No. 18-1104

IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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, No. 4:17-cv-2324

Brief of *Amicus Curiae* The Becket Fund for Religious Liberty in Support of Defendant-Appellee and Affirmance

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CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26.1 and 29(4)(A), *amicus* The Becket Fund for Religious Liberty states that it does not have a parent corporation and does not issue any stock.

June 12, 2018

/s Eric C. Rassbach
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INTEREST OF THE *AMICUS*[1]

The Becket Fund for Religious Liberty is a non-profit, nonpartisan law firm dedicated to protecting the free expression of all religious traditions. Becket has represented agnostics, Buddhists, Christians, Hindus, Jews, Muslims, Santeros, Sikhs, and Zoroastrians, among others, in lawsuits across the country and around the world. It is frequently involved, both as counsel of record and as *amicus curiae*, in cases seeking to preserve the freedom of all religious people to pursue their beliefs without excessive government interference.

Becket has also represented religious people and institutions with a wide variety of views about the interaction of religious liberty and LGBT rights, including religious people and institutions on all sides of the same-sex marriage debate, and also including both non-LGBT and LGBT clients.

Becket submits this brief to encourage the Court to ensure that its ruling preserves space for legislative and regulatory accommodations for

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[1] No party's counsel authored this brief in whole or in part, and no one other than the amicus curiae or its counsel contributed money that was intended to fund preparing or submitting the brief. All parties have consented to the filing of this brief pursuant to Fed. R. App. P. 29(a)(2).

religious objectors in the context of Title VII and in relation to LGBT rights more generally. In Becket's view, the potential conflicts between people of faith and those seeking to expand protections for LGBT individuals are best resolved not by judicial decree, but though the legislative process, which is more adept at balancing competing societal interests, including specifically the interest in religious liberty.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Sometimes a wolf comes as a wolf. This appeal is an open effort to enlist this Court as a combatant in the culture wars over LGBT rights and religion, with the eventual goal of creating a vehicle for Supreme Court review. Happily, this Court need not sign up for this duty. Under Eighth Circuit precedent, there is no need for the Court to look past the clear language and well-understood historical scope of Title VII in resolving Plaintiff Mark Horton's religious discrimination and sex discrimination claims.

Horton's Title VII religious discrimination claim says more about him than it does about Midwest Geriatric Management or its owners, Judah and Faye Bienstock. Horton would have this Court adopt the ugly position that just because the Bienstocks are Jewish, he can raise a Title VII religious discrimination claim against them. Under this logic, businesses owned by religious people are already under a cloud of suspicion even before a court bothers to look at the facts. The implication of this view—which this Court should not hesitate to reject—is that there is a presumption that religious defendants will act in a discriminatory way towards

existing or potential employees. Such a presumption would itself be discriminatory and a violation of the First Amendment.

Aside from its anti-religious premises, what is missing from Horton's religious discrimination claim is any factual allegation about *his* religious beliefs. Yet that is the sine qua non of a Title VII religious discrimination claim in this Circuit.

Furthermore, Horton tries to create a novel kind of religious discrimination claim, arguing that Title VII authorizes broad claims against employers who (purportedly) ask employees to conform to religious beliefs or practices in carrying out their duties. But this Court has never understood Title VII to allow such a claim. This argument is belied by a close reading of Title VII's text, which explains that "[i]t shall be an unlawful employment practice for an employer . . . to discriminate against any individual . . . because of *such individual's* . . . religion . . . ." 42 U.S.C. § 2000e-2(a) (emphasis added). Permitting such claims to go forward would endanger the ability of religious employers to hire in accordance with their religious beliefs and practices.

Horton's sex discrimination claim fares no better. Horton claims that Title VII's protection against discrimination based on sex incorporates

protections for discrimination based on sexual orientation and gender identity. But this argument is belied by the text, history, and purpose of Title VII and has been entertained by only the Second and Seventh Circuits. Moreover, in some contexts, drawing distinctions based on sexual orientation or gender identity is distinguishable from, and raises issues wholly different than, discrimination based on biological sex.

Even more concerning, however, are the potential conflicts that would arise were Title VII judicially expanded to include sexual orientation and gender identity protections without creating corresponding exemptions for rights of conscience. This is yet another reason why Congress—not the courts—should decide how best to harmonize important workplace antidiscrimination laws like Title VII with core First Amendment religious liberty protections.

