No. 15-1720

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

KIMBERLY HIVELY,

Plaintiff - Appellant,

v.

IVY TECH COMMUNITY COLLEGE, South Bend,

Defendant - Appellee.

On Appeal from the United States District Court
for the Northern District of Indiana, No. 3:14-cv-1791
The Honorable Rudy Lozano, Presiding

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION; ACLU OF INDIANA; 9to5, NATIONAL ASSOCIATION OF WORKING WOMEN; A BETTER BALANCE; CALIFORNIA WOMEN'S LAW CENTER; COALITION OF LABOR UNION WOMEN; EQUAL RIGHTS ADVOCATES; FEMINIST MAJORITY FOUNDATION; GENDER JUSTICE; LEGAL VOICE; NATIONAL ASSOCIATION OF WOMEN LAWYERS; NATIONAL PARTNERSHIP FOR WOMEN AND FAMILIES; NATIONAL WOMEN'S LAW CENTER; SOUTHWEST WOMEN'S LAW CENTER; WOMEN EMPLOYED; WOMEN'S LAW CENTER OF MARYLAND; and WOMEN'S LAW PROJECT IN SUPPORT OF PLAINTIFF-APPELLANT'S PETITION FOR PANEL REHEARING OR REHEARING EN BANC

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A Better Balance

California Women's Law Center

Coalition of Labor Union Women

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INTERESTS OF *AMICI CURIAE*[1]

Amici are a coalition of civil rights groups and public interest organizations committed to preventing, combating, and redressing sex discrimination and protecting the equal rights of women in the United States. More detailed statements of interest are contained in the accompanying appendix.

Amici have a vital interest in ensuring that Title VII's promise of equal employment opportunity effectively protects all people from invidious discrimination "because of sex" and have filed this brief to address the proper scope of Title VII's application to discrimination against lesbian, gay, and bisexual employees.

ARGUMENT

The panel in *Hively v. Ivy Tech Community College*, No. 15-1720 (July 28, 2016) recognized that there is no principled reason to create an exception from Title VII for sex discrimination that involves sexual orientation but felt powerless to correct the flawed analysis adopted by prior decisions from this circuit until the Supreme Court or Congress says it is time to do so. But this Court need not wait any longer to hold that there is no coherent line to be drawn between sex stereotyping that does not implicate sexual orientation, which clearly is prohibited by Title VII, and sex stereotyping that relates to the fact that an employee is lesbian, gay, or bisexual. Indeed, such a distinction flies in the face of decades of Supreme Court history, which make plain that Title VII's prohibition against discrimination because of sex has become a robust source of protection for men and women workers alike. Initially, Title VII was used as a vehicle for striking down employer policies and practices that literally excluded women from

[1] Pursuant to Rule 29(c)(5) of the Federal Rules of Appellate Procedure and Local Rule 29.1, counsel for *amici curiae* state that no counsel for a party authored this brief in whole or in part, and that no person other than *amici curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. This brief is filed with the consent of all parties.

employment opportunities. It soon became clear, however, that discrimination "because of sex" means much more than simply getting rid of "men only" signs (or, for that matter, "women only" signs). The Supreme Court has explained that sex discrimination occurs whenever an employer takes an employee's sex into account when making an adverse employment decision. Courts have applied this principle to countless forms of employer bias, from cases involving a ban on hiring mothers of preschool-aged children to bias against Asian-American women to the failure to promote a Big Eight accounting firm partnership candidate because she was considered to be "macho." Time and again, courts have refused to allow generalizations about men and women – or about certain types of men and women – to play any role in employment decisions.

This rich history of courts' interpretations of Title VII, in addition to the reasons stated by Plaintiff-Appellant, must be considered in understanding why discrimination against lesbian, gay, and bisexual employees is discrimination "because of sex." Indeed, many of the rationales advanced to exclude lesbian, gay, and bisexual employees from Title VII's protection were also made, and rejected, in cases involving equal opportunity for women.

This case presents an opportunity for the Court to correct its outdated and unworkable interpretation of the scope of Title VII's prohibition of discrimination "because of sex." In 2000, this Court held in a pair of decisions that "Title VII offers no protection from nor remedies for sexual orientation discrimination." Slip op. at 3 (citing *Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc.*, 224 F.3d 701 (7th Cir. 2000); *Spearman v. Ford Motor Co.*, 231 F.3d 1080 (7th Cir. 2000)). Yet sex stereotyping (or gender non-conformity), as defined by the Supreme Court, plainly encompasses discrimination on the basis of sexual orientation, as the panel acknowledged. Slip op. at 13-14. The panel further recognized that continued reliance on *Hamner* and *Spearman*'s outdated categorical exclusion has led to cramped and illogical

attempts to distinguish between sex stereotyping that does not implicate sexual orientation, which is clearly prohibited by Title VII, and sex stereotyping that relates to the fact that an employee is lesbian, gay, or bisexual. Slip op. at 12-35. This Court should now hold that employers may not discriminate against lesbian, gay, and bisexual people without running afoul of Title VII's historical prohibition against discrimination "because of sex."

