enumerated, protected classification. *Cf. Guimaraes v. SuperValu, Inc.*, 674 F.3d 962, 973 (8th Cir. 2012) ("[W]hile 'aliens are protected from illegal discrimination' under Title VII, 'nothing in Title VII makes it illegal to discriminate on the basis of citizenship or alienage' " (quoting *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 95 (1973) (internal alterations omitted)).

To this end, as of the filing of this Brief, no less than twenty-two (22) states, as well as the District of Columbia, have enacted or amended their human rights laws to enumerate "sexual orientation" as a protected characteristic, though "sex"

was already enumerated.[20] This is in addition to the countless local ordinances providing the same specific protection for sexual orientation. *See Hively*, 853 F.3d at 364 (Sykes, J. dissenting). Also significant is the fact that Congress has enumerated "sexual orientation" as a protected characteristic in other contexts, *see, e.g.*, 18 U.S.C. § 249(a)(2) (hate crimes); 34 U.S.C. § 12291(b)(13)(A) (certain federal funding programs), but has not amended Title VII thusly, *i.e.*, to include sexual orientation as a protected characteristic in the private employment setting.[21] *See also* 5 C.F.R. § 300.103(c) (non-performance-related treatment under the Civil Service Reform Act, 5 U.S.C. § 2302(b)(10)). This further reflects Congress's knowledge and intent that these are discrete concepts and that "sex" means male or female, not sexual orientation.

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[20] *See* Cal. Civ. Code § 51(b); Col. Rev. Stat. § 23-34-402(1)(a); Conn. Gen. Stat. § 46a-81c; Del. Code § 711(a); D.C. Code § 2-1402.31(a); Haw. Rev. Stat. § 378-2(a)(1); 775 Ill. Comp. Stat. 5/1-103(Q); Iowa Code § 216.7(1)(a); Me. Rev. Stat. § 4572.1.A; Md. Code § 20-606(a); Mass. Gen. Laws 151B § 4; Minn. Stat. § 363A.(1)(a)(1); Nev. Rev. Stat. § 613.330.1(a); N.H. Rev. Stat. § 354-A:7(I); N.J. Stat. § 10:5-4; N.M. Stat. § 28-1-7.A; N.Y. Stat. § 296.1(a); Or. Rev. Stat. § 659A.403(1); R.I. Gen. Laws § 28-5-7(1); Utah Code § 34A-5-106(1); Vt. Stat. § 495(a); Wash. Rev. Code § 49.60.030(1); Wis. Stat. § 106.52(3).

[21] The Executive Branch has similarly taken action to explicitly prohibit sexual orientation-based discrimination in certain contexts, including employment. *See* Exec. Order 13,672 (July 21, 2014) (government contracting); Exec. Order 13,087 (federal employment). Of course, the Executive Branch, like the Judicial Branch, lacks the unilateral authority to amend Title VII to include sexual orientation as a protected characteristic.

This is all to say, while, in enacting Title VII, Congress endeavored to "assure equality of employment opportunities," *see Pullman Standard v. Swint*, 456 U.S. 273, 276 (1982), and to "strike at the entire spectrum of disparate treatment of men and women in employment," *see Oncale*, 523 U.S. at 78 (quoting *Meritor*, 477 U.S. at 64), Congress nonetheless "prohibit[ed] only certain categories of unfair discrimination" and did not prohibit, and has not since prohibited, "discrimination based on sexual orientation." *Zarda*, 883 F.3d at 148 (Lynch, J., dissenting); *see also Hocevar v. Purdue Frederick Co*., 223 F.3d 721, 738 (8th Cir. 2000) ("Title VII is not a general civility code."); *Tovar v. Essential Health*, 857 F.3d 771, 777 (8th Cir. 2017) (explaining that Title VII's substantive antidiscrimination provisions are to be afforded a "narrower construction" than Title VII's antiretaliation provision (citing *Thompson v. N. Am. Stainless, LP*, 562 U.S. 170, 173-74 (2011)); *Coutu v. Martin Cty. Bd. of Cty. Comm'rs*, 47 F.3d 1068, 1074 (11th Cir. 1995) ("Unfair treatment, absent discrimination based on race, sex, or national origin [or another characteristic enumerated in Title VII], is not an unlawful employment practice under Title VII.").

2. *An Allegation of Sexual Orientation-Based Discrimination Is Not Cognizable under an Associational Discrimination Theory.*

Horton next attempts to shoehorn "sexual orientation" within the meaning of "sex" through an associational theory, that is, that "sexual orientation discrimination is sex discrimination because it treats otherwise similarly-situated people differently

because of their sex, viewed in relation to the sex of the individuals with whom they associate (or to whom they are attracted)." (App. Br. at 15-16). Horton chiefly relies upon decisions from other courts of appeals applying an associational theory to race-based (interracial) discrimination claims. (App. Br. at 15-18). Horton's attempt to draw upon race-based associational discrimination doctrine to craft a sexual orientation-based associational discrimination claim fails, however, because the comparison suffers a logical (and legal) flaw: While discrimination based on an interracial relationship is "inherently racist," discrimination based on sexual orientation "is not inherently *sexist*."[22] *Hively*, 853 F.3d at 368 (Sykes, J., dissenting) (emphasis in original). Men and women can be homosexual or heterosexual, but their sexes are still either "male" or "female."

