UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 18-1104

MARK HORTON,
Plaintiff-Appellant

v.

MIDWEST GERIATRIC MANAGEMENT, LLC,
Defendant-Appellee

On Appeal from the United States District Court
for the Eastern District of Missouri (Hon. Jean C. Hamilton)

BRIEF OF THE STATES OF ARKANSAS, LOUISIANA, MICHIGAN, MISSOURI, NEBRASKA, OKLAHOMA, SOUTH DAKOTA, AND TEXAS AS *AMICI CURIAE* IN SUPPORT OF APPELLEE

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INTEREST OF *AMICI CURIAE*

The States of Arkansas, Louisiana, Michigan, Missouri, Nebraska, Oklahoma, South Dakota, and Texas file this brief as *amici curiae* in support of Appellee Midwest Geriatric Management, LLC pursuant to Federal Rule of Appellate Procedure 29(a)(2).

State governments are some of the largest employers in the country and are subject to the prohibitions of Title VII, including discrimination based on sex. *See* 42 U.S.C. 2000e(b). *Amici* therefore have an interest in ensuring federal discrimination law is not interpreted more broadly than Congress intended, thus potentially subjecting states—and, ultimately, taxpayers—to monetary damages. Likewise, *amici* have an interest in fostering economic growth within their borders by ensuring that businesses are not overwhelmed by uncertainty in federal law and regulations. Finally, *Amici* have an interest in ensuring that the federal judiciary does not usurp the prerogatives of the judicial branch by overturning decades of settled understanding of the meaning of federal law, especially when that meaning has been repeatedly ratified by Congress.

STATEMENT OF THE CASE

Appellant raised three claims below, the pertinent one being sex

discrimination in violation of Title VII. JA005.[1] The district court granted Appellee's motion to dismiss this claim, holding that Appellant's claim—that he was discriminated against on the basis of his sexual orientation—is not covered by Title VII. *Horton v. Midwest Geriatric Management, LLC*, 2017 WL 6536576 (E.D. Mo. Dec. 21, 2017). This brief addresses Appellant's appeal on only this point.

SUMMARY OF ARGUMENT

This case presents the issue of whether Title VII of the Civil Rights Act of 1964, which prohibits discrimination based on "sex," includes discrimination based on sexual orientation. This Court should reaffirm that it does not. *First*, binding precedent of this Court compels the conclusion that Appellant's sexual orientation discrimination claims are not cognizable under Title VII. *Second*, this commonsense reading is supported by the plain language of the statute, what was until last year unanimous authority of the Courts of Appeals, and Congressional ratification of this precedent. *Third*, none of the theories for reimagining Title VII to cover sexual orientation discrimination are convincing.

ARGUMENT

This is a case about the fundamental role of courts in our system of

[1] This brief does not address Appellant's religious discrimination claim under Title VII, nor his state-law claim.

government. From 1964 until very recently, Title VII's prohibition of discrimination based on "sex" was understood by all to mean discrimination based on whether an employee is biologically male or female. Despite numerous attempts by litigants to expand the scope of Title VII to include discrimination based on sexual orientation, the Courts of Appeals were uniform in limiting the statute to its original meaning. Congress, aware of these rulings, has declined on numerous occasions to amend Title VII to cover sexual orientation discrimination. It is against this backdrop that two Courts of Appeals have taken it upon themselves to overrule decades over their own settled precedent and expand Title VII's scope to include sexual orientation discrimination. *See Zarda v. Altitude Express, Inc.*, 833 F.3d 100 (2d Cir. 2018) (en banc); *Hively v. Ivy Tech Community Coll. of Indiana*, 853 F3d 339 (7th Cir 2017) (en banc).

Appellant now asks this Court to join those courts in rewriting Title VII. But "it is for Congress, not the courts, to write the law," *Stanard v. Olesen*, 74 S. Ct. 768, 771 (1954), and this Court must resist any such temptation, lest "judge[s] . . . beg[in] to rule where [] legislator[s] should." Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* 1 (1990). Our system of government demands that the courts defer to the legislative branch in matters of policymaking, and that foundational principle demands that Title VII be interpreted as understood in 1964, unless and until amended by Congress. This Court should decline to

overrule its own precedents in recasting Title VII as prohibiting discrimination based on sexual orientation. But even if this Court were not bound by its precedent, Appellant's arguments for expanding the scope of Title VII fail, and the district court's decision should be affirmed.

I. *Williamson* is controlling precedent and precludes expanding Title VII to cover discrimination based on sexual orientation.