ARGUMENT

I. Horton's novel religious discrimination claim fails.

Count II of Horton's complaint was rightly dismissed. Not only has Horton failed to allege sufficient facts, but his attempt to convert a claim based on sexual orientation discrimination into one based on religious

discrimination—based solely on his belief that MGM's owners are Jewish—should be rejected.

A. Merely alleging that Judaism is important to MGM's owners cannot suffice to make out a Title VII religious discrimination claim against them.

Horton makes an argument that is itself discriminatory: because Horton believes that MGM's owners, Judah and Faye Bienstock, are Jewish and that their "faith plays a large part in their professional lives," Horton says he can make out a Title VII religious discrimination claim against MGM. Compl. ¶¶ 14, 15.

That cannot be the law. Merely alleging that a business owner is Jewish, even devoutly Jewish, cannot be the sole factual basis for bringing a Title VII religious discrimination claim against that business.

Yet Horton's only "factual" allegations regarding religion do just that. Those allegations, based only on Horton's information and belief, are that the Bienstocks "are of the Jewish faith[,]" "that the Jewish faith plays a large part in their professional lives[,]" and that they "have made their faith and its influence on their business known." Compl. ¶¶ 14, 15. There is no allegation that Horton had any discussions with the Bienstocks or others about religious topics or that he was asked about, or voluntarily

shared, his religious beliefs with MGM. Indeed, Horton doesn't say anything at all about his own beliefs, except that in Count II he says he thinks that his "religious beliefs regarding homosexual marriage and relationships differed from those held" by the Bienstocks. Compl. ¶ 65.

This argument—that because the Bienstocks are Jewish, their company must be held to a more demanding standard—is itself discriminatory. If that argument were adopted by courts, it would make religious employers peculiarly vulnerable to religious discrimination claims, solely because they are religious. How absurd would it be for courts to lower the pleading threshold for an age or disability discrimination claim simply because the defendant business's owner were elderly, or disabled? Such a result cannot be squared with Title VII or the Constitution. To the contrary, the First Amendment shows "special solicitude" for religious employers, not special suspicion. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 189 (2012).

Here, Horton's theory would mean that religious employers, or even entirely secular companies simply owned by religious people, would start out with one strike against them in a Title VII religious discrimination case, solely because of their religious connection. That would be "act[ing]

in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices[,]" which the Supreme Court has recently reiterated violates the First Amendment. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, No. 16-111, 2018 WL 2465172, at *12 (U.S. June 4, 2018).

Moreover, the idea that businesses owned by *devout* Jews ought to be given even more scrutiny runs afoul of the First Amendment's prohibition on discriminating among religions. The "degree of religiosity" of an employer "and the extent to which that religiosity affects its operations" is supposed to be constitutionally off-limits. *Colorado Christian Univ. v. Weaver*, 534 F.3d 1245, 1259 (10th Cir. 2008) (McConnell, J.). Yet here Horton would have the Court find it relevant that (according to the complaint) the Bienstocks' "Jewish faith plays a large part in their professional lives" and that "their faith and its influence on their business" is well-known. Compl. ¶¶ 14, 15.

The reality is that civil courts ought to be agnostic about the Bienstocks' religious beliefs, whether they happen to be Jewish, devoutly Jewish, or something else. As we demonstrate below, the right judicial

focus in a Title VII religious discrimination case is on the employee's religious beliefs, not the employer's. But the Court can also stop its analysis of the religious discrimination claim here—merely being Jewish or even devoutly Jewish cannot suffice on its own to make out a Title VII religious discrimination claim.

B. Title VII religious discrimination claims must be premised on discrimination against an employee because of *her* religious beliefs or practices, not the employer's supposed religious beliefs.

Aside from its discriminatory premise, Horton's religious discrimination claim fails for a second reason as well: he does not allege that MGM's alleged rescission of his employment offer was based on *his own* religious beliefs.

Title VII makes it unlawful for an employer to discriminate against an employee based on *that employee's* religious beliefs. As the plain language of Title VII states, "[i]t shall be an unlawful employment practice for an employer . . . to discriminate against any individual . . . because of *such individual's* . . . religion . . . ." 42 U.S.C. § 2000e-2(a) (emphasis added). This provision, for example, prevents discrimination against an employee who, for religious reasons, wants to wear a headscarf while working at a

retail store. *See E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2033 (2015).