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[22] Notably, Congress chose to explicitly protect employees' associations in the disability context. *See* 42 U.S.C. § 12112(b)(4) (defining "discrimination" to include denial of an equal job or benefits to a qualified individual "because of the known disability of an individual with whom the qualified individual is known to have a relationship or association"). Title VII, of course, contains no such associational definition of discrimination, as to "sex" or otherwise. Regardless, the Court need not define the precise contours of when a Title VII associational discrimination claim could lie because the theory proposed by Horton falls outside of the basic framework of such a claim, in that it fails to allege the *sine qua non* of a Title VII claim: discrimination based on his protected characteristic (sex). *See, e.g.*, *Tovar*, 857 F.3d at 776 (recognizing the holdings of *Tetro* and *Parr*, but finding them inapplicable to the plaintiff's sex-based Title VII claim premised upon her son's gender reassignment surgery, not her own sex); *see also Oncale*, 523 U.S. at 80 ("The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring))).

Notably, none of the race-based (interracial) Title VII association cases upon which Horton relies involved race-neutral, anti-interracial allegations of discrimination. Rather, in each of these cases, the plaintiff was white, and alleged discrimination was based upon racism exhibited in connection with the race of the person with whom the plaintiff associated. *See Holcomb v. Iona Coll.*, 521 F.3d 130, 138 (2d Cir. 2008) (white male plaintiff alleging discrimination based on, among other things, marrying an African-American woman); *Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick, & GMC Trucks, Inc.*, 173 F.3d 988, 994 (6th Cir. 1999) (white male employee alleging discrimination because he had a biracial child); *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 156 F.3d 581, 589 (5th Cir. 1998), *op. reinstated on reh'g en banc sub nom. Williams v. Wal-Mart Stores, Inc.*, 182 F.3d 333 (5th Cir. 1999) (white female employee alleging discrimination because she was dating an African-American man); *Collins v. Rectors and Visitors of Univ. of Va.*, No. 96-1078, 1998 WL 637420, at *1-2 (4th Cir. Aug. 31, 1998) (per curiam) (white male employee alleging discrimination because his wife was African-American); *Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 889 (11th Cir. 1986) (white man denied employment because he was married to an African-American woman). As such, Horton's analogy misses the mark. A sex-based Title VII associational theory (that is, discrimination on the basis of animus against the protected characteristic—being male or female—of someone with whom the

employee associates) is all but impossible, both logically and legally. *See Zarda*, 883 F.3d at 160 (Lynch, J., dissenting) ("It is . . . difficult to imagine realistic hypotheticals in which an employer discriminated against anyone who so much as associated with men or with women, though . . . academic examples of such behavior could be conjured.").

To bridge the analytical gap between the racist (*i.e.*, race-based) animus rooted in these race-based associational Title VII cases and the absence of any sexist (*i.e.*, sex-based) animus in Horton's sexual orientation-based associational Title VII theory, Horton attempts to rely on a combination of *Loving v. Virginia*, 388 U.S. 1 (1967), a constitutional case striking down Virginia's anti-miscegenation law, and the Supreme Court's unrelated observation that Title VII "treats each of the enumerated categories exactly the same," *see Price Waterhouse*, 490 U.S. at 243 n.9. (App. Br. at 17). Horton's alternative analytical bridge does not support the weight of the argument. *Loving*, which was decided on equal protection grounds, *see supra* n.9, "rests on the inescapable truth that anti-miscegenation laws are inherently racist." *Hively*, 853 F.3d at 368 (Sykes, J., dissenting). Anti-miscegenation laws "are premised on invidious ideas about white supremacy and use racial classifications toward the end of racial purity and white supremacy." *Id.* Sexual orientation discrimination does not "aim[] to promote or perpetuate the supremacy

of one sex."[23] *Id.*; *see also Zarda*, 883 F.3d at 160 (Lynch, J., dissenting) ("Discrimination on the basis of sexual orientation . . . is not discrimination of the sort at issue in [race-based associational cases]. In those cases, the plaintiffs alleged that they were discriminated against because the employer was biased—that is, had a 'discriminatory animus'—*against members of the race with whom the plaintiffs associated*." (emphasis in original)). Moreover, that each of Title VII's enumerated characteristics is treated the same does not overcome the fundamental flaw in Horton's associational argument: the absence of sex-based discrimination, either as to the employee or as to the person with whom the employee associates.

