IN THE
SUPREME COURT OF MISSOURI

SC96828

HAROLD LAMPLEY and RENE FROST,

Appellants,

v.

MISSOURI COMMISSION ON HUMAN RIGHTS,

Respondent.

Appeal from the Circuit Court of Cole County, Missouri
The Honorable Patricia S. Joyce
Case No. 15AC-CC00296

Brief of American Civil Liberties Union; ACLU of Missouri; 9to5, National Association of Working Women; A Better Balance; American Association of University Women; California Women's Law Center; Coalition of Labor Union Women; Equal Rights Advocates; Feminist Majority Foundation; Gender Justice; Legal Momentum; Legal Voice; National Organization for Women Foundation; National Partnership for Women & Families; National Women's Law Center; Southwest Women's Law Center; Women Employed; Women's Law Center of Maryland, Inc.; and Women's Law Project as *Amici Curiae* in Support of Appellants Filed with Consent

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Jurisdictional Statement

Amici adopt the jurisdictional statement as set forth in Appellants' brief.

Interest of *Amici Curiae* and Authority to File

Amici are a coalition of civil rights groups and public interest organizations committed to preventing, combating, and redressing sex discrimination and protecting the equal rights of women in the United States. *Amici* have a vital interest in ensuring that the promise of equal employment opportunity effectively protects all people—including lesbian, gay, and bisexual persons—from invidious discrimination "because of sex."

This *amici* brief is filed with consent of the parties.

The **American Civil Liberties Union** ("ACLU") is a nationwide, nonprofit, nonpartisan organization with over 1.6 million members dedicated to defending the principles embodied in the Constitution and our nation's civil rights laws. The **ACLU of Missouri** is one of the ACLU's statewide affiliates with over 19,000 members. The ACLU and the ACLU of Missouri have long fought to ensure that lesbian, gay, bisexual, and transgender people are treated equally and fairly under law.

9to5, National Association of Working Women is a 45-year-old national membership organization of women in low-wage jobs dedicated to achieving economic justice and ending all forms of discrimination. Our membership includes transgender individuals. 9to5 has a long history of supporting local, state and national measures to combat discrimination. The outcome of this case will directly affect our members' and constituents' rights and economic well-being, and that of their families.

A Better Balance is a national legal advocacy organization dedicated to promoting fairness in the workplace and helping employees meet the conflicting demands of work and family. Through its legal clinic, A Better Balance provides

direct services to low-income workers on a range of issues, including employment discrimination based on pregnancy and/or caregiver status. A Better Balance is also working to combat LGBTQ employment discrimination through its national LGBT Work-Family project. The workers we serve, who are often struggling to care for their families while holding down a job, are particularly vulnerable to retaliation that discourages them from complaining about illegal discrimination.

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

California Women's Law Center ("CWLC") is a statewide, nonprofit law and policy center dedicated to advancing the civil rights of women and girls through impact litigation, advocacy and education. CWLC's issue priorities include gender discrimination, reproductive justice, violence against women, and women's health. Since its inception in 1989, CWLC has placed an emphasis on eliminating all forms of gender discrimination, including discrimination based on sexual orientation. CWLC remains committed to supporting equal rights for lesbians and gay men, and to eradicating invidious discrimination in all forms, including eliminating laws and

policies that reinforce traditional gender roles. CWLC views sexual orientation discrimination in the workplace as a form of illegal gender discrimination that is harmful to our state and country, and needs to be eradicated.

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

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

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

Legal Momentum, *the Women's Legal Defense and Education Fund*, is a leading national non-profit civil rights organization that for nearly fifty years has used the power of the law to define and defend the rights of girls and women. Legal Momentum has worked for decades to ensure that all employees are treated fairly in the workplace, regardless of their gender or sexual orientation. Legal Momentum has

litigated cutting-edge gender-based employment discrimination cases, including *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and has participated as *amicus curiae* on leading cases in this area, including *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), and *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993). Legal Momentum has also worked to secure the rights of women under state constitution, including the right of lesbians to marry.