Title VII does not come into play, unless discrimination based on an *employee's own religious belief* is alleged. *See Tovar v. Essentia Health*, 857 F.3d 771, 776 (8th Cir. 2017) (Title VII requires an employee "to have suffered discrimination on the basis of *her own* protected characteristic." (emphasis added)); Andrea J. Sinclair, *Delimiting Title VII: Reverse Religious Discrimination and Proxy Claims in Employment Discrimination Litigation*, 67 Vand. L. Rev. 239, 267 (2014) ("Title VII was meant to provide protection only for *members of a protected class* that has traditionally been subject to discrimination." (emphasis added)).

But even putting aside *whose* beliefs might be at issue, religious discrimination must be based on *religious* beliefs—for example, religious beliefs about same-sex marriage.

In *Prowel v. Wise Business Forms, Inc.* the Third Circuit rejected the plaintiff's religious discrimination claim as simply a "repackaged claim for sexual orientation discrimination." 579 F.3d 285, 293 (3d Cir. 2009). The complaint in *Prowel* alleged only that the plaintiff suffered an adverse employment action based on his status as a homosexual man. As

the court put it, "when asked to identify which of [the employer's] beliefs to which he failed to conform, Prowel could identify just one: 'that a man should not lay with another man.'" *Id*. at 292-93. The court then looked to the remaining allegations in the complaint and concluded that the "exclusive[ ]" basis for the alleged discrimination was Prowel's homosexual status. *Id.* at 293.

This was so even though "Prowel averred that he suffered religious harassment because: 'I am a gay male, which status several of my co-workers considered to be contrary to being a good Christian.'" *Id*. Despite this facially religious allegation, the court saw the lack of a factual basis in the complaint and thus refused to "accept Prowel's *de facto* invitation to hold that he was discriminated against 'because of religion' merely by virtue of his homosexuality." *Id*.

The Sixth Circuit came to the same conclusion in *Pedreira v. Kentucky Baptist Homes for Children, Inc.*, when it rejected the plaintiff's attempt to convert a claim for sex discrimination into one for religious discrimination. 579 F.3d 722, 728 (6th Cir. 2009). As the court explained, "Pedreira has not alleged any particulars about her religion that would even allow an inference that she was discriminated against on account of

her religion, or more particularly, her religious differences with [her employer]." *Id.* Or put another way, "[t]o show that the termination was based on her religion, the plaintiff must show that it was the *religious* aspect of her conduct that motivated her employer's actions." *Id.* (emphasis original; citation and internal alterations omitted).

The above two cases can be contrasted with *Erdmann v. Tranquility Inc.*, in which the plaintiff was told that his "homosexuality was immoral and that he would go to hell if he did not give up his homosexuality and become a Mormon." 155 F. Supp. 2d 1152, 1161 (N.D. Cal. 2001). The plaintiff further alleged that he suffered discrimination when he refused to lead prayer in the office. *Id.* Thus, "Erdmann did not claim Title VII religious harassment based exclusively upon his homosexual status." *Prowel*, 579 F.3d at 293. Instead he pointed to facts showing discrimination based on his religious disagreements with his employer, including a religious disagreement over the morality of same-sex marriage.

Horton's claim is like *Prowel*, not *Erdmann*. His complaint draws *no* connection between his or the Bienstocks' alleged religious beliefs and his sexual orientation. Nor does he connect anyone's religious beliefs to the

alleged withdrawal of his employment offer. And as in *Pedreira*, the exclusive factual basis for Horton's claims is his same-sex relationship; even if one takes all the facts in the complaint as true, there was no "*religious* aspect" to his alleged disagreement with MGM. *Pedreira*, 579 F.3d at 728 (emphasis original).

C. Horton's allegations that his religious views diverge from the alleged religious views of the Bienstocks do not suffice to make out a religious discrimination claim.

A third deficiency in Horton's Title VII religious discrimination claim is rooted in his attempt to analogize his case to other cases that have entertained religious nonadherence claims: that is, cases where an employer is alleged to discriminate against an employee by imposing religiously-motivated requirements on that employee. Not only is there no factual support for this claim, but more importantly, the broad recognition of such a cause of action would be unconstitutional, as religious employers must, in many circumstances, be able to impose such requirements on their employees.