Phrased differently, Horton's attempted associational theory fails because it is not one *based on sex*, but rather, is *based on sexual orientation*. Unlike the race-based associational cases upon which he relies, Horton does not contend that the alleged discrimination he suffered was based on anti-male discrimination: He alleges it was based on sexual orientation discrimination. Because sexual orientation

[23] Horton attempts to circumvent this truism by contending that malice is not required by Title VII. (App. Br. at 18-20); *see, e.g.*, *City of Los Angeles, Dep't of Water & Power v. Manhart*, 435 U.S. 702 (1978) (holding that Title VII was violated by employer's provision requiring women employees to contribute more to employee pension fund than male employees based on empirical evidence that women live longer than men). The absence of malice does not make Horton's sex-based associational theory more logical. Malice or not, there still must be a *sex*-based theory of discrimination.

discrimination is not discrimination "because of . . . sex," Horton's associational theory fails.

3. *An Allegation of Sexual Orientation-Based Discrimination, Standing Alone, Cannot Support a Title VII Sex Discrimination Claim under a Sex Stereotyping Theory.*

Lastly, Horton contends that sexual orientation is a *per se* protected characteristic under Title VII via a *Price Waterhouse* sex stereotyping theory.[24] (App. Br. at 18-20). According to Horton, this is so because discrimination based on sexual orientation "rests on the idea that women should not be attracted to women and men should not be attracted to men." (App. Br. at 19).

As a threshold matter, "sex stereotyping" is not "an independent cause of action," "doctrine," or "theory" under which an employee can assert a Title VII claim. *Hively*, 853 F.3d at 369 (Sykes, J., dissenting). Rather, as the Supreme Court held in *Price Waterhouse*, "the presence of sex stereotyping by an employer 'can certainly be *evidence*' of sex discrimination; [but] to prove her case, the plaintiff must always prove that 'the employer *actually* relied on her gender in making its decision.' " *Id.* (quoting *Price Waterhouse*, 490 U.S. at 251) (emphasis in original). Horton does not allege discrimination because he is male: he alleges discrimination because of his sexual orientation. As such, he has not—and cannot—state a Title

[24] Again, sexual orientation is the *only* allegation of sex stereotyping—and of alleged sex discrimination generally—alleged by Horton. (JA-005 – JA-021).

VII sex discrimination claim, even when relying upon sex stereotyping evidence (whatever evidence that may be) to support his claim. *See supra* § II(B)(1).

Horton's sex stereotyping theory is fundamentally flawed for a second reason: sexual orientation is not a sex-based stereotype. As Judge Sykes explained in *Hively*,

> [H]eterosexuality is not a *female* stereotype; it is not a *male* stereotype; it is not a *sex-specific* stereotype at all. An employer who hires only heterosexual employees is neither assuming nor insisting that his female and male employees match a stereotype specific to their sex. He is instead insisting that his employees match the dominant sexual orientation *regardless of their sex*. Sexual-orientation discrimination does not classify people according to invidious or idiosyncratic *male* or *female* stereotypes. It does not spring from a sex-specific bias at all.

Hively, 853 F.3d at 370 (Sykes, J., dissenting) (emphasis in original); *see also Zarda*, 883 F.3d at 158 (Lynch, J., dissenting) (explaining that sexual orientation discrimination "does not stem from a desire to discriminate against either sex, nor does it result from any sex-specific stereotype, nor does it differentially harm either men or women vis-à-vis the other sex"; "[r]ather, it results from a distinct type of objection to anyone, of whatever gender, who is identified as homosexual").

A close examination of *Price Waterhouse* reveals its inapplicability to sex-neutral, sexual orientation-based allegations of sex stereotyping. In *Price Waterhouse*, Ann Hopkins, a female senior manager, was denied partnership based in part on the partners' belief that she was "macho" and needed to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." 490 U.S. at 235. In addressing the issue presented—

the allocation of burdens of proof on causation in mixed-motives cases—a four Justice plurality did not disturb the district court's conclusion "that a number of the partners' comments showed sex stereotyping at work." *Id.* at 232, 251. As to the legal significance of sex-stereotyping evidence, the plurality explained:

> **In saying that gender played a motivating part in an employment decision, we mean that, if we asked the employer at the moment of the decision what its reasons were and if we received a truthful response, one of those reasons would be that the applicant or employee was a woman.** In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.
>
> . . . . [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, for [i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes. **An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not. Title VII lifts women out of this bind.**

Id. at 250-51 (internal footnote, citations, and quotation marks omitted) (emphasis added) (second alteration in original); *see also Zarda*, 883 F.3d at 158 (Lynch, J., dissenting) (explaining that *Price Waterhouse* is inapplicable in the sexual orientation context because any disapproval of an employee's sexual orientation "does not stem from a desire to discriminate against either sex, nor does it result from any sex-specific stereotype, nor does it differentially harm either men or women vis-à-vis the other sex"; "[t]he belief on which it rests is not a belief about

what men or women ought to be or do; it is a belief about what *all* people ought to be or do" (emphasis in original)).