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

treated fairly and equally under the law. As an education and litigation organization dedicated to eradicating sex-based discrimination, we believe that the Civil Rights Act of 1964, Title VII provision prohibiting sex discrimination extends to sexual orientation.

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

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

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 these cases because we 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 transgender 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.

Statement of Facts

Amici adopt the statement of facts as set forth in Appellants' brief.

Argument

This appeal involves the Missouri Commission on Human Rights' refusal to investigate Appellants' charges of sex discrimination solely because Appellant Harold Lampley is gay. That approach runs counter to decades of Supreme Court history making plain that prohibitions against discrimination "because of sex" provide robust protection for all workers, including workers who are lesbian, gay, and bisexual.

Missouri courts routinely look to federal case law when interpreting language in the Missouri Human Rights Act ("MHRA") that is similar to federal law, such as the prohibition against discrimination "because of sex." The rich history of courts' interpretations of Title VII, the federal law banning sex discrimination in the workplace, helps to show why discrimination on the basis of sexual orientation is discrimination "because of sex." Initially, Title VII was a vehicle for striking down employer policies and practices that literally excluded women (or men) from certain employment opportunities. It soon became clear, however, that discrimination "because of sex" means much more than simply getting rid of "Help Wanted—Male" signs (or, for that matter, "Help Wanted—Female" 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 "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.

So, too, generalizations about men and women because they are lesbian, gay, or bisexual are impermissible discrimination "because of sex." Indeed, many of the rationales advanced to exclude lesbian, gay, and bisexual employees from Title VII were also made by employers, and rejected by the courts, in cases involving equal opportunity for women. Sexual harassment, for example, is now recognized to be as unlawful as it is odious, but it was not always understood to be discrimination "because of sex."

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 the individuals to whom one is attracted. 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. There is no principled reason to create an exception from sex discrimination laws for sex discrimination that involves sexual orientation, as the en banc Second and Seventh Circuits, federal district courts, and administrative agencies have recognized. This Court should come to the same conclusion.

The Circuit Court's interpretation of the MHRA precluded not only sex discrimination claims premised on sexual orientation, but also claims involving sex stereotyping that do not directly implicate sexual orientation. Again, federal courts' experience with Title VII is instructive. Courts that have wrongly excluded claims of sexual orientation discrimination from Title VII's ambit nonetheless have recognized that the sex discrimination claims of lesbians and gay men are actionable where they involve

additional kinds of gender nonconformity. At a minimum, this Court should affirm the principle that sex, including sex-based stereotypes, should play no role in adverse employment actions in Missouri.

I. The MHRA should be interpreted liberally to address all forms of sex discrimination.

When interpreting a remedial statute such as the MHRA, Missouri courts follow the precept that "remedial statutes should be construed liberally to include those cases which are within the spirit of the law and all reasonable doubts should be construed in favor of applicability to the case." *Mo. Comm'n on Human Rights v. Red Dragon Rest., Inc.*, 991 S.W.2d 161, 166-67 (Mo. App. W.D. 1999) (internal quotation marks omitted). Accordingly, Missouri courts have routinely construed the MHRA liberally "in order to accomplish the greatest public good." *Id.* at 167 (quoting *Hagan v. Dir. of Revenue*, 968 S.W.2d 704, 706 (Mo. banc 1998)).

For example, in *Red Dragon*, the Court of Appeals read the MHRA to prohibit associational discrimination, even before the statute was amended to prohibit it explicitly. *Id.* Similarly, in *Doe ex rel. Subia v. Kansas City, Missouri School District*, 372 S.W.3d 43, 47-48 (Mo. App. W.D. 2012), the Court of Appeals concluded that the MHRA's definition of public accommodation must be interpreted broadly to include schools, even though the text of the statute was susceptible to a narrower interpretation. As a subsequent panel of that court noted, adopting a narrow interpretation of the definition of a "public accommodation" would "circumvent[] the legislature's purpose." *State ex rel. Wash. Univ. v. Richardson*, 396 S.W.3d 387, 396 (Mo. App. W.D. 2013).