I. Since Title VII's enactment, courts consistently have adopted an expansive interpretation of what constitutes discrimination "because of sex."

This Court should revisit its decisions in *Hamner v. St. Vincent Hospital & Health Care Center, Inc.*, 224 F.3d 701 (7th Cir. 2000) and *Spearman v. Ford Motor Co.*, 231 F.3d 1080 (7th Cir. 2000), that discrimination on the basis of sexual orientation is not sex-based discrimination prohibited by Title VII. In doing so, this Court should take into account the Supreme Court's expansive interpretation of the phrase "because of sex" during the past fifty years.

Title VII of the Civil Rights Act of 1964 makes it an unlawful employment practice for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a)(1). Unlike the prohibition against discrimination because of race, the prohibition against discrimination because of sex was added to the bill at the last minute, with a few hours of floor debate and without the benefit of congressional hearings. 110 Cong. Rec. 2577-84 (1964).

Since Title VII's enactment, this sparse record has been invoked by some to justify limiting Title VII's coverage solely to workplace barriers that explicitly disadvantage women as compared to men.[2] Indeed, many have presumed that such distinctions were the only kind of

[2] Even the motivations of the sex amendment's sponsor, Representative Howard Smith of Virginia, have been the subject of intense dispute among historians, including theories that he intended the addition as a joke or as a vehicle for scotching the entire bill, which he opposed. *See, e.g.*, Robert C. Bird, *More Than*

discrimination "because of sex" that concerned legislators in 1964. This interpretation is simply incorrect. As one scholar has explained in a seminal law review article: "Contrary to what courts have suggested, there was no consensus among legislators in the mid-1960s that the determination of whether an employment practice discriminated on the basis of sex could be made simply by asking whether an employer had divided employees into two groups perfectly differentiated along biological sex lines." Cary Franklin, *Inventing the "Traditional Concept" of Sex Discrimination*, 125 HARV. L. REV. 1307, 1320, 1328 (2012).[3]

Given this history, it was left largely to the courts to define what is meant by "because of sex." Interpreting the plain meaning of these words, courts consistently have interpreted Title VII's prohibition against sex discrimination to cover a wide range of employer assumptions about women and men alike. As the Supreme Court put it nearly forty years ago, "'[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." *City of L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978) (internal citation omitted). Indeed, when examined in full, the half-century of precedent interpreting "sex discrimination" has dismantled not just distinctions *between* men and women,

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a Congressional Joke: A Fresh Look at the Legislative History of Sex Discrimination of the 1964 Civil Rights Act, 3 WM. & MARY J. WOMEN & L. 137, 139-42 (1997); Michael Evan Gold, *A Tale of Two Amendments: The Reasons Congress Added Sex to Title VII and Their Implication for Comparable Worth*, 19 DUQUESNE L. REV. 453, 458-59 (1981). But as one scholar has noted, whatever Smith's "real" motivation, it is irrelevant; the reason(s) for introducing legislation may or may not bear any relation to the reason(s) the legislature enacts it. *Id.* at 462-67.

[3] Commentators also have noted that supporters of the sex amendment were motivated not by concern for women vis a vis men, but for white women vis a vis Black women. That is, if Title VII included only race but not sex provisions, Black women would enjoy a level of protection in the workplace that white women would not. *See, e.g.*, Bird, *supra* note 2, at 155-58; Carl M. Brauer, *Women Activists, Southern Conservatives, and the Prohibition of Sex Discrimination in Title VII of the 1964 Civil Rights Act*, 49 J. SOUTHERN HIST. 37, 49-50 (1983). These historical realities militate against, not in favor of, the cramped analysis of Title VII embodied in *Hamner*, *Spearman*, and related decisions.

but also those *among* men and *among* women – distinctions that for generations had confined individuals to strict sex roles at work, as well as in society.

In *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), the Supreme Court famously held that when an employer relies on sex stereotypes to deny employment opportunities, it unquestionably acts "because of sex." There, the Court considered the Title VII claim of Ann Hopkins, who was denied promotion to partner in a major accounting firm – despite having brought in the most business of the eighty-seven other (male) candidates – because she was deemed "macho." *Id.* at 235. To be fit for promotion, Hopkins was told, she needed to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have [her] hair styled, and wear jewelry." *Id.*

Price Waterhouse confirms that employees who fail to conform to all manner of sex stereotypes are protected by Title VII's sex provision, and the stereotype concerning to whom men and women "should" be romantically attracted is encompassed within this principle. But Ann Hopkins's case was hardly the only instance in which an employer's stereotype-based decision making was found to violate Title VII. Quite the opposite.