As *Price Waterhouse* and its progeny make clear, certain evidence of sex stereotyping can support a Title VII sex discrimination claim when, at base, an individual of one sex is treated unfairly because of his or her sex. *See, e.g.*, *Lewis v. Heartland Inns of Am., LLC*, 591 F.3d 1033, 1041 (8th Cir. 2010) ("The question is whether [the employer's] requirements that [the plaintiff] be 'pretty' and have the 'Midwestern girl look' were because she is a woman. A reasonable factfinder could find that they were since the terms by their nature apply only to women."). This analysis is inapplicable when, as here, the predicate allegation of sex stereotyping is *sex-neutral* sexual orientation discrimination, in that "members of one sex" are *not* "exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." *See Oncale*, 523 U.S. at 80 (quoting *Harris*, 510 U.S. at 25 (Ginsburg, J., concurring)); *see also Lewis*, 591 F.3d at 1040 (explaining that a woman alleging sex discrimination need not "prove that men were not subjected to the same challenged discriminatory conduct" or "show that the discrimination affected anyone other than herself"; "an employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination *because the discrimination would not occur but for the victim's sex*" (internal quotation marks omitted) (emphasis in original)).

Finally, as the District Court correctly analyzed (Addendum at 7-9; JA-083 – JA-085), "*Price Waterhouse* concerned behavior, not status, and that current doctrine does not protect on the basis of status alone." *Evans*, 850 F.3d at 1259 (Pryor, J., concurring); *see also Pambianchi v. Ark. Tech Univ.*, No. 4:13-CV-00046-KGB, 2014 WL 11498236, at *5 (E.D. Ark. Mar. 14, 2014) ("Courts have routinely rejected attempts to use a sex-stereotyping theory to bring under Title VII what is in essence a claim for discrimination on the basis of sexual orientation." (collecting cases)). This distinction is rooted in the difference between "status-based classes that provide relief," which "are those enumerated within Title VII," and behavior-based evidence, which is "a proxy a plaintiff uses to help support her argument that an employer discriminated on the basis of the enumerated sex category by holding males and females to different standards of behavior." *Evans*, 850 F.3d at 1260 (Pryor, J., concurring).

In short, as Judge Pryor explained in his concurring opinion in *Evans*, "a person who experiences discrimination because of sexual orientation" and a person who "experiences discrimination for deviating from gender stereotypes" are two "legally distinct" concepts. 850 F.3d at 1258. For all of these reasons, Horton's attempt to transform a sex stereotyping theory into an independent Title VII sex claim, based solely upon his sexual orientation, fails as a matter of law.

III. The District Court Properly Dismissed Horton's Title VII Claim Alleging Discrimination "Because of . . . Religion" as a Non-Cognizable, Repackaged Sexual Orientation-Based Discrimination Claim that Otherwise Failed to Allege *Religious* Discrimination.

A. The District Court Properly Dismissed Horton's Religious Discrimination Claim as a Non-Cognizable, Repackaged Sexual Orientation Discrimination Claim.

In his Complaint, Horton also attempted to assert a religion-based Title VII claim. (JA-015 – JA-017). In attempted support of this claim, Horton alleged that by virtue of his May 17, 2016 e-mail (referencing his "partner"), MGM "learn[ed] . . . that [he] did not share [MGM's and/or the Bienstocks'] religious beliefs, and in fact held different beliefs which permitted him to be in a homosexual marriage and relationship[.]" (JA-015). From this, Horton alleged that his "differing religious beliefs" motivated MGM to withdraw the conditional offer of employment. (*Id.*)

The District Court properly concluded that these allegations failed to state a Title VII religious discrimination claim as a matter of law. Nowhere did Horton allege, for example, what his religious beliefs were, or what his "differing religious beliefs" were, aside from that they "permit[ed] him to be in a homosexual marriage and relationship[.]" (JA-015). Nor, as discussed *infra* § III(B), did Horton plausibly allege that he made MGM aware of the "differing religious beliefs" upon which he bases his claim. (JA-010, JA-015). Given that the sole allegation regarding Horton's alleged religious beliefs concerned sexual orientation, *i.e.*, that he was permitted to be in a homosexual marriage, the District Court correctly distilled Horton's religious

discrimination claim for what it was: "merely a repackaged claim for sexual orientation discrimination" that is not cognizable under Title VII as a matter of law. (Addendum at 9-10; JA-085 – JA-086); *see generally McShane Constr. Co., LLC v. Gotham Ins. Co*., 867 F.3d 923, 928 (8th Cir. 2017) (explaining that evaluating the plausibility of a claim "[is] a context-specific task that requires the reviewing court to draw on its judicial experience and common sense" (quoting *Iqbal*, 556 U.S. at 678-69) (alteration in original)); *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 594 (8th Cir. 2009) (explaining that, in evaluating the sufficiency of the pleadings, "the complaint should be read as a whole, not parsed piece by piece to determine whether each allegation, in isolation, is plausible").