Consistent with this general approach, in the sex discrimination context, Missouri courts have applied the MHRA's prohibition against discrimination "because of sex" to a broad range of gender-based discrimination. *See, e.g.*, *Gilliland v. Mo. Athletic Club*, 273 S.W.3d 516, 521 n.8 (Mo. banc 2009) (same-sex harassment is sex discrimination); *Midstate Oil Co. v. Mo. Comm'n on Human Rights*, 679 S.W.2d 842, 846 (Mo. banc 1984) (pregnancy discrimination is sex discrimination).

The Circuit Court gave weight to the fact that the Missouri legislature has declined to amend the MHRA to explicitly prohibit discrimination because of gender identity (and, for that matter, sexual orientation). But the Supreme Court has repeatedly cautioned that acts of subsequent legislatures "deserve little weight in the interpretive process." *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994); *cf. Zarda v. Altitude Express, Inc.*, No. 15-3775, 2018 WL 1040820, slip op. at 62-64 (2d Cir. Feb. 26, 2018) (en banc) (declining to draw same inference from Congress's failure to amend Title VII). Moreover, legislative failure to act could just as easily establish the opposite conclusion from the one the Circuit Court drew: that amendment of the statute was unnecessary because gender identity (and sexual orientation) discrimination already is covered by the prohibition against discrimination because of sex. *Cf. Fabian v. Hosp. of Cent. Conn.*, 172 F. Supp. 3d 509, 527 n.12 (D. Conn. 2016). That is precisely the conclusion the Court of Appeals drew in *Red Dragon*, 991 S.W.2d at 161, which addressed whether the amendment of the MHRA to bar associational discrimination explicitly meant that the MHRA should be interpreted to exclude those claims prior to the amendment. In rejecting the employer's efforts to construe the statute narrowly, the

Court of Appeals noted that "the purpose of a change in the statute can be clarification," not only to change existing law. *Id.* at 167 (internal quotation marks omitted).

At a bare minimum, subsequent legislative action (or inaction) has no bearing on what the legislature intended (or did not intend) when it enacted the MHRA's sex provision. Nor can legislative intent—whatever it may have been—alter the meaning of the words the legislature actually used. *Missourians for Honest Elections v. Mo. Elections Comm'n*, 536 S.W.2d 766, 775 (Mo. App. 1976) (en banc). Two decades ago, the Supreme Court squarely rejected the notion that legislative intent could limit the forms of sex discrimination prohibited by Title VII and made clear that the full scope of Title VII's protections cannot be determined solely by reference to the kinds of discrimination that were evident to legislators in 1964. *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 79-80 (1998). As Justice Scalia observed, the mere fact that a particular strain of bias was "not the principal evil Congress was concerned with when it enacted Title VII" does not end the analysis: "[S]tatutory 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." *Id.* at 79 (finding same-sex sexual harassment to be actionable sex discrimination under Title VII); *see also Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 679-81 (1983) (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 enacted 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 from Title VII (or the MHRA) for lesbian, gay, or bisexual people either.

The Circuit Court's conclusion that employers are free to discriminate against lesbian, gay, and bisexual people without violating the MHRA's prohibition against sex discrimination is inconsistent with the principle that Missouri courts should construe the MHRA broadly to carry out the legislature's goal of eradicating sex discrimination in all its forms.

II. This Court should look to Title VII case law when interpreting the parallel provision of the MHRA barring sex discrimination.