To decide this case, this Court need only hold that it meant what it said in *Williamson A.G. Edwards and Sons, Inc.*: "Title VII does not prohibit discrimination against homosexuals." 876 F.2d 69, 70 (8th Cir. 1989). *Williamson* controls here, and Appellant's case may easily be disposed of on this ground alone.

Appellant argues that a panel of this Court is free to disregard to *Williamson*'s clear language as mere *dicta*. This would surprise the panel of this Court that decided *Schmedding v. Tnemec Co., Inc.*, which stated that "[i]n *Williamson*, . . . we *held* that Title VII does not afford a cause of action for discrimination against homosexuals." 187 F.3d 862, 664 n.3 (8th Cir. 1999) (emphasis added). This would also surprise every district court in this Circuit that has considered whether Title VII covers discrimination based on sexual orientation—all of whom determined that they were bound by *Williamson* to hold that it does not. *See Miller v. Bd. Of Regents of Univ. of Minn.*, 2018 WL 659851 (D. Minn. Feb. 1, 2018); *Pambianchi v. Ark. Tech. Univ.*, 2014 WL 11498236

(E.D. Ark. Mar. 14, 2014); *Johnson v. Shinseki*, 2013 WL 1987352, at *2 (E.D. Mo. May 13, 2013); *Robertson v. Siouxland Comm. Health Cent.*, 938 F. Supp.2d 831, 841 (N.D. Iowa Apr. 10, 2013); *Logan v. Chertoff*, 2009 WL 3064882, at *1 n.3 (E.D. Mo. Sept. 22, 2009); *Harmon v. Dep't of Veterans Affairs*, 2008 WL 495876, at *2 (E.D. Ark. Feb. 20, 2008); *Klein v. McGowan*, 36 F. Supp.2d 885, 889 (D. Minn. Feb. 16, 1999); *Kelley v. Vaughn*, 760 F. Supp. 161, 163 (W.D. Mo. Apr. 5, 1991).

Such treatment is not surprising, as both the *Schmedding* panel and the district courts were "bound . . . to apply the precedent of this Circuit." *Hood v. United States*, 342 F.3d 861, 864 (8th Cir. 2003). Yet Appellant would have this Court hold that every one of these courts— in addition to the other circuits that have cited to *Williams* as holding that Title VII does not cover discrimination based on sexual orientation—were wrong. *See* Appellant's Br. at 48. But Appellants fail to cite to even a single case where any court has casted *Williamson*'s proscription of sexual orientation Title VII claims as mere *dicta*. This Court should resolve this case by simply holding—as every court in this Circuit has—that *Williamson* dictates the outcome. Appellant's claims are not cognizable under Title VII, and the district court dismissal should be affirmed.

II. Until very recently, Title VII's prohibition of discrimination based on "sex" has never been understood—by the courts or Congress—to extend to discrimination based on sexual orientation.

Title VII prohibits employers from discriminating against an individual based on "such individual's . . . sex." 42. U.S.C. 2000e. The original 1964 version of Title VII did not define "sex." In 1978, in response to the Supreme Court's decision in *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976), Congress amended Title VII to clarify that sex discrimination "include[s]" discrimination "because of or on the basis of pregnancy, childbirth, or related medical conditions." 42 U.S.C. 2000e(k). Congress did not, however, further define the scope of the term "sex" and did not address discrimination on the basis of sexual orientation. Title VII was further amended in 1991, *see* Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991), again with no inclusion of sexual orientation as a protected trait.

That Title VII does not define "sex" is not surprising. As Judge Sykes observed in her dissent in *Hively*, "[i]n common, ordinary usage in 1964—and now, for that matter—the word 'sex' means biologically male or female." 853 F.3d at 362. Thus, Title VII's prohibition of sex discrimination is limited to discrimination involving the "disparate treatment of men and women." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (plurality op.). In other words, employers may not cause "members of one sex [to be] exposed to disadvantageous

terms or conditions of employment to which members of the other sex are not exposed." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998).

But discrimination based on sexual orientation is different. It does not involve differential treatment based on an employee's sex; instead it involves differential treatment of gay and straight employees, regardless of those employees are men or women. This commonsense notion comports with the original public meaning of the term "sex" in Title VII, as described by Judge Sykes. *Hively*, 853 F.3d at 362. The meaning of "sex" as used in Title VII simply does not encompass sexual orientation.