In the few cases that have entertained claims for nonadherence to the religious views of an employer, courts have always looked to evidence of

actual disagreement between the employee and her employer over a sincerely held *religious* belief. As explained above, there is no evidence of such a disagreement here. *See Shapolia v. Los Alamos Nat'l Lab.*, 992 F.2d 1033, 1038 (10th Cir. 1993) (claim based on "employee's failure to hold or follow his or her employer's *religious beliefs*." (emphasis added)); *Noyes v. Kelly Servs.*, 488 F.3d 1163, 1166 (9th Cir. 2007) (denial of promotion for failure to be a member of "a *religious organization* whose followers adhere to 'Fourth Way' principles" constituted religious discrimination (emphasis added)).

This case is thus in stark contrast to *Venters*, a case highlighted by opposing *amici*, in which the employer "described the police station as 'God's house'; and to work in that house, one had to be spiritually whole, and that required her to be 'saved.'" *Venters v. City of Delphi*, 123 F.3d 956, 973 (7th Cir. 1997). Indeed, the employer even threatened that if the employee "did not choose 'God's way' over 'Satan's way'—she would lose her job." *Id.* Horton, however, cannot point to any conversation, email, or even stray remark in which the Bienstocks suggested that either Horton's religious beliefs or their religious beliefs played a role in their alleged decision to revoke MGM's offer.

This type of religious discrimination claim would also prove far too much. Specifically, it would subject to civil liability a practice that is common for many religious employers: requiring their employees to follow religiously-motivated workplace policies as a condition of employment. Kosher butchers cannot possibly carry out their work without being able to hire Jewish or non-Jewish employees who are willing and able to conform to the minutiae of kashrut. Buddhist employers can require employees not to take life of any sort while carrying out their duties. Catholic schools can require non-Catholic teachers to abide by Catholic teachings on marriage. *See, e.g., Little v. Wuerl*, 929 F.2d 944, 951 (3d Cir. 1991) ("[I]t does not violate Title VII's prohibition of religious discrimination for a parochial school to discharge a Catholic or a non-Catholic teacher who has publicly engaged in conduct regarded by the school as inconsistent with its religious principles.").[2]

[2] The ministerial exception also reflects this principle. In *Hosanna-Tabor*, the Supreme Court explained that religious organizations may pick their ministers without government interference. *Hosanna-Tabor*, 565 U.S. at 188 ("the Free Exercise Clause . . . protects a religious group's right to shape its own faith and mission through its appointments.").

For many religious employers, hiring an employee who would refuse to respect the religious beliefs and corresponding workplace requirements of their employer—even if the employee's role is wholly secular—would constitute "interference with the ability of religious organizations to define and carry out their religious missions." *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 339 (1987). Imagine a rabbi's shock if he were sued for religious discrimination because only non-Jews are permitted to work as Shabbos goyim who turn on the lights for Saturday services. The reality is that religious employers often need their employees to conform their behavior to the employers' religious practices. That is not just constitutionally permissible, but constitutionally required. *See generally Ehlers-Renzi v. Connelly Sch. of the Holy Child, Inc.*, 224 F.3d 283, 287 (4th Cir. 2000) ("This authorized, and sometimes mandatory, accommodation of religion is a necessary aspect of the Establishment Clause jurisprudence because, without it, government would find itself effectively and unconstitutionally promoting the absence of religion over its practice.").[3]

[3] While Title VII exempts some religious employers from religious discrimination claims, some religious employers may not be exempted, even

Accordingly, the Court should refrain from imposing Title VII requirements that would interfere with religious employers' ability to carry out their religious missions. Since the Constitution and federal civil rights laws plainly protect religious individuals and groups seeking to live their lives and operate their organizations without violating their religious beliefs, *see Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2759 (2014), this Court should reject Plaintiff's invitation to read Title VII as extinguishing those rights.

D. Mere harmonization with religious tenets cannot give rise to a Title VII religious discrimination claim.

Broader constitutional considerations also make clear that Horton cannot be right. Accepting Horton's argument would import into the Title VII context an argument that the Supreme Court has repeatedly rejected in the Establishment Clause context: "the 'Establishment' Clause does not ban federal or state regulation of conduct whose reason or effect

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though they hold sincere religious beliefs that ought to be respected and accommodated. *See, e.g., Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1131 (10th Cir. 2013), *aff'd sub nom. Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) ("*Amos* leaves open the question of whether for-profit status matters for Title VII's religious employer exemption.").

merely happens to coincide or harmonize with the tenets of some or all religions." *McGowan v. Maryland*, 366 U.S. 420, 442 (1961).