Missouri courts often rely on federal decisions interpreting anti-discrimination laws. That is because the MHRA "is modeled after federal anti-discrimination laws," and federal decisions may supply "strong persuasive authority" for purposes of deciding certain issues. *Pollock v. Wetterau Food Distrib. Grp.*, 11 S.W.3d 754, 771 (Mo. App. E.D. 1999); *see also Daugherty v. City of Maryland Heights*, 231 S.W.3d 814, 818 (Mo. banc 2007) ("In deciding a case under the MHRA, appellate courts are guided by both Missouri law and federal employment discrimination case[]law that is consistent with Missouri law."). Accordingly, where the language of the MHRA is similar to its federal counterpart, Missouri courts have often adopted federal courts' reasoning and conclusions. *See, e.g.*, *Daugherty*, 231 S.W.3d at 821-22 (relying on federal disability case law to interpret the MHRA); *id.* at 818 (citing other Missouri cases applying federal precedents to interpret the MHRA); *Swyers v. Thermal Sci., Inc.*, 887 S.W.2d 655, 656

(Mo. App. E.D. 1994) (applying federal case law regarding Title VII in construing the "after-acquired evidence" defense to an MHRA claim).

Both Missouri and federal law clearly and unambiguously prohibit workplace discrimination "because of sex." *Compare* Mo. Rev. Stat. § 213.055.1(1)(a) (providing that it is an "unlawful employment practice . . . [f]or an employer . . . to discriminate against any individual . . . because of such individual's . . . sex"), *with* 42 U.S.C. § 2000e-2(a)(1) (providing that it is an "unlawful employment practice for an employer . . . to discriminate against any individual . . . because of such individual's . . . sex"). This Court should follow federal authority in finding that discrimination against lesbian, gay, and bisexual employees is discrimination "because of sex."

III. Federal courts frequently allow for an expansive interpretation of what constitutes discrimination "because of sex."

Title VII of the Civil Rights Act of 1964 forbids employers from making adverse decisions about hiring, firing, or the terms, conditions, or privileges of employment because of 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 little 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.[1] Indeed, many have presumed that such distinctions were the only kind of discrimination "because of sex" that concerned legislators in 1964. This interpretation is 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).[2]

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[1] Even the motivations of the sex amendment's sponsor, Representative Howard Smith of Virginia, have been the subject of intense dispute among historians, giving rise to 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 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).

[2] 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,*

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 quotation marks omitted). Indeed, when examined in full, the half-century of precedent interpreting "sex discrimination" has dismantled not just distinctions *between* men and women, 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 (plurality opinion). To

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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).

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.*

As detailed in Part IV.B, *infra*, *Price Waterhouse* confirms that adverse employment action based on all manner of sex stereotypes is prohibited by Title VII's sex provision. The stereotype concerning to whom men and women "should" be romantically attracted is encompassed within this principle.

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. *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) (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 upheld a Florida statute exempting women from jury service because of their "special responsibilities" in the home unless they affirmatively chose to register for service. *Hoyt v. Florida*, 368 U.S. 57, 62 (1961); *see also Duren v. Missouri*, 439 U.S. 357, 360 (1979) (Missouri statute granting women automatic exemption from jury service violated Sixth Amendment's fair cross section requirement).

It is unsurprising, then, that prior to Title VII's enactment, it had been 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 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 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). 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 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.[3]

[3] 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

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

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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). This Court has similarly concluded that pregnancy-based discrimination is sex discrimination under the MHRA. *Midstate Oil Co.*, 679 S.W.2d at 846.

that Congress had always intended to protect *all* individuals from sex discrimination in employment." *Newport News*, 462 U.S. at 681.

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.*, *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); *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); *Jefferies v. Harris Cty. 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." 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"); *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).

Roughly a decade later, the Court extended *Vinson* to encompass same-sex sexual harassment. *See Oncale*, 523 U.S. at 79-80; *accord Gilliland*, 273 S.W.3d at 521 n.8. 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. 523 U.S. 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.

IV. Title VII's prohibition against sex discrimination protects all employees, including lesbian, gay, and bisexual people.