Among the earliest Title VII cases were those addressing – and disapproving of – the literal exclusion of women from particular employment opportunities. The sex-segregated work world of 1964 that Title VII was charged with regulating reflected longstanding assumptions about the kinds of jobs for which women (and men) were suited – physically, temperamentally, and even morally.[4] It is unsurprising, then, that prior to Title VII's enactment, it had been

[4] *See, e.g.*, *Goesaert v. Cleary*, 335 U.S. 464, 466 (1948) (upholding state law preventing women from working as bartenders unless their husband or father owned the bar, because "the oversight assured through [such] ownership . . . minimizes hazards that may confront a barmaid without such protecting oversight"); *Muller v. Oregon*, 208 U.S. 412, 421 (1908) (sustaining state maximum-hours law for women laundry workers because "woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence"); *Bradwell v. State*, 83 U.S. 130, 141 (1872)

routine for newspapers to separate "help wanted" advertisements into "male" and "female" sections, but the EEOC and courts found that practice illegal under the new law. *See Am. Newspaper Publishers Ass'n v. Alexander*, 294 F. Supp. 1100 (D.D.C. 1968). Employers' segregation of job opportunities by sex was premised on assumptions about what work women and men can and want to do. Indeed, Title VII was enacted at a time when the workforce was divided into "women's jobs" and "men's jobs," stemming largely from state "protective laws" restricting women's access to historically male-dominated fields, but also from the resulting cultural attitudes about the sexes' respective abilities and preferences. Just as sex-specific job listings were found to violate Title VII, so too were a variety of other policies and practices that had the purpose or effect of judging employees by their sex, not their qualifications.

By adopting a narrow approach to the bona fide occupational qualification (BFOQ) exception, for instance, courts assured that women and men alike would be assessed for jobs on individual merit, not group-based stereotypes. *See, e.g.*, *Rosenfeld v. S. Pac. Co.*, 444 F.2d 1219 (9th Cir. 1971) (striking down employer policy prohibiting women from becoming station agents due to job's physical demands); *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385 (5th Cir. 1971) (finding airline's women-only rule for flight attendants unlawful discrimination); *Weeks v. S. Bell Tel. & Tel. Co.*, 408 F.2d 228 (5th Cir. 1969) (prohibiting employer policy against women working as switchmen on grounds that job required heavy lifting).

Similarly, within a few years of these decisions, the Supreme Court ruled that physical criteria that disproportionately exclude women applicants violate Title VII unless justified by

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(Bradley, J., concurring) (in approving under the due process clause Illinois' law against admitting women to practice law, observing that "[t]he natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life"). Indeed, just three years before Title VII became law, the Court had unanimously ruled that women's "special responsibilities" in the home even made them unfit for the civic work of jury service. *Hoyt v. Florida*, 368 U.S. 57, 62 (1961).

business necessity; employers could no longer merely assume that "bigger is better" when it came to dangerous jobs. *See Dothard v. Rawlinson*, 433 U.S. 321 (1977) (unanimously extending disparate impact framework of *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), to cover height and weight minimums for prison guards).[5] The Court later relied on similar logic to invalidate an employer's "fetal protection policy" that barred women, but not men, from jobs involving contact with lead – despite medical evidence showing that men faced equal if not worse reproductive hazards. *United Auto. Workers of Am. v. Johnson Controls, Inc.*, 499 U.S. 187 (1991). Such a policy, said the Court, unlawfully presumed that women were more suited to motherhood than to the rigors, and dangers, of certain work: "It is no more appropriate for the courts than it is for the individual employers to decide whether a woman's reproductive role is more important to herself and her family than her economic role. Congress has left this choice to the woman as hers to make." *Id.* at 211.[6]

[5] Although the *Dothard* Court upheld on BFOQ grounds Alabama's exclusion of women from certain positions within maximum-security penitentiaries that required bodily contact with inmates, the Court emphasized that its decision should not be interpreted as endorsing an absolute male-only rule in all such jobs. Rather, the Court reiterated that the BFOQ exception was otherwise to be read narrowly; it was the harrowing conditions then prevailing in Alabama's maximum-security facilities, which were under federal court order to come into compliance with the Eighth Amendment, that made this a special case. *See* 433 U.S. at 335 ("In the usual case, the argument that a particular job is too dangerous for women may appropriately be met by the rejoinder that it is the purpose of Title VII to allow the individual woman to make that choice for herself.").