As the District Court recognized, other courts have rejected similar attempts to commandeer Title VII's prohibition on religious discrimination as a proxy for an otherwise non-cognizable sexual orientation discrimination claim. For example, in *Prowel v. Wise Business Forms, Inc.*, the plaintiff alleged a Title VII religious harassment claim based solely on his sexual orientation, *i.e.*, his "fail[ure] to conform to his co-workers' religious beliefs . . . by virtue of his status as a gay man." 579 F.3d 285, 292-93 (3d Cir. 2009). The plaintiff also (belatedly) averred "that he suffered religious harassment because" he was "a gay male, which status several of [his] co-workers considered contrary to being a good Christian." *Id.* at 292. The Third Circuit critically analyzed the plaintiff's allegations and concluded that the

plaintiff's claim was not for religious discrimination, but rather, was for sexual orientation discrimination:

> Prowel's identification of this single "religious" belief leads ineluctably to the conclusion that he was harassed not "because of religion," but because of his sexual orientation. Given Congress's repeated rejection of legislation that would have extended Title VII to cover sexual orientation, we cannot accept Prowel's *de facto* invitation to hold that he was discriminated against "because of religion" merely by virtue of his homosexuality.

Id. at 293 (internal citation omitted); *see also Pedreira v. Ky. Baptist Homes for Children,* 579 F.3d 722, 727-28 (6th Cir. 2009) (discussed *infra* § III(B)) (holding similarly); *Burrows v. Coll. of Cent. Fl.*, No. 5:14-CV-197-OC-30PRL, 2014 WL 7224533, at *3-4 (M.D. Fla. Dec. 17, 2014) (dismissing Title VII religious discrimination claim where the plaintiff's "claim for religious discrimination [was] based solely on [the] [d]efendant's alleged religious disapproval of her sexual orientation"); *Bennefield v. Mid-Valley Healthcare, Inc.*, Case No. 6:13-CV-00252 MC, 2014 WL 4187529, at *5 (D. Or. Aug. 21, 2014) ("This is a case centered around alleged discrimination based on [the plaintiff's] sexual orientation. Her claim of religious discrimination, based on a single comment where she simply refused to discuss religion at work, is merely a repackaged claim for sexual orientation.").

For this reason alone, the District Court's decision should be affirmed: Title VII's prohibition on discrimination "because of . . . religion" is not a vehicle by

which an otherwise non-cognizable sexual orientation discrimination claim can be asserted under the guise of "religion." That said, and though the Court need not address them, Horton's other proffered theories of religious discrimination—based on alleged nonadherence to certain supposed tenets—are easily disposed of and fail as a matter of law, as discussed below.

B. Horton's Religious Discrimination Claim Is Not Cognizable Under a Nonadherence Theory, Either as to his Alleged "Differing Religious Beliefs" Regarding Homosexual Marriage or as to his Homosexual Marriage Itself.

Horton attempts to cast his religious discrimination claim as a nonadherence claim, either with respect to his own "differing religious beliefs" regarding homosexual marriage and relationships, as alleged in his Complaint (JA-015 – JA-017), or as to his homosexual marriage itself, as suggested in his Brief.[25] (App. Br. at 25-34). Neither theory states a claim.

[25] In his Brief, it is unclear whether Horton attempts to tailor his nonadherence theory to his alleged "fail[ure] to adopt [MGM's] religious beliefs" or, alternatively, his alleged failure "to comport himself in conformity with [MGM's] religious beliefs." (*See* App. Br. at 25); (*see also id.* at 27 ("Thus, it is immaterial whether a plaintiff advancing a nonadherence claim professes a given denomination or has religious beliefs himself."). In his Complaint, Horton alleged religious discrimination based *only* on his "differing religious beliefs," *i.e.*, not his homosexual marriage. (JA-015 – JA-017). Regardless, as discussed herein, the result is the same under either theory.

1. *Horton Did Not Plausibly Allege that He Informed MGM of, or that MGM Otherwise Had Reason to Suspect, His "Differing Religious Beliefs" Relating Solely to Homosexuality.*

To the extent Horton's religious discrimination claim is based on his alleged failure to conform his religious beliefs to those of MGM, Horton failed to raise plausible allegations in his Complaint that MGM knew of, or had any reason to suspect, his alleged "differing religious beliefs" regarding homosexuality in the first instance. The only basis on which Horton alleged that MGM knew of his religious beliefs was his May 17, 2016 e-mail in which he made a passing reference to his "partner," who he identified by a male pronoun.[26] (*See* JA-010, JA-015). Horton did not allege that he referenced his religious beliefs in this e-mail. (*See* JA-010).

As such, Horton's theory vis-à-vis MGM's alleged knowledge his of religious beliefs relies on the premise that MGM could divine his *religious beliefs* from his vague, passing reference in an e-mail about his "partner," to whom he ascribed the pronoun "he," which was made in the context of Horton discussing getting his MBA. (*Id.*) This theory is not plausible, and thus not viable, as a matter of law. Without knowing, or having any plausible reason to suspect, Horton's religious beliefs in any way (much less that they were "differing"), MGM necessarily could not have withdrawn the offer of employment because of Horton's alleged nonadhering

[26] This passing reference is the sole basis on which Horton alleges that MGM was aware of his sexual orientation. (*See* JA-010).

religious beliefs.[27] *See, e.g.*, *Bennefield*, 2014 WL 4187529, at *5 (recognizing that the plaintiff "point[ed] to no case holding a defendant discriminated based on religion despite not knowing [the] plaintiff's religion, or even knowing if [the plaintiff] holds any religious beliefs at all").