Unlike a private employer, however, the government is banned from favoring or disfavoring any religion. Thus, if the *government* does not discriminate when its actions happen to coincide or harmonize with religious beliefs or practices, then a fortiori *private employers* cannot discriminate merely because their actions coincide or harmonize with religion. At best, this kind of harmonization is all Horton has alleged in his complaint.

II. The text, purpose, and history of Title VII show that the statute's prohibition on sex discrimination does not incorporate a prohibition on sexual orientation or gender identity discrimination.

Title VII prohibits discrimination "against any individual with respect to his . . . sex." 42 U.S.C. § 2000e-2. But Horton does not allege discrimination based on his male sex (for example, he was treated worse in comparison to a similarly-situated woman). Instead, Horton claims that he suffered discrimination on the basis of his sexual orientation, which he argues is incorporated into the term "sex" as used in Title VII. Horton Br. 12. This argument not only fails under this court's precedent and the

statute's text, but it also opens the door to significant conflicts with people of sincere religious beliefs.

Looking first to this Court's precedent—and as MGM has made clear in its brief—*Williamson* provides the rule of decision here; this Court is not free to ignore its holding. *See* MGM Br. 11–22. But even putting *Williamson* aside, Title VII, as currently written and understood, cannot support an expanded interpretation of the term "sex" that includes "sexual orientation." Instead, a close and careful analysis of Title VII's text, purpose, and history instead shows that the term "sex" does not incorporate this distinct concept.

As this Court has explained, "[o]ur first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *LaCurtis v. Express Med. Transporters, Inc.*, 856 F.3d 571, 578 (8th Cir. 2017) (*quoting Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997)). What is more, "[t]he plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Id*. That said, when a statute's text is ambiguous, "a court seeks guidance in the

statutory structure, relevant legislative history, congressional purposes expressed in the statute at issue, and general principles of law relevant to the statute at issue." *United States v. E.T.H.*, 833 F.3d 931, 937 (8th Cir. 2016) (internal citations and quotation marks omitted).

Here, each of these sources leads to the same conclusion. Whether this Court looks only to the language and its context in Title VII or considers the relevant history and purpose expressed in the statute, it is clear the meaning of "sex" in Title VII does not incorporate the concepts of sexual orientation or gender identity.

A. Text and context.

As explained above, this Court must begin by looking to the "plain and unambiguous meaning" of the text of Title VII, while also considering "the specific context in which that language is used, and the broader context of the statute as a whole." *LaCurtis*, 856 F.3d at 578. Title VII does not define the term "sex."[4] This Court should therefore look first to the ordinary meaning of the term. *Smith v. United States*, 508 U.S. 223, 228 (1993) ("When a word is not defined by statute, we normally construe it

[4] Title VII defines the phrase "because of sex," but the import of this definition will be addressed below.

in accord with its ordinary or natural meaning."). Indeed, this Court has already done so. In *Sommers v. Budget Marketing, Inc.*, this Court held that the "plain meaning of the term 'sex' under Title VII" connotes "either male or female gender," *i.e.*, it only covers one's "anatomical classification." 667 F.2d 748, 749 (8th Cir. 1982); *see also Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984) ("The phrase in Title VII prohibiting discrimination based on sex, in its plain meaning, implies that it is unlawful to discriminate against women because they are women and against men because they are men. The words of Title VII do not outlaw discrimination against a person [based on] sexual identity.").

Such a position is also well supported by both the current and historical meaning of the term "sex." Indeed, "virtually every dictionary definition of 'sex' referred to the *physiological* distinctions between males and females, particularly with respect to their reproductive functions." *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 736 (4th Cir.) (Niemeyer, J., concurring in part and dissenting in part), *cert. granted in part*, 137 S. Ct. 369 (2016), *and vacated and remanded*, 137 S. Ct. 1239

(2017).[5] In fact, in a landmark 1973 opinion, the Supreme Court expressed its understanding of the term "sex" as referring to the distinction between men and women and even tied this broader understanding directly to Title VII's prohibition with the same wording. *Frontiero v. Richardson*, 411 U.S. 677, 687 (1973) (describing sex discrimination as "relegating the entire class of *females* to inferior legal status" (emphasis added)); *see also Franciscan All., Inc. v. Burwell*, 227 F. Supp. 3d 660, 688