Until recently, all of the Courts of Appeals to have considered the issue, including this one, agreed. *See, e.g.*, *Evans v. Georgia Reg'l Hosp.*, 850 F.3d 1248, 1255 (11th Cir. 2017), *rehearing en banc denied* (July 6, 2017); *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 763 (6th Cir. 2006); *Medina v. Income Support Div.*, 413 F.3d 1131, 1135 (10th Cir. 2005); *Hamm v. Weyauwega Milk Prods., Inc.*, 332 F.3d 1058, 1063 (7th Cir. 2003), *overruled by Hively*, *supra*; *Bibby v. Philadelphia Coca Cola Bottling Co.*, 260 F.3d 257, 261 (3d Cir. 2001); *Simonton v. Runyon*, 232 F.3d 33, 36 (2d Cir. 2000); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999); *Wrightson v. Pizza Hut*, 99 F.3d 138, 143 (4th Cir. 1996); *Williamson*, 876 F.2d at 70; *DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327, 329-30 (9th Cir. 1979), *abrogated in part on other grounds*, *Nichols*

v. Azteca Restaurant Enterpr., Inc., 256 F.3d 864, 874-75 (9th Cir. 2001); *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979). *But see Zarda* 833 F.3d 100; *Hively*, 853 F.3d 339. Also until recently, the EEOC agreed. *See e.g., Angle v. Veneman*, EEOC Doc. 01A32644, 2004 WL 764265, at *2 (April 5, 2004) (noting that the EEOC had "consistently held that discrimination based on sexual orientation is not actionable under Title VII"); *Baldwin v. Foxx*, EEOC Doc. 0120133080, 2015 WL 4397641 (July 15, 2015) (reversing decades of precedent and holding that sexual orientation discrimination is per se sex discrimination).

So too has Congress repeatedly ratified this settled understanding. "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Lorillard v. Pons*, 434 U.S. 575, 580 (1978). And Congress has amended Title VII multiples times after the courts of appeals—including this one—concluded that Title VII does not cover discrimination based on sexual orientation, providing further support for the (until recent) unanimous authority on this point. *See Faragher v. City of Boca Raton*, 524 U.S. 775, 792 (1998) ("[T]he force of precedent here is enhanced by Congress's amendment to the liability provisions of Title VII since the Meritor decision, without providing any modification of our holding.").

There is no doubt that Congress was "was aware of th[e] unanimous precedent" of the Courts of Appeals holding that Title VII does not cover discrimination based on sexual orientation. *Tex. Dep't of Housing & Comm. Aff. v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2519 (2015). By 1991, four circuits had already decided the issue. *See Williamson*, 876 F.2d at 70; *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984); *DeSantis*, 608 F.2d at 329-30; *Blum*, 597 F.2d at 938. "Against this background of [unanimous] understanding," Congress "amended [Title VII] while still adhering to its operative language." *Inclusive Communities*, 135 S. Ct. at 2520. Congress added new language regarding the methods and burdens of proof for sex discrimination claims, but it did not add sexual orientation to the definition of "sex" or include it as a new protected trait. *See, e.g.*, Pub. L. No. 102-166, §§ 105-107, 105 Stat. 1071, 1074-75 (1991). These amendments abrogated several Title VII decisions that Congress believed had "sharply cut back on the scope and effectiveness" of the statute, *Ricci v. DeStefano*, 557 U.S. 557, 624 (2009) (quoting H.R. Rep. No. 102-40, pt. 2, at 2 (1991)), including *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) and *Price Waterhouse*. While Congress "has not been shy in revising other judicial constructions" of Title VII that it has deemed unduly narrow, it has left in place the circuit decisions holding that Title VII does not reach sexual

orientation discrimination. *General Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 594 n.7 (2004).

Recognizing that Title VII does not currently prohibit discrimination based on sexual orientation, members of Congress have introduced numerous bills over the decades to amend Title VII to prohibit it. Indeed, every Congress since 1974 has considered such a bill, and none have passed. *See* Attachment A to Brief for the United States as *Amicus Curiae*, *Zarda v. Altitude Express, Inc.*, Case No. 15-3775 (2d Cir.), ECF No. 417 (listing bills). Not only has Congress declined to prohibit sexual orientation discrimination in the Title VII context, it has affirmatively chosen to do so in sex discrimination provisions of other statutes. *See, e.g.*, 18 U.S.C. 249(a)(2) (enhanced penalties for crimes motivated by "gender" or "sexual orientation"); 42 U.S.C. 13925(b)(13)(A) (no discrimination based on "sex" or "sexual orientation" under certain federally funded programs); *see also* 42 U.S.C. 3716(a)(1)(C) (federal aid to state or local investigations of crimes motivated by "gender" or "sexual orientation"). Tellingly, each of these statutes list sexual orientation in addition to "sex" or "gender," belying any notion that Congress—or anyone else—understood Title VII's reference to discrimination based on "sex" to include sexual orientation.