2. *Horton's Alternative, Unpleaded Theory—That His Sexual Orientation Alone Is a Sufficient Basis on Which to State a Title VII Religious Discrimination Claim—Fails.*

In any event, to the extent it is not construed as a non-cognizable, repackaged sexual orientation discrimination claim (even though that is the sole basis upon which it rests, as shown), Horton's religious nonadherence claim, even when premised on his sexual orientation (as opposed to his "differing religious beliefs," which was the pleaded basis of his claim), nonetheless fails to state a claim because Horton did not allege *religious discrimination* vis-à-vis his sexual orientation. *See, e.g.*, *Cowan v. Strafford R-VI Sch. Dist.*, 140 F.3d 1153, 1160 (8th Cir. 1998) (Hansen, J., concurring) ("This court has uniformly interpreted [Title VII] to require a religious discrimination plaintiff to plead and prove both that she has a bona fide

[27] In his Brief, Horton contends that his "own religious beliefs are not central to the claim." (App. Br. at 27). Again, setting aside whether a plaintiff *can* assert a Title VII religious discrimination claim without in any way referencing his or her own religious beliefs, that is not the claim pleaded by Horton. Horton specifically—and only—alleged religious discrimination based upon his alleged "differing religious beliefs" (JA-015 – JA-018), which he failed to plausibly allege he communicated to MGM in the first instance.

religious belief and that she has suffered an adverse employment action because of this bona fide religious belief.") (collecting cases).

The principle case upon which Horton relies, *Shapolia v. Los Alamos National Laboratory*, does not support Horton's religious nonadherence theory. In *Shapolia*, the plaintiff alleged a Title VII religious discrimination claim based upon his failure to hold Mormon beliefs as his two supervisors did. 992 F.2d 1033, 1035 (10th Cir. 1993). Recognizing that the traditional *prima facie* requirements of sex and race discrimination claims—most notably, the employee's protected characteristic—"do[] not fit neatly within the facts of this case" (given that the allegation was discrimination based upon the employee's failure to hold the employer's religious beliefs (Mormonism), which themselves were the non-majority of society), the Tenth Circuit crafted a more flexible standard for such a religious discrimination claim. *Id.* at 1038. Under this standard, the employee need only proffer "some additional evidence to support the inference that the employment actions were taken because of a discriminatory motive based upon the employee's failure to hold or follow his or her employer's religious beliefs."[28] *Id.* *Shapolia* does not support the proposition that a plaintiff can allege a Title VII religion-based discrimination claim

[28] Despite articulating this more flexible standard, the Tenth Circuit had "significant doubts about whether the plaintiff ha[d] met his *prima facie* burden" and ultimately affirmed dismissal based upon the employer's facially nondiscriminatory explanation for the adverse employment action. 993 F.2d at 1039-40.

premised solely on his or her sexual orientation, even if antithetical to his or her employer's religion; there *must* be allegations of discrimination for "failure to hold or follow [the] employer's *religious beliefs*." *Id.* (emphasis added).

Horton also attempts to rely on this Court's decision in *Campos v. City of Blue Springs, Missouri* in support of his nonadherence theory. (App. Br. at 27-28). *Campos*, however, does not support the legal viability of Horton's allegations. In *Campos*, the plaintiff, who "observed tenets of Native American spirituality rather than Christianity," alleged religious discrimination based on her failure to hold Christian beliefs. 289 F.3d 546, 549 (8th Cir. 2002). She alleged that her supervisor "treated her differently" after she disclosed her religion and, throughout her employment, commented regarding her need to act as "a good Christian." *Id.* This Court affirmed the district court's conclusion that the plaintiff "presented sufficient evidence to allow the jury to find that she was forced to quit because she was not a Christian."[29] *Id.* at 550.

The only other decision of this Court cited by Horton in support of his religious discrimination claim is *Winspear v. Community Development, Inc.*, which

[29] The court in *Venters v. City of Delphi* held similarly. In *Venters*, the plaintiff was lectured about her "sinful life," told she should attend the church of the employer's owner, and told to convert religions to avoid her employment being terminated. 123 F.3d 956, 976 (7th Cir. 1997). The court held that, based on these allegations, a jury could find that the employer "made adherence to his set of religious values a requirement of continued employment." *Id.* at 977.