[5] *See, e.g., The Random House College Dictionary* 1206 (rev. ed. 1980) ("either the male or female division of a species, esp. as differentiated with reference to the reproductive functions"); *Webster's New Collegiate Dictionary* 1054 (1979) ("the sum of the structural, functional, and behavioral characteristics of living beings that subserve reproduction by two interacting parents and that distinguish males and females"); *The American College Dictionary* 1109 (1970) ("the sum of the anatomical and physiological differences with reference to which the male and the female are distinguished . . ."); *Webster's New World College Dictionary* 1331 (5th ed. 2014) ("either of the two divisions, male or female, into which persons, animals, or plants are divided, with reference to their reproductive functions"); *The American Heritage Dictionary* 1605 (5th ed. 2011) ("Either of the two divisions, designated female and male, by which most organisms are classified on the basis of their reproductive organs and functions"); *Merriam-Webster's Collegiate Dictionary* 1140 (11th ed. 2011) ("either of the two major forms of individuals that occur in many species and that are distinguished respectively as female or male esp. on the basis of their reproductive organs and structures").

(N.D. Tex. 2016) (describing sex discrimination under Title IX as "discrimination on the basis of the biological differences between males and females").

The terms "sexual orientation" and "gender," however, have consistently been used *in contrast with* the term "sex." Indeed, starting in the mid-1950s, the psychologist John Money appropriated "gender" to refer to culturally determined roles for men and women. Joanne Meyerowitz, *A History of "Gender,"* 113 Am. Hist. Rev. 1346, 1354 (2008). He explained that "gender" was learned in early childhood and was distinct from, and not determined by, "biological sex." *Id.* Other social scientists picked up on this new usage, and in 1963, Robert Stoller, a UCLA psychoanalyst, coined the term "gender identity." David Haig, *The Inexorable Rise of Gender and the Decline of Sex: Social Change in Academic Titles, 1945–2001*, Archives of Sexual Behav., Apr. 2004, at 93. He, too, contrasted "sex" with "gender," arguing that "sex was biological but gender was social." *Id.*

This differentiation of "sex" from "sexual orientation" and "gender" has continued to this day. For example, the English Oxford Living Dictionary defines "sexual orientation" in social and cultural terms as "[a] person's

sexual identity in relation to the gender to which they are attracted," but it defines "sex" in biological terms as "[e]ither of the two main categories (male and female) into which humans and most other living things are divided on the basis of their reproductive functions." Oxford Living Dictionary (2018), available at https://en.oxforddictionaries.com/; *see also* Sari L. Reisner et al., *"Counting" Transgender and Gender-Nonconforming Adults in Health Research*, Transgender Stud. Q., Feb. 2015, at 37 ("Gender typically refers to cultural meanings ascribed to or associated with patterns of behavior, experience, and personality that are labeled as feminine or masculine"; "[s]ex refers to biological differences among females and males, such as genetics, hormones, secondary sex characteristics, and anatomy."). There is thus no ambiguity in Title VII's use of the term "sex." Sex is, and has always been, understood as distinct from sexual orientation. Indeed, these two concepts can even be defined without reference to one another; for example, describing someone as homosexual or heterosexual tells the listener nothing about whether that person is biologically male or female.

Consideration of the context in which the term "sex" is used in Title VII further supports this conclusion. As this Court has noted, "[p]erhaps

no interpretive fault is more common than the failure to follow the whole-text canon, which calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts." *Does v. Gillespie*, 867 F.3d 1034, 1043 (8th Cir. 2017) (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 167 (2012)). Here, Congress specifically included within Title VII a provision that sheds light on this very concept.

As Title VII explains, "[t]he terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . ." 42 U.S.C. § 2000e(k). Indeed, not only does this provision provide protection for pregnant women, but its specific reference to pregnancy and childbirth—circumstances that affect only a single biological sex—suggest that the term "sex" elsewhere in Title VII should similarly be read as distinguishing between men and women for purposes of ensuring equal employment opportunities. *See generally Perko v. United States*, 204 F.2d 446, 449 (8th Cir.

1953) ("[W]here, in a statute, general words follow a designation of particular subjects or classes of persons, the meaning of the general words will ordinarily be presumed to be, and construed as, restricted by the particular designation . . . .").

Viewed together, the plain meaning of the term "sex" and the context within which that term is used remove any doubt or ambiguity: Title VII, as currently written, covers discrimination only on the basis of biological sex, not sexual orientation.

B. Congressional intent: history and purpose.

Although the rightful role of legislative history in statutory interpretation is of course a contested issue, here that history points to the same outcome as the textual analysis.

