No. _____

In the

Supreme Court of the United States

AKIEL MCKNIGHT,

Petitioner,

v.

THE PICKENS POLICE DEPARTMENT; THE CITY OF PICKENS; TRAVIS RIGGS; DENNIS HARMON,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the Petitioner has a claim pursuant to Title VII 42 U.S.C. § 2000e-2(a)(1) when he was terminated on the basis of his sexual orientation.

II. Whether dismissal of the Petitioner's claims violated the Petitioner's right to a jury trial afforded by the Seventh Amendment to the United States Constitution.

PARTIES TO THE PROCEEDING

The captioned parties, Petitioner Akiel McKnight, Respondent the Pickens Police Department, Respondent the City of Pickens, Respondent Travis Riggs, and Respondent Dennis Harmon are the only parties to this proceeding.

STATEMENT OF RELATED CASES

There are no other proceedings in other courts directly related to the case in this Court.

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PETITION FOR WRIT OF CERTIORARI

Akiel McKnight respectfully petitions this court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINION BELOW

The United States Court of Appeals for the Fourth Circuit rendered an unpublished, per curiam opinion in this matter on December 16, 2022. *McKnight v. The Pickens Police Department, et al.*, App. No. 22-1427 (4th Cir. 2020). The Fourth Circuit opinion is attached to this petition as Appendix A. The district court opinion and order is attached to the petition as Appendix B, the district court order on Summary Judgment is attached as Appendix C, the Report and Recommendation of the Magistrate Judge is attached to the petition as Appendix D, and the Fourth Circuit Court of Appeals' order denying rehearing is attached as Appendix E.

JURISDICTION

The Fourth Circuit filed its opinion in this matter on December 16, 2022. A petition for rehearing was filed on December 23, 2022. The petition for rehearing en banc was denied on January 17, 2023, with the final decision being entered January 25, 2023. This Court may review the Fourth Circuit's decision pursuant to 28 U.S.C. § 1254(1). The Petitioner timely filed this Petition for a Writ of Certiorari within ninety days of the United States Court of Appeals for the Fourth Circuit's judgment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The statutory and constitutional provisions at issue in this case are 42 U.S.C Section 2000e-2000e17; the Seventh Amendment to the United States Constitution: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law"; the Fourteenth Amendment to the United States Constitution: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws"; and 42 U.S.C. § 1983. All other relevant constitutional provisions considered by this Court to be relevant or applicable to this Petition may also be involved.

INTRODUCTION

This is a case that tests the judiciary's commitment to upholding the protections of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e17 as interpreted and applied by this Court in *Bostock v. Clayton County, Georgia*, 590 U.S. 140, 140 S. Ct. 1731, 207 L. Ed. 2d. 218 (2020). This case also squarely implicates the Seventh Amendment to the United States Constitution, which provides, "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall

be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." Petitioner was terminated on the basis of his sexual orientation and seeks the benefit of 42 U.S.C. §§ 2000e-2000e17 and the Seventh Amendment in this action.

Akiel McKnight was an officer with the Pickens City Police Department when he was romantically pursued by Hunter Nelms, a male above the age of consent. McKnight exchanged electronic communications with Nelms, who sent McKnight an unsolicited nude photograph. McKnight did not engage in any physical relationship with Nelms. The Respondents terminated McKnight for this relationship after discovering that McKnight is bisexual. According to the City of Pickens mayor, the decision to terminate McKnight was based, in part, on McKnight's sexual orientation. The district court granted the Respondents' motion for summary judgment, and the Fourth Court affirmed the dismissal. The practical implication of these rulings is that an employee has no recourse under state or federal law when he is terminated for his sexual orientation. The Petitioner asks the Court to correct this injustice.

STATEMENT OF THE CASE

Legal Framework

Title VII 42 U.S.C. § 2000e-2(a)(1) provides, "it shall be unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any

individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." An employer who fires an individual for being gay or transgender violates Title VII. "It is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex." *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731, 590 U.S. 140, 207 L. Ed. 2d 218 (2020). "Just as sex is necessarily a but-for *cause* when an employer discriminates against homosexual or transgender employees, an employee who discriminates on these grounds inescapably *intends* to rely on sex in its decision making." *Id*.