similarly does not support Horton's theory that his sexual orientation is a sufficient basis to allege a *religious discrimination* claim. In *Winspear*, the plaintiff, who had a "strict religious upbringing" but later "reject[ed] . . . organized religion," alleged a religion-based hostile work environment claim after a co-worker, who was also the wife of the business's co-owner, harassed him about her alleged communication with the spirit of the plaintiff's brother, who had committed suicide. 574 F.3d 604, 605-06 (8th Cir. 2009). The co-worker said that the plaintiff's brother "was suffering in hell" and repeatedly said that the plaintiff "would also go to hell if he did not 'find God.'" *Id.* at 606. This Court reversed the district court's grant of summary judgment, which incorrectly treated the plaintiff's hostile work environment claim as one for constructive discharge. *Id.* at 608. Although the plaintiff's hostile work environment claim appeared to be doomed even under the correct standard, *see id.* at 809 (Bowman, J., concurring) and 609-612 (Smith, J., dissenting), *Winspear* is consistent with *Campos*, inasmuch as the religious-based hostile work environment claim was premised on the plaintiff's failure to "find God," *i.e.*, adhere to the employer's alleged Christian *religious beliefs*.[30] *See id.* at 608 (emphasis added).

[30] Nor does *Sarenpa v. Express Images Inc.* support Horton's theory. In *Sarenpa*, the plaintiff alleged a hostile work environment/constructive discharge claim based on the "repeated and constant commentary" from his parents, who owned the business, "about the wrongfulness and immorality of his personal choices," *i.e.*, his adultery and divorce. No. Civ. 04-1538(JRT/JSM), 2005 WL 3299455, at *4 (D. Minn. Sept. 8, 2005). The plaintiff's parents made "repeated statements to [the plaintiff] at work that his relationship with [his new girlfriend]

The two district court decisions identified by Horton that allowed a religious discrimination claim vis-à-vis sexual orientation to proceed are similarly distinct from Horton's theory, in that neither of these cases relied *exclusively* on the plaintiff's homosexual status. In *Terveer v. Billington*, the plaintiff alleged that after learning of his sexual orientation, his supervisor "engage[d] in a religious lecture" targeting him with conservative Catholic beliefs and "confronted [him] directly regarding his homosexuality and its non-conformance with [the supervisor's] conservative religious beliefs." 34 F. Supp. 3d 100, 117 (D.D.C. 2014). The court held:

> [A] fact finder could infer from [the plaintiff's] allegations that [the supervisor] repeatedly engaged in religious lectures targeted at imposing [the supervisor's] 'conservative Catholic beliefs' on [the plaintiff] that religion (**and not simply homosexuality**) played a role in [the employer's] employment decisions regarding [the plaintiff] and contributed to the hostility of the work environment.[31]

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was sinful" and internally discussed "their efforts to have their business conform to Biblical principles[.]" *Id.* The district court observed that "Title VII has . . . been found to encompass situations in which an employee suffers an adverse employment action *because he or she does not conform to the religious expectations of his or her employer*," and ultimately concluded that disputes of material fact existed such that summary judgment was not appropriate. *Id.* at *3-4 (collecting cases, including *Campos*, 289 F.3d at 550-51) (emphasis added). Horton's attempt to state a religious discrimination claim by divorcing his homosexuality from any corresponding alleged nonadhering religious beliefs is not supported by *Sarenpa*.

[31] Notably, the *Terveer* court explicitly distinguished the plaintiff's allegations from those in *Prowel*, "where the plaintiff alleged religious proselytizing focused *exclusively* on the plaintiff's sexual orientation." 34 F.3d at 117 (emphasis added).

Id. (emphasis added) (footnote added).

In *Erdman v. Tranquility Inc.*, the plaintiff "was pressured to stay for the daily prayer" and his employer's owner, a member of the Mormon Church, "was offended when he declined to lead the prayer." 155 F. Supp. 2d 1152, 1161 (N.D. Cal. 2001). The employer's owner also told the plaintiff that "homosexuality was immoral and that he would go to hell if he did not give up his homosexuality *and become a Mormon*."[32] *Id.* (emphasis added). The district court held that a genuine issue of fact existed as to the plaintiff's hostile work environment claim. *Id.*

Whereas both *Terveer* and *Erdman* were premised on the plaintiff's alleged failure to conform their religious beliefs to the employer's religious beliefs, Horton's theory of religious discrimination (as espoused in his Brief) vis-à-vis his sexual orientation—tied in no way to his own religious beliefs—is indistinguishable from the theory rejected by the Third Circuit in *Prowel* and by the Sixth Circuit in *Pedreira v. Kentucky Baptist Homes for Children, Inc.*. In *Pedreira*, a lesbian employee, Alicia Pedreira, and a lesbian prospective applicant, brought suit against their (actual and prospective, respectively) employer, Kentucky Baptist Homes for

[32] Also notably, the *Prowel* court explicitly distinguished *Erdmann* by recognizing that the plaintiff in *Erdmann* "did not claim Title VII religious harassment based exclusively on his homosexual status"; "[r]ather, the employer in that case insisted that [the plaintiff] convert to the employer's faith and lead the company's daily prayer service." 579 F.3d at 293.