"The legislative history pertaining to the addition of the word 'sex' to the Act [Title VII] is indeed meager." *Wetzel v. Liberty Mut. Ins. Co.*, 511 F.2d 199, 204 (3d Cir. 1975), *vacated and remanded*, 424 U.S. 737 (1976). This is primarily because "[t]he amendment adding the word 'sex' to the Civil Rights Act was adopted one day before the House passed the Act without prior legislative hearings and little debate." *Sommers*, 667 F.2d at 750. That said, there is general agreement that "the legislative history

does not show any intention to include transsexualism in Title VII." *Id.* Instead, it is "generally recognized that the major thrust of the 'sex' amendment was towards providing equal opportunities for women." *Id.*; *see also Wetzel*, 511 F.2d at 204 ("Congress intended to strike at all discriminatory treatment of men and women."); *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 386 (5th Cir. 1971) ("one of Congress' main goals was to provide equal access to the job market for both men and women.").

But more importantly, both when Title VII was enacted and ever since, Congress has treated "sex" and "gender identity" (along with "sexual orientation") as distinct concepts. In the 1970s, Congress rejected several proposals to amend the Civil Rights Act to add the category of "sexual orientation."[6] Similarly, in 1994, Congress rejected the Employment Non-Discrimination Act ("ENDA"), which sought to prohibit employment discrimination on the basis of "sexual orientation."[7] In 2007, 2009, and 2011, Congress rejected a broader version of ENDA, which, for the first time, sought to add protections for "gender identity" (along with "sexual

[6] H.R. 14752, 93rd Cong. (1974); H.R. 166, 94th Cong. (1975); H.R. 2074, 96th Cong. (1979); S. 2081, 96th Cong. (1979).

[7] H.R. 4636, 103rd Cong. (1994).

orientation").[8] None of these proposals makes any sense if Title VII already prohibited such discrimination.

But not every proposal to add protections for "sexual orientation" failed. In 2010, Congress enacted hate crimes legislation providing enhanced penalties for crimes motivated by "sexual orientation." 18 U.S.C. § 249(a)(2). And in 2013, Congress reauthorized the Violence Against Women Act, prohibiting discrimination in certain funding programs on the basis of both "sex" and "sexual orientation." 34 U.S.C. § 12291(b)(13)(A). These Congressional actions—both those rejecting new protections for "sexual orientation," and those expressly adding new protections for "sexual orientation" alongside "sex"—show that Congress continues to understand that "sex" and "sexual orientation" are distinct concepts.

Courts, therefore, should not read into Title VII something that Congress never intended. This, unfortunately, is exactly what the Second and Seventh Circuits have done. *See generally Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 108 (2d Cir. 2018); *Hively v. Ivy Tech Cmty. Coll. of Ind.*,

[8] H.R. 2015, 110th Cong. (2007); H.R. 2981, 111th Cong. (2009); S. 811, 112th Cong. (2011).

853 F.3d 339, 341 (7th Cir. 2017). Both courts suggest that Congress has granted the federal courts a broad authority to read into Title VII not only new *forms of protection* (*e.g.*, sex stereotyping) against discrimination based on Title VII's protected categories, but whole new *categories for protection* (*e.g.*, prohibitions on sexual orientation discrimination) as well.[9] As explained above, this innovation cannot be squared with the statute itself.

Instead, any change or addition to Title VII should be made by Congress, a legislative body better able to consider and balance the important and competing interests associated with extending federal workplace protections on the basis of sexual orientation or gender identity.

III. Judicial expansion of Title VII to cover sexual orientation discrimination would create unnecessary conflicts with religious people.

Title VII does not include protection for discrimination on the basis of sexual orientation and gender identity. This Court should reject Horton's

[9] Discrimination based on sexual orientation is not a subset or variety of sex discrimination because, as explained above, it does not constitute drawing a distinction on the basis of one's biological sex. There has been, for example, no claim or argument that homosexual *men* are treated any better or worse than homosexual *women*. *See* MGM Br. 35–40.

invitation to usurp the role of Congress in striking an appropriate balance on this nuanced issue and, due to the court's inability to carve out specific protections for religious believers, create unnecessary and wide-ranging social conflict.

A. Unlike the courts, Congress can strike a balance between the important societal interests at stake.

"It is the province of a court to expound the law, not to make it." *Luther v. Borden*, 48 U.S. 1, 41 (1849). This is because "[t]he Judiciary is particularly ill suited to make such decisions, as courts are fundamentally underequipped to formulate national policies[.]" *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986) (internal quotation marks omitted). Thus, having determined that sexual orientation and gender identity do not fall within the plain meaning of the term "sex" in Title VII, this ought to be "the end of the matter" as far as the federal courts are concerned. *Id.* at 233.