As a remedial statute, and as illustrated by the foregoing decisions, Title VII does not prohibit only discrimination against women in favor of men. *Oncale*, 523 U.S. at 78. Rather, the statute protects "*all* individuals" from differential treatment because of their sex. *Newport News*, 462 U.S. at 681. This includes lesbian, gay, and bisexual individuals, as the en banc Second and Seventh Circuits have recently held. *See Zarda*, 2018 WL 1040820; *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339 (7th Cir. 2017) (en banc).

A. Discrimination because of sexual orientation is sex discrimination under the plain meaning of the term "sex."

Discrimination on the basis of sexual orientation is sex discrimination under the plain meaning of the term, because sexual orientation turns on one's sex in relation to the sex of one's partner. Consideration of an employee's sexual orientation therefore necessarily involves consideration of the employee's sex. *Zarda*, 2018 WL 1040820, slip op. at 29-37; *Hively*, 853 F.3d at 345-47; *Isaacs v. Felder Servs., LLC*, 143 F. Supp. 3d 1190, 1193 (M.D. Ala. 2015) (holding that "claims of sexual orientation-based discrimination are cognizable under Title VII"); *Baldwin v. Foxx*, EEOC Doc. 0120133080, 2015 WL 4397641, at *5 (EEOC July 15, 2015).

That discrimination because of sexual orientation involves impermissible consideration of sex is particularly apparent in the employee benefits context. When an employer refuses to provide insurance coverage to an employee's same-sex spouse, but would provide such benefits to a different-sex spouse, the employment benefit depends on the sex of the employee. For example, a female employee who is denied fringe benefits because she is married to a woman experiences sex discrimination, because she would be provided those benefits if she were a man married to a woman. *See* Final Determination, *Cote v. Wal-Mart Stores E., LP*, EEOC Charge No. 523-2014-00916 (Jan. 29, 2015), https://www .glad.org/wp-content/uploads/2014/09/cote-v-walmart-probable-cause-notice.pdf. In addition to the EEOC, several federal courts have reached the same conclusion in analogous contexts. For example, in *Foray v. Bell Atlantic*, the court recognized that a male plaintiff could advance a sex discrimination theory based on the denial of benefits to his same-sex partner. *See* 56 F. Supp. 2d 327, 329-30 (S.D.N.Y. 1999) (recognizing sex discrimination theory under Title VII and the Equal Pay Act "because all things being equal, if [plaintiff's] gender were female, he would be entitled to claim his domestic partner as an eligible dependent under the benefits plan" but dismissing both claims because plaintiff and his partner were not similarly situated to married couples (internal quotation marks omitted)); *see also In re Levenson*, 560 F.3d 1145, 1147 (9th Cir. 2009) (holding that denial of benefits for same-sex spouse of federal public defender constituted discrimination on the basis of sex or sexual orientation).

Numerous federal courts have concluded that sexual orientation discrimination is sex discrimination in cases seeking the freedom to marry for same-sex couples. As Judge