[6] At the time *Johnson Controls* was decided, Title VII had been amended by the 1978 Pregnancy Discrimination Act ("PDA"). The PDA's addition to the statute does not warrant the conclusion that Title VII's sex provision, as originally enacted, did not encompass pregnancy discrimination, or that the law otherwise was incomplete in its substantive reach. Rather, the PDA was enacted in response to the Supreme Court's widely-disparaged ruling in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), in which it found that the exclusion of pregnancy from a company's disability benefits plan did not favor men over women, but rather, differentiated between pregnant and non-pregnant persons. *Gilbert* was nearly universally considered a misreading of Title VII; at the time it was decided, the EEOC, as well as all of the courts of appeals that had considered the issue, had declared pregnancy discrimination to be unlawful sex discrimination. *See AT&T Corp. v. Hulteen*, 556 U.S. 701, 717-18 (2009) (Ginsburg, J., dissenting). Indeed, just one year after *Gilbert* (and before passage of the PDA), the Supreme Court found discrimination on the basis of pregnancy to be discrimination "because of sex" when it struck down a municipal employer's policy of erasing women's seniority while they were out on maternity leave. *Nashville Gas Co. v. Satty*, 434 U.S. 136, 142-43 (1977).

Although what little floor debate occurred prior to Title VII's passage focused on women's second-class status in the workplace, the prohibition against discrimination "because of sex" has long been understood to ban discrimination against men as well. As the Supreme Court noted, "[p]roponents of the legislation stressed throughout the debates that Congress had always intended to protect *all* individuals from sex discrimination in employment." *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 681 (1983).

In addition to protecting male employees, Title VII also has been read repeatedly to forbid discrimination against subsets of employees, resulting in a broad definition of sex discrimination that acknowledges the diversity of employees' identities – and the equally diverse forms of sex-based bias to which they may be subjected. *See, e.g., Lam v. Univ. of Hawai'i*, 40 F.3d 1551 (9th Cir. 1994) (Asian-American woman's Title VII sex discrimination claim viable despite evidence that white women comparators were not subjected to discrimination); *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971) (*per curiam*) (invalidating employer's ban on hiring mothers of preschool-aged children, despite overall high rates of women's employment); *Jefferies v. Harris Cnty. Cmty. Action Ass'n*, 693 F.2d 589 (5th Cir. 1982) (Black woman could bring Title VII claim despite evidence that employer treated white female comparators favorably); *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194 (7th Cir. 1971) (airline's policy of employing only unmarried female flight attendants violated Title VII).

The initial rejection and later recognition of sexual harassment as sex discrimination offers another useful lens into courts' ever-widening understanding of what constitutes discrimination "because of sex." Although courts understood by the early 1970s that using racial epithets or displaying racist symbols like nooses was harassment "because of race" that violated Title VII, they were slower to see sexual harassment as harassment "because of sex." Instead,

judges routinely wrote off adverse employment actions against women who had spurned their supervisors' advances as "controvers[ies] underpinned by the subtleties of an *inharmonious personal relationship*." *Barnes v. Train*, No. 1828-73, 1974 WL 10628, at *1 (D.D.C. Aug. 9, 1974) (emphasis added), *rev'd sub nom Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977); *see also Miller v. Bank of Am.*, 418 F. Supp. 233, 236 (N.D. Cal. 1976) (sexual harassment could not be discrimination "because of sex" because "[t]he attraction of males to females and females to males is a natural sex phenomenon"), *rev'd*, 600 F.2d 211 (9th Cir. 1979); *Tomkins v. Pub. Serv. Elec. & Gas Co.*, 422 F. Supp. 553, 556 (D.N.J. 1976) (Title VII not meant to provide a remedy "for what amounts to physical attack motivated by sexual desire . . . which happened to occur in a corporate corridor rather than a back alley"), *rev'd*, 568 F.2d 1044 (3d Cir. 1977); *Corne v. Bausch & Lomb, Inc.*, 390 F. Supp. 161, 163 (D. Ariz. 1975) (supervisor's sexual harassment was motivated not by plaintiff's sex but by a "personal proclivity, peculiarity or mannerism"), *rev'd*, 562 F.2d 55 (9th Cir. 1977).