Moreover, for the federal courts to rush in where Congress has feared to tread would result in significant and unnecessary social conflicts with people of faith. *See generally Owen v. City of Independence*, 445 U.S. 622, 665 (1980) ("[T]his Court should not initiate a federal intrusion of this magnitude in the absence of explicit congressional action."). Congress,

not the courts, has both the institutional expertise and political accountability necessary to allow it to balance competing claims for civil rights and religious liberty and to make nuanced policy decisions in this sensitive area.

B. Expansion of Title VII to cover sexual orientation without creating accommodations for religious employers will lead to wide-ranging social conflict.

Accepting Horton's invitation to create new protected categories within Title VII would also open up a Pandora's box of social conflict. For many religious institutions, an employee's decision to enter a same-sex marriage would constitute a public repudiation of the institution's core religious beliefs—beliefs that are entitled under our Constitution to respect. As the Supreme Court has noted, traditional beliefs about marriage have been held "in good faith by reasonable and sincere people here and throughout the world." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2594 (2015); *see also Masterpiece*, 2018 WL 2465172, at *7 ("[R]eligious and philosophical objections to gay marriage are protected views and in some instances protected forms of expression."). The Supreme Court has never said as much with respect to *any* employers—religious or otherwise—who might instead discriminate on the basis of race, sex, or ethnicity. This

well-recognized distinction makes it inappropriate for a court to adopt, wholesale, the framework Congress created to address vastly different forms of discrimination.

What is more, there is a growing tension between advocates of same-sex marriage who seek to broaden the use of existing anti-discrimination laws to prevent sexual orientation discrimination and people of faith with sincerely held beliefs regarding the definition of marriage. This manifests itself in a variety of ways. From opinions seeking to define the relationship between the free exercise of religion and antidiscrimination laws,[10] to lawsuits over whether religious adoption agencies must be excluded from helping children in need,[11] these disputes are growing in frequency and intensity.[12]

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[10] *See*, *e.g.*, *Masterpiece*, 2018 WL 2465172, at *1.

[11] Margot Cleveland, *Michigan Tolerates Faith-Based Adoption Agencies, the ACLU Sues*, National Review (September 21, 2017), https://www.nationalreview.com/2017/09/american-civil-liberties-union-michigan-law-adoption-agencies-same-sex-couples-religious-beliefs/.

[12] The large number of cases grappling with similar issues makes clear that this tension will not simply evaporate. *See, e.g.*, *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 108 (2d Cir. 2018); *Hively v. Ivy Tech Cmty. Coll. of Indiana*, 853 F.3d 339, 341 (7th Cir. 2017); *Barber v. Bryant*, 860 F.3d 345 (5th Cir. 2017); *Telescope Media Grp. v. Lindsey*, 271 F. Supp. 3d 1090 (D. Minn. 2017); *Klein v. Or. Bureau of Labor & Indus.*, 410 P.3d

One well-recognized way to reduce the scope of these disagreements, however, is to ensure that LGBT rights come with tailored exemptions for religious people. That is exactly what state legislatures have already started doing: when passing anti-discrimination laws, they have consistently provided exemptions for rights of conscience. *See* Robin Fretwell Wilson, *Squaring Faith and Sexuality: Religious Institutions and the Unique Challenge of Sports*, 34 L. & Ineq. 385, 387–88 (2016) ("Every state that has banned discrimination on the basis of sexual orientation in hiring makes some accommodation for religious employers."). This Court should allow Congress the opportunity do the same with respect to Title VII.

CONCLUSION

The decision of the district court should be affirmed.

1051 (Or. Ct. App. 2017); *Alford v. Moulder*, No. 16-cv-350, 2016 WL 3449911, at *1 (S.D. Miss. June 20, 2016); *Miller v. Davis*, 123 F. Supp. 3d 924 (E.D. Ky. 2015); *Brush & Nib Studio, LC v. City of Phoenix*, No. 1 CA-CV 16-0602, 2018 WL 2728317, at *1 (Ariz. Ct. App. June 7, 2018).

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This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because it contains 6,493 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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June 12, 2018

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June 12, 2018

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I certify that on June 12, 2018, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

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