Ortrie D. Smith recognized, the Equal Protection Clause forbids marriage bans for same-sex couples as a form of impermissible sex discrimination: "The State would permit Jack and Jill to be married but not Jack and John. Why? Because in the latter example, the person Jack wishes to marry is male. The State's permission to marry depends on the genders of the participants, so the restriction is a gender-based classification." *Lawson v. Kelly*, 58 F. Supp. 3d 923, 934 (W.D. Mo. 2014); *see also Latta v. Otter*, 771 F.3d 456, 480 (9th Cir. 2014) (Berzon, J., concurring); *Jernigan v. Crane*, 64 F. Supp. 3d 1260, 1286-87 (E.D. Ark. 2014), *aff'd on other grounds*, 796 F.3d 976 (8th Cir. 2015); *Rosenbrahn v. Daugaard*, 61 F. Supp. 3d 845, 859-60 (D.S.D. 2014), *aff'd on other grounds*, 799 F.3d 918 (8th Cir. 2015); *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1206 (D. Utah 2013), *aff'd on other grounds*, 755 F.3d 1193 (10th Cir. 2014); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 996 (N.D. Cal. 2010), *appeal dismissed sub nom. Perry v. Brown*, 725 F.3d 1140 (9th Cir. 2013); *cf. Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 982 n.4 (N.D. Cal. 2012) ("Ms. Golinski is prohibited from marrying Ms. Cunninghis, a woman, because Ms. Golinski is a woman. If Ms. Golinski were a man, [the Defense of Marriage Act ("DOMA")] would not serve to withhold benefits from her. Thus, DOMA operates to restrict Ms. Golinski's access to federal benefits because of her sex."), *initial hearing en banc denied*, 680 F.3d 1104 (9th Cir. 2012), *and appeal dismissed*, 724 F.3d 1048 (9th Cir. 2013). This reasoning applies with equal force to Title VII (and the MHRA) as it does to the Equal Protection Clause.

B. Discrimination because of sexual orientation involves impermissible sex-role stereotyping.

As the Supreme Court recognized in *Price Waterhouse*, the prohibition against discrimination "because of sex" is not limited to discrimination based on the fact that an individual is male or female, but also discrimination based on other aspects of a person's sex, such as gender expression and conformity (or lack of conformity) with social sex roles. 490 U.S. at 250 (employers discriminate "because of sex" when they rely on sex-specific stereotypical beliefs, such as the notion that "a woman cannot be aggressive, or that she must not be"); *id.* at 256 ("[I]f an employee's flawed 'interpersonal skills' can be corrected by a soft-hued suit or a new shade of lipstick, perhaps it is the employee's sex and not her interpersonal skills that has drawn the criticism.").

While discrimination because of sexual orientation often is accompanied by explicit evidence of disparate treatment because of an individual's failure to conform with sex stereotypes about dress and appearance, it need not be to constitute sex discrimination. *See Zarda*, 2018 WL 1040820, slip op. at 38-47; *Hively*, 853 F.3d at 346; *Baldwin*, 2015 WL 4397641, at *7-8. Since 2011, the EEOC has recognized that discrimination against lesbian, gay, and bisexual employees is unlawful to the extent that it turns on the sex-role expectation that women should be attracted to only men (and not women), and that men should be attracted to only women (and not men). *See Veretto v. Donahoe*, EEOC Doc. 0120110873, 2011 WL 2663401, at *3 (EEOC July 1, 2011) (Title VII prohibits adverse employment action "motivated by the sexual stereotype that marrying a woman is an essential part of being a man"); *see also Luigi B. v. Johnson*,

EEOC Doc. 0120110576, 2014 WL 4407457, at *7 (EEOC Aug. 20, 2014) (collecting cases).

Because nonconformity with sex-role expectations is the very quality that defines lesbian, gay, and bisexual people, federal courts likewise have begun to recognize that discrimination against members of those groups is a form of sex stereotyping without requiring additional evidence of gender nonconformity. *See, e.g.*, *Hively*, 853 F.3d at 346 (noting that the plaintiff's same-sex attraction was "the ultimate case of failure to conform to the female stereotype"); *Philpott v. New York*, 252 F. Supp. 3d 313, 317 (S.D.N.Y. 2017) ("[B]ecause plaintiff has stated a claim for sexual orientation discrimination, 'common sense' dictates that he has also stated a claim for gender stereotyping discrimination, which is cognizable under Title VII."); *EEOC v. Scott Med. Health Ctr., P.C.*, 217 F. Supp. 3d 834, 841 (W.D. Pa. 2016) ("There is no more obvious form of sex stereotyping than making a determination that a person should conform to heterosexuality."); *Videckis v. Pepperdine Univ.*, 100 F. Supp. 3d 927, 936 (C.D. Cal. 2015) ("[A] policy that female basketball players could only be in relationships with males inherently would seem to discriminate on the basis of gender."); *Boutillier v. Hartford Pub. Sch.*, 221 F. Supp. 3d 255, 269 (D. Conn. 2016) ("[S]tereotypes concerning sexual orientation are probably the most prominent of all sex related stereotypes . . . ."); *Hall v. BNSF Ry. Co.*, No. C13-2160, 2014 WL 4719007, at *3 (W.D. Wash. Sept. 22, 2014) (denying motion to dismiss where plaintiff alleged that "he (as a male who married a male) was treated differently in comparison to his female coworkers who also married males"); *Terveer v. Billington*, 34 F. Supp. 3d 100, 116 (D.D.C. 2014)