"A plaintiff can provide disparate treatment either (1) by direct evidence that a workplace policy, practice, or decision relies expressly on a protected characteristic, or (2) by using the burden-shifting framework set forth in *McDonnell Douglas*." *Young v. United Parcel Service, Inc.*, 135 S. Ct. 1338, 1344 (2015). "Absent direct evidence, the elements of a prima facie case of discrimination under Title VII are: (1) membership in a protected class; (2) satisfactory job performance; (3) adverse employment action; and (4) different treatment from similarly situated employees outside of the protected class." *Coleman v. Maryland Court of Appeals*, 626 F.3d 187, 190 (4th Cir. 2010) citing *White v. BFI Waste Servs*., LLC, 375 F.3d 288, 295 (4th Cir. 2004). *See also McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S. Ct. 1817 (1973).

Once a plaintiff makes a prima facie case of discrimination, the burden shifts to the employer "to

articulate some legitimate, non-discriminatory reason for" treating employees outside the protected class better than employees within the protected class." *Ibid*. In response to such a showing by an employer, "a plaintiff then has 'an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant [i.e., the employer] were not its true reasons, but were a pretext for discrimination." *Ibid* citing *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253, 101 S. Ct. 1089, 67 L.Ed.2d 207 (1981).

"Should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons but were a pretext for discrimination." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). "The fact that an employer has offered inconsistent post-hoc explanations for employment decisions is probative of pretext." *Dennis v. Columbia Colleton Med. Centr., Inc.*, 290 F.3d 639, 647 (4th Cir. 2002).

42 U.S.C. § 1983 "imposes liability upon any person who, acting under color of state law, deprives an individual of rights secured by the Constitution or law." "In order for an individual to be liable under Section 1983, it must be affirmatively shown that the official charged acted personally in the deprivation of the plaintiff's rights, [and that he] must have had personal knowledge of and involvement in the alleged deprivation of [the plaintiff's rights]." *Willson v. Eagleton*, 1:18-0050-RMG, 2020 WL 449999 at *3 (D.S.C. Aug. 5, 2020) (quoting *Blessing v. Scaturo*, No.

6:16-cv-1832-BHH-KFM, 2017 WL 3575732, at *9 (D.S.C. July 21, 2017)).

Facts and Procedural History

After learning that the Petitioner had exchanged text messages with Nelms, the Respondents suspended the petitioner for two weeks without pay because of the communications, even though the Petitioner did not violate any rules or policies. The Petitioner then learned that other Pickens City Police officers engaged in physical and sexual relationships with teenage females but were never questioned or disciplined for these relationships.

After McKnight filed an employment grievance, the Respondents offered three different rationales for the suspension, first claiming that McKnight's actions constituted conduct unbecoming of an officer and later that his actions constituted contributing to the delinquency of a minor. After the Petitioner informed the Respondents that, pursuant to South Carolina law, he had never committed the crime of contributing to the delinquency of a minor, the Respondents then accused the Petitioner of violating General Order 1.1 of the Pickens Police Department. The Petitioner filed an EEOC charge alleging discrimination on the basis of his sexual orientation. The Respondents then terminated the Petitioner's employment. The Petitioner later filed suit.

In its decision, the district court reasoned that the Petitioner's conduct showed "remarkably bad judgment" and that Respondents' decision to suspend and subsequently terminate the Plaintiff was

"certainly understandable" and "entirely understandable." The district court granted summary judgment even though McKnight filed a verified complaint. The Respondents violated the Petitioner's constitutional rights by terminating him because of his sexual orientation, as shown by their failure to discipline or terminate similarly situated heterosexual competitors. The Petitioner was then deprived of his right to a jury trial when the district court made factual determinations and weighed the evidence in its order granting summary judgment.

REASONS FOR GRANTING THE PETITION

I. Under Title VII and *Bostock,* an employee must have recourse when he is terminated because of his sexual orientation.

The Petitioner submitted ample evidence in support of his Title VII claim, including a verified complaint, a witness's affidavit, and substantial deposition testimony supporting his claims and establishing genuine issues of material fact, including, most significantly, whether the respondents terminated McKnight because of his sexual orientation. In his verified complaint, McKnight alleged that he was romantically pursued by Nelms, who was above the age of consent and who sent McKnight an unsolicited nude photograph. (JA 14). McKnight further alleged that he was terminated after he filed an EEOC charge alleging discrimination based upon his sexual orientation. (JA 15). In her affidavit, Elrod offered support of McKnight's claims, testifying that McKnight was terminated because of the messages that he exchanged with Nelms, that

Nelms was above the age of consent, and that no department policy forbids same sex relationships. (JA 144-145). Elrod further testified that two other officers, Braden Wimpey, and Noe Sudduth, had sexual relationships with a teenage female and that neither officer was disciplined or terminated for these relationships, which were known to the community. (JA 144-145). Elrod's affidavit establishes a genuine issue of material fact as to whether McKnight's sexual orientation was the cause for his termination.