Children, Inc. ("KBHC"), alleging religious discrimination under Title VII and the Kentucky Civil Rights Act ("KCRA"). 579 F.3d 722, 724-26 (6th Cir. 2009). Both plaintiffs alleged that they were terminated or denied employment because of their sexual orientation. *Id.* KBHC's official policy was that "[h]omosexuality is a lifestyle that would prohibit employment." *Id.* at 725. The district court dismissed the plaintiffs' employment discrimination claims, concluding that "sexual orientation is not a protected class under either Title VII or the [KCRA]" and that the plaintiffs "had failed to show that they had been discriminated against *because of their refusal to comply with KBHC's religion*." *Id.* (emphasis added). The Sixth Circuit affirmed, explaining that a religious discrimination claim tied to sexual orientation must be based on alleged *religious* discrimination:

> The issue on appeal is whether the plaintiffs' claim is covered by the KCRA's prohibition against employment discrimination on account of religion.[33] Courts have interpreted the prohibition to preclude employers from discriminating against an employee because of the employee's religion as well as because the employee fails to comply with the *employer's* religion. Seizing on this latter interpretation, **Pedreira argues that living openly as a lesbian constitutes not complying with her employer's religion. Pedreira claims that she**

[33] Because the Sixth Circuit affirmed dismissal of the prospective applicant's Title VII claim for lack of standing, the court addressed this issue only under the KCRA; Pedreira did not plead a Title VII claim. Regardless, "[b]ecause the purpose of the KCRA was '[t]o provide for execution within the state of the policies embodied in [Title VII],' " the court "appli[ed] Title VII precedent to assess Pedreira's claim under the KCRA." *Id.* (quoting Ky. Rev. Stat. § 344.020(1)(a)) (second and third alterations in original).

> **was terminated because she does not hold KBHC's religious belief that homosexuality is sinful.**
>
> . . . .
>
> It is undisputed that KBHC fired Pedreira on account of her sexuality. **However, Pedreira has not explained how this constitutes discrimination based on *religion.* Pedreira has not alleged any particulars about her religion that would even allow an inference that she was discriminated against on account of her religion, or more particularly, her religious differences with KBHC. To show that the termination was based on her religion, [the plaintiff] must show that it was the *religious* aspect of her conduct that motivated her employer's actions.** Furthermore, Pedreira does not allege that her sexual orientation is premised on her religious beliefs or lack thereof, nor does she state whether she accepts or rejects Baptist beliefs. While there may be factual situations in which an employer equates an employee's sexuality with her religious beliefs or lack thereof, in this case, Pedreira has failed to state a claim upon which relief could be granted.

Id. at 727-28. (internal quotation marks, alteration, and citations omitted) (italic emphasis in original) (bold emphasis added) (footnote added).

As *Pedreira* (among others) makes clear, an employee's sexual orientation, standing alone, is insufficient to support a claim of religious discrimination as a matter of law, even when the employee alleges that his or her sexual orientation conflicts with the employer's religion. To state a religious discrimination claim, the plaintiff must, at a minimum, allege that "it was the *religious* aspect" of his or her conduct that motivated the adverse employment action. *Id.* at 728. Like in *Pedreira*, Horton has not done so.

In short, and to summarize: As the District Court correctly deduced, Horton's religious discrimination claim is non-cognizable, repackaged claim alleging sexual orientation discrimination. Horton did not plausibly allege that MGM knew of, or had reason to suspect, his "differing religious beliefs" regarding homosexual marriage and relationships, which was the pleaded basis for his religious discrimination claim. Nor did Horton allege what his "differing religious beliefs" are, aside from that they permit him to be in a homosexual marriage. To the extent his claim could be construed as being based on his sexual orientation (not his "differing religious beliefs"), Horton's *religious* discrimination claim further fails because Horton has not alleged that it was his failure to adhere his religious beliefs to some *religious* tenet of MGM's (or the Bienstocks') beliefs that prompted the adverse employment action. Phrased differently, Horton's sexual orientation is not, in and of itself, a sufficient basis on which to state a religious discrimination claim. There must be some *religious* nonadherence to state a claim of discrimination "*because of . . . religion*," even under a nonadherence theory.

CONCLUSION

Appellee/Defendant Midwest Geriatric Management, LLC respectfully requests this Court affirm in all respects the District Court's Judgment in favor of MGM, and against Appellant/Plaintiff Mark Horton, on Horton's Title VII claims (Counts I and II).

Dated: June 5, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), as amended by the Court's May 30, 2018 Order, because it contains 15,351 words, excluding the parts of the Brief exempted by Fed. R. App. P. 32(f). Further, 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 Word 2013 in fourteen (14) point Times New Roman font. I further certify that the electronic version of this Brief complies with this Court's Local Rule 25A and 28A because it has been submitted in Portable Document Format (PDF), which was generated by printing to PDF from the original word processing file so that the electronic version may be searched and copied.

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

Dated: June 5, 2018

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CERTIFICATE OF SERVICE

I hereby certify that 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 appellate CM/ECF system on June 5, 2018. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by this Court's CM/ECF system.

Dated: June 5, 2018

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