Notably, these courts buttressed their narrow readings of Title VII by referencing the limited debate that preceded Congress's addition of the sex provision. *See Miller*, 418 F. Supp. at 235 (the "Congressional Record fails to reveal any specific discussions as to the amendment's intended scope or impact"); *Tomkins*, 422 F. Supp. at 556-57 (sexual harassment "clear[ly] . . . without the scope of the Act," because otherwise "we would need 4,000 federal trial judges instead of some 400"); *Corne*, 390 F. Supp. at 163 (given the "little legislative history surrounding the addition of the word 'sex' to the employment discrimination provisions of Title VII," it would "be ludicrous to hold that the sort of activity involved here was contemplated by the Act").

The jurisprudential tide began to turn in the late 1970s (as evidenced in part by the appellate reversals of the above-cited decisions), and in 1980 the EEOC updated its Guidelines on Discrimination Because of Sex to declare that sexual harassment of a female employee could not be disentangled from her sex. 29 C.F.R. § 1604.11(a) (1980). The 1980 Guidelines recognized that it is not "personal" to disadvantage a female employee because of her supervisor's sexual conduct toward her; it is illegal.

The Supreme Court continued this evolution in 1986, when it ruled that severe or pervasive conduct that creates a sexually hostile work environment violates Title VII by altering the "terms, conditions, or privileges" of employment. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 63-67 (1986). But the *Vinson* Court took it as a given that sexual harassment was sex discrimination; its analysis centered on whether a plaintiff's "voluntary" acquiescence to sexual demands and her failure to lodge a formal complaint negated her Title VII claim. As the Court put it, "*Without question*, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex." *Id.* at 64 (emphasis added). Indeed, the bank had not contested that principle in its filings, either. *Id.*

Roughly a decade later, the Court extended *Vinson* – unanimously – to encompass same-sex sexual harassment. *See Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 79-80 (1998). In so doing, the *Oncale* Court rejected various attempts to define sexual harassment narrowly. For example, the Court declined to hold that whether an employee is the victim of sex (or race) discrimination turns on the sex (or race) of the harasser. *Id.* at 78-79. The Court likewise did away with the argument that sexual harassment must be motivated by sexual desire to be actionable under Title VII. *Id.* at 80-81. Rather, the Court adopted perhaps the simplest test for whether discrimination had occurred: whether the conduct at issue met Title VII's "statutory

requirements," *i.e.*, whether the harassment occurred because of the employee's sex. *Id.* at 80. The same test applies to discrimination against lesbian, gay, and bisexual employees, for the reasons explained below.

II. The panel's opinion should be reconsidered in light of the Supreme Court's expansive interpretation of what constitutes discrimination "because of sex."

Hamner and *Spearman* were wrongly decided because they ignored the meaning of sex discrimination discussed above. This Court should now revisit those decisions in light of the history of Title VII jurisprudence, which makes plain that the prohibition against sex discrimination protects all employees, including lesbian, gay, and bisexual people. Employers who take sexual orientation into account necessarily take sex into account, because sexual orientation turns on one's sex in relation to the sex of people to whom one is attracted. *See, e.g.*, *Isaacs v. Felder Servs., LLC*, 143 F. Supp. 3d 1190, 1193-94 (M.D. Ala. 2015). And bias against lesbian, gay, and bisexual people turns on the sex-role expectation that women should be attracted to only men (and not women) and vice versa. *See, e.g., Videckis v. Pepperdine Univ.*, 100 F. Supp. 3d 927, 936 (C.D. Cal. 2015). There is no principled reason to create an exception from Title VII for sex discrimination that involves sexual orientation, as the EEOC, a growing number of district courts, and the panel itself recognized. Slip op. at 11. While the panel felt constrained to follow the flawed analysis adopted in *Hamner* and *Spearman*, *id.* at 42, Plaintiff-Appellant's petition for rehearing presents an opportunity to correct those decisions' erroneous reasoning.

This Court first stated in dicta that Title VII does not prohibit sexual orientation discrimination in *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984). But the language from *Ulane* on which the panel relied has now been soundly rejected by sister circuits

as "'eviscerated' by *Price Waterhouse*'s holding." *Glenn v. Brumby*, 663 F.3d 1312, 1318 n.5 (11th Cir. 2011) (quoting *Smith v. City of Salem, Ohio*, 378 F.3d 566, 573 (6th Cir. 2004)).