(denying motion to dismiss where "Plaintiff has alleged that he is 'a homosexual male whose sexual orientation is not consistent with the Defendant's perception of acceptable gender roles'"); *Koren v. Ohio Bell Tel. Co.*, 894 F. Supp. 2d 1032, 1038 (N.D. Ohio 2012) (finding genuine issue of material fact under sex stereotyping theory where plaintiff failed to conform by taking his same-sex spouse's surname after marriage); *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212, 1224 (D. Or. 2002) (finding genuine issue of material fact under sex stereotyping theory where female plaintiff failed to conform by being attracted to and dating other women and not only men).

Nearly every federal court recognizes that discrimination against lesbians, gay men, and bisexual people often includes sex-based harassment and evaluations. Accordingly, even courts that have wrongly excluded claims of sexual orientation discrimination from Title VII have allowed claims of lesbians and gay men to proceed under Title VII where they sound explicitly in sex stereotypes. For example, even before its recent decision in *Hively*, the Seventh Circuit held that a plaintiff stated a valid claim of sex discrimination under Title VII when he was harassed by co-workers by being called a "fag" and a "queer" because "a homophobic epithet like 'fag,' for example, may be as much of a disparagement of a man's perceived effeminate qualities as it is of his perceived sexual orientation." *Doe ex rel. Doe v. City of Belleville, Ill.*, 119 F.3d 563, 593 & n.27 (7th Cir. 1997), *vacated on other grounds*, 523 U.S. 1001 (1998); *see also Lewis v. Heartland Inns of Am., L.L.C.*, 591 F.3d 1033, 1036, 1041 (8th Cir. 2010) (evidence that employer rejected female employee's "'tomboyish' appearance" and

"Ellen DeGeneres kind of look" made out claim of sex discrimination); *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285 (3d Cir. 2009) (concluding that effeminate gay man who did not conform to his employer's expectation of how men should present themselves and behave provided sufficient evidence of gender stereotyping harassment under Title VII); *Nichols v. Azteca Rest. Enters.*, 256 F.3d 864, 874-75 (9th Cir. 2001) (holding that plaintiff, a male waiter, stated a Title VII claim based on harassment "for walking and carrying his tray 'like a woman'—i.e., for having feminine mannerisms"); *Simonton v. Runyon*, 232 F.3d 33, 37 (2d Cir. 2000) (explaining that a gay man would have a viable Title VII claim if "the abuse he suffered was discrimination based on sexual stereotypes, which may be cognizable as discrimination based on sex"); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 261 & n.4 (1st Cir. 1999) (considering gay plaintiff's claim that his co-workers harassed him by "mocking his supposedly effeminate characteristics" and acknowledging that "just as a woman can ground an action on a claim that men discriminated against her because she did not meet stereotyped expectations of femininity . . . a man can ground a claim on evidence that other men discriminated against him because he did not meet stereotypical expectations of masculinity"). At a minimum, this Court should follow nearly every federal circuit and affirm that, regardless of sexual orientation, sex discrimination involving gender-based stereotypes about behavior, appearance, or other personal characteristics is prohibited by the MHRA.