In sum, Congress knew what it was—and was not—doing when it enacted Title VII's prohibition against discrimination based on sex. Until the Seventh

Circuit's decision in *Hively*, the Courts of Appeals were uniform in taking the unremarkable position that discrimination based on "sex" meant only discrimination based on whether an employee is biologically male or female. This understanding was shared by Congress and ratified through its decades of acquiescence. Congress has declined to expand Title VII to include sexual orientation discrimination, and this Court must defer to its judgment.

III. The theories advanced by Appellant for extending Title VII to cover sexual orientation discrimination are unavailing.

Faced with the overwhelming weight of authority—including binding precedent of this Court—that Title VII does not cover sexual orientation discrimination, Appellant provides three primary reasons to reimagine Title VII as covering his claim. They are unavailing and should be rejected. First, a proper application of the "but for" theory of sex discrimination shows that sexual orientation discrimination does not, in fact, discriminate on the basis of sex. Second, "associational discrimination" like discrimination in the context of interracial relationships is not cognizable in the sexual orientation context. Third, sexual orientation discrimination does not involve sex-based stereotyping and, even if it did, it does not involve the sort that Title VII prohibits.

A. The "but for" theory of sex discrimination, properly applied, does not include discrimination based on sexual orientation.

For his first theory as to why—despite decades of settled understanding to the contrary—discrimination based on sexual orientation is discrimination based on "sex" under Title VII, Appellant submits that this Court should employ the "but for" test utilized by the majority in *Hively*. *See Hively*, 853 F.3d at 345-46. He argues that sexual orientation discrimination fails the "simple test of whether the evidence shows treatment of a person in a manner which but for that person's sex would be different." *City of L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978). Under his theory, "where an employer fires a male employee because [he] is married to . . . a man, but would not fire a female employee for" being married to a man, the employer has discriminated on the basis of sex. Appellant's Br. at 15. Thus, discrimination based on sexual orientation *necessarily* involves discrimination based on sex. *Accord Zarda*, 883 F.3d at 113 ("Because one cannot fully define a person's sexual orientation without identifying his or her sex, sexual orientation is a function of sex.").

Appellant's argument misapplies the "but for" test in two ways. *First*, as Judge Sykes correctly observed in her dissent, the but for "comparison can't do its job of ruling in sex discrimination as the actual reason for the employer's decision . . . if we're not scrupulous about holding *everything* constant except the plaintiff's sex." *Hively*, 853 F.3d at 366 (Sykes, J., dissenting). But, in a sleight-of-hand,

Appellant's analysis changes both the hypothetical employee's sex (from male to female) and his sexual orientation (from gay to straight). A proper application of *Manhart*'s "simple test" would be to change the employee's sex (to female) but keep the sexual orientation constant (gay). The employee would thus be subject to discrimination regardless of sex (whether as a gay man or gay woman). Thus properly construed, the "but for" test does not bring sexual orientation discrimination within the purview of Title VII.

Second, even if Appellant were properly applying the "but for" test, that does not establish "disparate treatment of men and women," *Price Waterhouse*, 490 U.S. at 251, in circumstances where "the sexes are not similarly situated," *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, 469 (1981). Appellant's simplistic application of the "but for" test would prohibit sex-specific restrooms or locker rooms under Title VII because a male employee would not be prohibited from using a women's restroom "but for" the fact that he is a man. But, of course, accounting for sex-based differences without treating one sex worse than the other is not prohibited by Title VII. *See, e.g., Jespersen v. Harrah's Operating Co., Inc.*, 444 F.3d 1104, 1109-10 (9th Cir. 2006) (en banc) (noting that courts have "long recognized that companies may differentiate between men and women in appearance and grooming policies" so long as the policy "does not unreasonably burden one gender more than the other," even if employees who fail to comply

with the policy's "sex-differentiated requirements" would not have been disciplined "but for" their sex).

B. Sexual orientation discrimination is not "associational discrimination" based on sex.

Appellant next contends that sexual orientation discrimination is "associational discrimination" on the basis of sex. He cites primarily to cases dealing with discrimination based on interracial relationships for the proposition 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)." Appellant's Br. at 15-16. This analogy is misplaced.