The panel's discussion regarding line-drawing, slip op. at 12-35, reveals and acknowledges the tension between the categorical rejection of sexual orientation claims, on the one hand, with the expansive definition of sex discrimination adopted in *Price Waterhouse*, on the other. The panel observed that courts have tended to limit sex stereotyping claims brought by lesbians, gay men, and bisexual people to those premised on how employees "look or act" but not on employees' family roles or responsibilities. Slip op. at 26; *see also id.* at 35 ("We are left with a body of law that values the wearing of pants and earrings over marriage."). But that limitation is not found in *Price Waterhouse* and, in fact, is contradicted by decades of case law – both before and after *Price Waterhouse*. *See, e.g.*, *Manhart*, 435 U.S. at 707 n.13 (noting that Title VII prohibits "the entire spectrum of disparate treatment of men and women resulting from sex stereotypes"). Those decisions make clear that employers may not make adverse decisions based on any aspect of a person's sex, including the respective roles of men and women as spouses, breadwinners, or caregivers at home. That is because stereotypes about "promiscuity, religious beliefs, spending habits, child-rearing, sexual politics, or politics," slip op. at 22, far from being restricted to "the gay and lesbian 'lifestyle,'" *id.*, are grounded in an individual's sex. Just as employers may not refuse to hire a woman because she is liable to become pregnant, *see Sheehan v. Donlen Corp.*, 173 F.3d 1039, 1045 (7th Cir. 1999), or because of a belief that "women are and should be the family's primary caregivers and . . . should subordinate their career aspirations to their family responsibilities," *Lust v. Sealy, Inc.*, 277 F. Supp. 2d 973, 982 (W.D. Wis. 2003), or conversely because she does not have a family to support, *Costa v. Desert*

Palace, Inc., 299 F.3d 838, 861 (9th Cir. 2002) (en banc), so too they may not refuse to hire a woman because she is married to a person of the same sex.

As one district court recognized, "The lesson imparted by the body of Title VII litigation concerning sexual orientation discrimination and sexual stereotyping seems to be that no coherent line can be drawn between these two sorts of claims." *Christiansen v. Omnicom Grp., Inc.*, No. 15 Civ. 3440 (KPF), 2016 WL 951581, at *14 (S.D.N.Y. Mar. 9, 2016); *see also Videckis v. Pepperdine Univ.*, 150 F. Supp. 3d 1151, 1159 (C.D. Cal. 2015) (concluding that "the distinction is illusory and artificial"). That is why the panel concluded there is no principled reason to create an exception from Title VII for sex discrimination that involves sexual orientation. Slip op. at 34 (characterizing the exclusion of lesbian, gay, and bisexual employees from Title VII a "paradox"); *id.* at 41 (calling it "illogical"); *id.* (noting that there is "no rational reason" for the exclusion); *id.* (observing that "inconsistencies" in this circuit's sex discrimination doctrine may "come to be seen as defying practical workability"). This Court now has the opportunity to correct the "unsatisfying results," slip op. at 35, that the panel recognized but declined to remedy.

The panel, like the *Ulane* Court before it, also gave great weight to the fact that Congress has refused to amend Title VII to explicitly prohibit discrimination because of sexual orientation. Slip op. at 6-9 & n.2; *Ulane*, 742 F.2d at 1085-86. As an initial matter, the Supreme Court has repeatedly cautioned that acts of subsequent Congresses "deserve little weight in the interpretive process" regarding federal statutes. *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994). Moreover, congressional failure to act could just as easily establish the opposite conclusion from the one the panel drew: that amendment of the statute was unnecessary because sexual orientation discrimination already is covered by the

prohibition against discrimination because of sex. *See* Br. *Amici Curiae* of 128 Members of Congress, No. 16-748-cv, 2016 WL 3551468, at *8 (2d Cir. June 28, 2016) ("[I]t is equally plausible that ENDA was introduced to *clarify* as well as expand Title VII's protections . . . ."); *cf. Fabian v. Hosp. of Cent. Conn.*, No. 3:12-CV-1154 (SRU), 2016 WL 1089178, at *14 n.12 (D. Conn. Mar. 18, 2016) ("The fact that the Connecticut legislature added [language explicitly protecting gender identity] does not require the conclusion that gender identity was not already protected by the plain language of the statute [prohibiting sex discrimination], because legislatures may add such language to clarify or to settle a dispute about the statute's scope rather than solely to expand it.").

At a bare minimum, subsequent legislative action (or inaction) has no bearing on what Congress intended (or did not intend) in 1964 when it enacted Title VII. Nor can congressional intent – whatever it may have been – alter the meaning of the words Congress actually used. "[I]t is what Congress *says*, not what Congress *means* to say, that becomes the law of the land." *Bernstein v. Bankert*, 733 F.3d 190, 211 (7th Cir. 2013). The Supreme Court has flatly rejected the notion that "sex" discrimination is limited by unwritten exceptions. *Oncale*, 523 U.S. at 79 ("[M]ale-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."); *see also Newport News*, 462 U.S. at 679-81 (rejecting the argument that some of Title VII's protections apply only to women and not to men, despite the fact that the prohibition against sex discrimination was intended to combat discrimination against women). Just as there is no

exception to Title VII for same-sex sexual harassment, *see Oncale*, 523 U.S. at 79, there is no exception for lesbian, gay, or bisexual people either.[7]

This Court should no longer adhere to its pre-*Price Waterhouse* precedent and reasoning. Instead, this Court should apply the principles mandated by the Supreme Court to determine whether sexual orientation claims are covered by Title VII. For the reasons discussed above, applying those principles leads to the conclusion that sexual orientation discrimination is a form of sex discrimination prohibited by Title VII.