C. Discrimination against people who have or seek to have same-sex relationships is associational discrimination.

Title VII, unlike the MHRA, does not explicitly bar associational discrimination, yet federal courts have long recognized that associational discrimination violates Title VII in the context of employees who are subjected to adverse action because of an interracial marriage or relationship. *See, e.g.*, *Floyd v. Amite Cty. Sch. Dist.*, 581 F.3d 244, 249 (5th Cir. 2009); *Holcomb v. Iona Coll.*, 521 F.3d 130, 139 (2d Cir. 2008); *Parr v. Woodmen of World Life Ins. Co.*, 791 F.2d 888, 892 (11th Cir. 1986). "The reason is simple: where an employee is subjected to adverse action because an employer disapproves of interracial association, the employee suffers discrimination because of the employee's *own* race." *Holcomb*, 521 F.3d. at 139.[4]

The same standard, and the same reasoning, apply to discrimination against an employee because he or she is in a relationship, or seeks to be in one, with a person of the same sex. *Zarda*, 2018 WL 1040820, slip op. at 48-59; *Hively*, 853 F.3d at 348-49;

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[4] The MHRA's explicit prohibition against discrimination against any person "because of such person's association with any person protected by" the MHRA, Mo. Rev. Stat. § 213.070(4), means that the Missouri Commission on Human Rights should have investigated the claim of Appellant Rene Frost based on her association with Appellant Harold Lampley. *See, e.g.*, *Francin v. Mosby*, 248 S.W.3d 619, 622 (Mo. App. E.D. 2008) (employee presented cognizable claim for discrimination based on association with his wife, who was disabled).

Boutillier, 221 F. Supp. 3d at 268; *Baldwin*, 2015 WL 4397641, at *6-7; *see also Price Waterhouse*, 490 U.S. at 243 n.9 (plurality opinion) (noting that Title VII "on its face treats each of the enumerated categories exactly the same"). The employer's disapproval of same-sex relationships depends on the employee's sex: If the employee were of a different sex, he or she would not be in (or seek to be in) a same-sex relationship and, therefore, would not be subject to the employer's adverse action. *Cf. Foray*, 56 F. Supp. 2d at 329 ("[A]ll things being equal, if [plaintiff's] gender were female, he would be entitled to claim his domestic partner as an eligible dependent under the benefits plan."); Final Determination, *Cote v. Wal-Mart Stores E., LP*, EEOC Charge No. 523-2014-00916 (Jan. 29, 2015), https://www .glad.org/wp-content/uploads/2014/09/cote-v-walmart-probable-cause-notice.pdf (a female employee is "subjected to employment discrimination [where] she was treated differently and denied benefits *because* of her sex, since such coverage would be provided if she were a woman married to a man"). As the en banc Seventh Circuit noted, this exercise "reveals that the discrimination rests of distinctions drawn according to sex"—distinctions prohibited by Title VII. *See Hively*, 853 F.3d at 349.

* * *

This Court should apply the principles set forth by the Supreme Court to determine whether sexual orientation claims are covered by prohibitions against discrimination "because of sex." Applying those principles leads to the conclusion that sexual orientation discrimination is a form of sex discrimination prohibited by the MHRA.

Conclusion

This Court should hold that sexual orientation discrimination is sex discrimination prohibited by the MHRA.

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Respectfully submitted,

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Certificate of Service and Compliance

The undersigned hereby certifies that on February 27, 2018, the foregoing *amici* brief was filed electronically and served automatically on the counsel for all parties.

The undersigned further certifies that pursuant to Rule 84.06(c), this brief: (1) contains the information required by Rule 55.03; (2) complies with the limitations in Rule 84.06; (3) contains 6,880 words (excluding the cover, signature block, and this certificate of service and compliance), as determined using the word-count feature of Microsoft Office Word. Finally, the undersigned certifies that the electronically filed brief was scanned and found to be virus-free.

/s/ Anthony E. Rothert