Title VII prohibits discrimination against an employee in an interracial relationship because that is discrimination "because of [the employee's] race." 42 U.S.C. 2000e-2(a). But this is not "associational discrimination" as such—it is race discrimination. The employer is treating the employee in an interracial relationship adversely because of the employer's judgment about the employee's race relative to other races. The employer is thus engaging in adverse race-based treatment of the employee. This is purely race discrimination.

On the other hand, where an employer discriminates against an employee on the basis of sexual orientation, it does not engage in sex-based treatment at all. The employer is not treating one sex differently than the other; rather, it is

engaging in sex-neutral treatment of both gay men and women. For this reason, Appellant's analogy to interracial relationships fails.

C. Discrimination based on sexual orientation is not prohibited sex stereotyping.

Appellant's final argument is that sexual orientation discrimination is sex stereotyping because it is based on an employee's failure to conform to the gender norm of heterosexuality. Thus, sexual orientation discrimination is *per se* sex discrimination under Title VII. But like Appellant's argument regarding the "but for" theory of discrimination, this argument likewise contains two fatal flaws.

First, it mistakenly assumes that sexual orientation discrimination necessarily involves a sex-based stereotype. In order to prevail on a sex-stereotyping claim, an employee must show that the employer actually relied on her gender in making its decision." *Price Waterhouse*, 490 U.S. at 251. As the Supreme Court explained, "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." *Id.* at 250. The employer is *Price Waterhouse*, for example, acted on the basis of gender because it "act[ed] on the basis of a belief that a woman cannot be aggressive, or that she must not be . . . ." *Id.*

But if an employer discriminates against a female employee solely because of her homosexuality, rather than, for example, whether she displays masculine

mannerisms, the employer may not have "actually relied on her gender in making its decision." *Id*. As Judge Sykes explained, "heterosexuality 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*." *Hively*, 853 F.3d at 370.

Second, even if sexual orientation discrimination could be gender stereotyping, it is not the kind of stereotyping barred by *Price Waterhouse*. Title VII only prohibits "sex stereotypes" inasmuch as that that kind of "sex-based consideration[]" causes "disparate treatment of men and women." 490 U.S. at 242, 251. This was obviously true of the stereotype against aggressive women seen in *Price Waterhouse*. But the "stereotype" of heterosexuality does not result in "disparate treatment of men and women." *Price Waterhouse*, 490 U.S. at 251. Rather, gay men are treated no better or worse than gay women. Indeed, the notion of gender stereotyping cannot possibly be read as broadly as Appellant suggests; otherwise, it would be impermissible stereotyping for an employer to take action against a female employee for failing to use the women's restroom. Such a notion is simply untenable and demonstrates that, contrary to Appellant's assertion, Title VII cannot and should not be rewritten by the courts to cover sexual orientation

discrimination. The district court's unremarkable decision on this point should be affirmed.

CONCLUSION

For the foregoing reasons, *Amici* ask the Court to affirm the decision of the district court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Mark Horton v. Midwest Geriatric Management, LLC (18-1104)

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains approximately 3,761 words, excluding the parts exempted by Fed. R. App. P. 32(f).

I also certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5)-(6) and 8th Cir. R. 28A(c) because it has been prepared in a proportionally-spaced typeface using Microsoft Word in 14-Point Times New Roman.

I further certify that this PDF file was scanned for viruses, and no viruses were found on the file.

/s/ *Dylan L. Jacobs*

CERTIFICATE OF SERVICE

I, Dylan L. Jacobs, Assistant Solicitor General, hereby certify that on June 12, 2018, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which shall send notification of such filing to any CM/ECF participants.

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RE: 18-1104 Mark Horton v. Midwest Geriatric Management

Dear Counsel:

The amicus curiae brief of the States in support of the appellee has been filed. Please complete and file an Appearance form. You can access the Appearance Form at www.ca8.uscourts.gov/all-forms.

Please note that Federal Rule of Appellate Procedure 29(g) provides that an amicus may only present oral argument by leave of court. If you wish to present oral argument, you need to submit a motion. Please note that if permission to present oral argument is granted, the court's usual practice is that the time granted to the amicus will be deducted from the time allotted to the party the amicus supports. You may wish to discuss this with the other attorneys before you submit your motion.

Michael E. Gans
Clerk of Court

YML

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