CONCLUSION

This Court should hold that sexual orientation discrimination is sex discrimination prohibited by Title VII.

Dated: August 25, 2016

Respectfully submitted,

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[7] Additionally, that the Supreme Court "was presented with the opportunity to consider the question as one of sex discrimination" under the Equal Protection Clause in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), "but declined to do so," slip op. at 40, does not indicate how the Court would resolve that question in an appropriate case. For example, in *Lawrence v. Texas*, 539 U.S. 558, 562, 564 (2003), the petitioners raised both Equal Protection and Due Process challenges to Texas's statute making it a crime for two persons of the same-sex to engage in intimate sexual conduct. The Court concluded that the case should be resolved as a matter of the liberty guaranteed by the Due Process Clause. *Id.* at 564. But that did not stop the Court from deciding later cases involving sexual orientation discrimination under the constitutional promise of equality. *See, e.g.*, *United States v. Windsor*, 133 S. Ct. 1675 (2013).

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(d) because it contains 5,206 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), as calculated by the word-counting function of Microsoft Word.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Circuit Rule 32(b) 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 in 12-point Times New Roman, with 11-point Times New Roman footnotes.

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CERTIFICATE OF SERVICE FOR ELECTRONIC FILINGS

I hereby certify that on August 25, 2016, I electronically filed the foregoing Brief of *Amici Curiae* American Civil Liberties Union; ACLU of Indiana; 9to5, National Association of Working Women; A Better Balance; California Women's Law Center; Coalition of Labor Union Women; Equal Rights Advocates; Feminist Majority Foundation; Gender Justice; Legal Voice; National Association of Women Lawyers; National Partnership for Women & Families; National Women's Law Center; Southwest Women's Law Center; Women Employed; Women's Law Center of Maryland; and Women's Law Project in Support of Plaintiff-Appellant's Petition for Panel Rehearing or Rehearing En Banc with the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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APPENDIX: INTERESTS OF *AMICI CURIAE*

The **American Civil Liberties Union** is a nationwide, nonprofit, nonpartisan organization with over 500,000 members dedicated to defending the principles embodied in the Constitution and our nation's civil rights laws. The ACLU of Indiana is similarly dedicated to preserving constitutional and civil rights in the State of Indiana and has more than 3,500 members.

9to5, National Association of Working Women is a 43-year-old national membership organization of women in low-wage jobs dedicated to achieving economic justice and ending all forms of discrimination. Our membership includes lesbian, gay, bisexual and transgender individuals. 9to5 has a long history of supporting local, state and national measures to combat discrimination. The outcome of this case will directly affect our members' and constituents' rights and economic well-being, and that of their families.

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

California Women's Law Center (CWLC) is a statewide, nonprofit law and policy center dedicated to advancing the civil rights of women and girls through impact litigation, advocacy and education. CWLC's issue priorities include gender discrimination, reproductive

justice, violence against women, and women's health. Since its inception in 1989, CWLC has placed an emphasis on eliminating all forms of gender discrimination, including discrimination based on sexual orientation. CWLC remains committed to supporting equal rights for lesbians and gay men, and to eradicating invidious discrimination in all forms, including eliminating laws and policies that reinforce traditional gender roles. CWLC views sexual orientation discrimination in the workplace as a form of illegal gender discrimination that is harmful to our state and country, and must be eradicated.

The **Coalition of Labor Union Women** is a national membership organization based in Washington, DC with chapters throughout the country. Founded in 1974 it is the national women's organization within the labor movement which is leading the effort to empower women in the workplace, advance women in their unions, encourage political and legislative involvement, organize women workers into unions and promote policies that support women and working families. During our history we have fought against discrimination in all its forms, particularly when it stands as a barrier to employment or is evidenced by unequal treatment in the workplace or unequal play.

Equal Rights Advocates (ERA) is one of the oldest public interest law firms specializing in litigation efforts to eliminate gender discrimination and secure equal rights. Begun in 1974 as a teaching law firm focused on sex-based discrimination, ERA has evolved into a legal organization with a multi-faceted approach to addressing issues of gender discrimination, including impact litigation, public policy initiatives, and legislative advocacy. ERA has represented clients in numerous individual and class sex discrimination cases under Title VII, including *AT&T Corp. v. Hulteen*, 556 U.S. 701 (2009) and *Wal-Mart Stores v. Dukes*, 564 U.S. 338 (2011), and has appeared as *amicus curiae* in a number of Supreme Court cases involving

the interpretation of Title VII, including *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986) and *Ledbetter v. Goodyear*, 550 U.S. 618 (2007). ERA has long viewed sexual orientation discrimination as a pernicious and legally impermissible form of sex discrimination, and seeks to participate in this case to highlight the inextricability of women's rights and civil rights for LGBTQ people.

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

Gender Justice is a nonprofit advocacy organization based in the Midwest that works to eliminate gender barriers based on sex, sexual orientation, gender identity, or gender expression. Gender Justice targets the root causes of gender discrimination, such as cognitive bias and stereotyping. We believe that courts should take an expansive, and inclusive, interpretation of what constitutes discrimination "because of sex." Consistent with that view, we represent the transgender plaintiff in *Rumble v. Fairview Health Services*, No. 0:14-cv-02037-SRN-FLN (D. Minn.), whose right to sue under the Affordable Care Act, Section 1557, was recognized by the court in 2015.

Legal Voice is a nonprofit public interest organization in the Pacific Northwest that works to advance the legal rights of women and girls through litigation, legislation, and public education on legal rights. Since its founding in 1978, Legal Voice has been at the forefront of efforts to combat sex discrimination in the workplace, in schools, and in public accommodations.

We have served as counsel and as *amicus curiae* in numerous cases involving workplace gender discrimination throughout the Northwest and the country. Legal Voice serves as a regional expert advocating for legislation and for robust interpretation and enforcement of anti-discrimination laws to protect women and LGBTQ people. Legal Voice has a strong interest in ensuring that Title VII is interpreted to cover discrimination based on sexual orientation and sex stereotyping.

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

The **National Women's Law Center** is a nonprofit legal advocacy organization dedicated to the advancement and protection of women's legal rights and opportunities since its founding in 1972. The Center focuses on issues of key importance to women and their families, including economic security, employment, education, health, and reproductive rights, with special attention to the needs of low-income women and women of color, and has participated as counsel or *amicus curiae* in a range of cases before the Supreme Court and the federal Courts of Appeals to secure the equal treatment of women under the law, including numerous cases addressing the scope of Title VII's protection. The Center has long sought to ensure that rights

and opportunities are not restricted for women or men on the basis of gender stereotypes and that all individuals enjoy the protection against such discrimination promised by federal law.

The **Southwest Women's Law Center** is a non-profit policy and advocacy Law Center that was founded in 2005 with a focus on advancing opportunities for women and girls in the state of New Mexico. We work to ensure that women have equal access to quality, affordable healthcare, access to equal pay and that girls in middle and high school have equal access to sports' programs. Our work strongly supports protections for individuals, without regard to sexual orientation as we advocate to eliminate the full range of stereotypes and biases that women and LGBT individuals often face. Accordingly, the Law Center is uniquely qualified to comment on the decision in *Hively v. Ivy Tech Community College*.

Women Employed's mission is to improve the economic status of women and remove barriers to economic equity. Since 1973, the organization has assisted thousands of working women with problems of discrimination and harassment, monitored the performance of equal opportunity enforcement agencies, and developed specific, detailed proposals for improving enforcement efforts, particularly on the systemic level. Women Employed believes that barring discrimination "because of sex" encompasses discrimination against an employee because of his/her sexual orientation because women's rights and LGBT rights are inextricable.

The **Women's Law Center of Maryland, Inc.** is a non-profit, membership organization established in 1971 with a mission of improving and protecting the legal rights of women, particularly regarding gender discrimination, employment law, family law and reproductive rights. Through its direct services and advocacy, the Women's Law Center seeks to protect women's legal rights and ensure equal access to resources and remedies under the law. The Women's Law Center is participating as an *amicus* in *Hively v. Ivy Tech Community College*

because it agrees with the proposition that sex, gender, and sexual orientation are intrinsically intertwined, particularly in the realm of discrimination. The concerns and struggles of the LGBTQ community impact all women, regardless of sexual orientation.

The **Women's Law Project (WLP)** is a non-profit women's legal advocacy organization with offices in Philadelphia and Pittsburgh, Pennsylvania. Founded in 1974, WLP's mission is to create a more just and equitable society by advancing the rights and status of all women throughout their lives. To this end, we engage in high impact litigation, policy advocacy, and public education. For over forty years, WLP has challenged discrimination rooted in gender stereotyping and based on sex.