At his deposition, McKnight offered substantial support of his allegations. He testified that Mayor Perry and Police Commissioner McKinney told him in meetings that Pickens is "a small town, biblical community," where non-traditional lifestyles are "not acceptable." (JA 113:7-114:8). McKnight went on to testify that "they were pretty much stating that no one is openly gay or openly bisexual in this community. So, they felt the need for me to either resign or leave the city." (JA 112:10-23). When Chief Riggs asked McKnight to resign "because of the morals of the situation," McKnight asked Riggs directly, "is it fair for me to be in hiding that I'm bisexual or gay?" (JA 112:10-23). Riggs could not give McKnight a clear answer. (JA 112:10-23). When asked if McKinney ever used the words "gay" or "bisexual" during the executive session, McKnight indicated he thought McKinney used the word "homosexual." (JA113:22-114:8). "[McKinney] stated that this is a small, biblical town, that homosexuals – I don't recall the conversation verbatim, but it was beating around the bush of homosexuals are not accepted here; this is a small, biblical town." (JA 113:22-114:8).

McKnight further testified that other Pickens City officers were involved in sexual relationships with a teenage girl, Amanda Smith, and that those officers were not disciplined or terminated for their relationships. (JA 292:2-293:7). These allegations are supported by deposition testimony from Smith, who confirmed that Wimpey pursued her while he was a police officer by messaging her on Facebook. (JA 152:11-13). Smith also confirmed that she was a teenager at the time Wimpey pursued her and that she had sexual relations with Wimpey. (JA 155:3-5, 155:25-156:13).

Smith similarly supported McKnight's allegations with respect to Sudduth, testifying that people knew about her relationship with Sudduth and that no police officers ever expressed any problem with the two dating, even though Sudduth is 10 years older than Smith, who was a teenager at the time. (JA 158:17-159:11). Smith believes that Pickens City employees and officers did not object to her relationship with Sudduth because she was "technically legal" at the time. (JA 181:7-14). Nelms, like Smith, was above the age of consent at the time of his communications with McKnight.

Smith also testified that she consumed alcohol with multiple Pickens City police officers, including Sudduth, while she was a minor. (JA 167:19-168:2). According to Smith, none of the officers who drank alcohol with her while she was a minor were disciplined, even though city employees knew of their conduct. (JA 168:4-12). When asked, "and so city employees knew about the city officers drinking with a girl who is under the age of 21 and that seemed to be

acceptable at least while y'all were hanging out at the house, correct?" Smith responded "Correct." (JA 168:4-9).

Sudduth himself confirmed at his deposition that he had a sexual relationship with Smith. (JA 244:4-8). Sudduth testified that "everybody knew [he] was dating [Smith]," who was a teenager at the time. (JA 245:5-14). This is important, because "everybody" presumably includes Chief Riggs and other city officials. According to Sudduth, neither he nor Wimpey were disciplined or terminated for having sexual relationships with a teenage girl. (JA 245:15-22). Sudduth testified that he is not aware of any Pickens rule or policy forbidding officers from having relationships allowed by law simply because one of the parties is not 18 years old. (JA 258:24-259:5). He further testified that, to his knowledge, the Pickens Police Department has not terminated anyone other than McKnight because they interacted romantically with a person who was 17 years old. (JA 260:21-261:1). Sudduth went on to confirm that McKnight is the only person he has ever heard of who was terminated because he exchanged messages with a person who was 17. (JA 261:2-13).

At his deposition, Mayor Perry admitted that McKnight's sexual orientation played some role in his termination. Asked, "[d]o you believe Mr. McKnight's sexual orientation had anything to do with his termination at all?" Perry responded, after some back and forth, "I think that him being bisexual in conjunction with the person being a student played a part in it." (JA 205:8-206:8). Under *Bostock*, McKnight's sexuality cannot play *any* role in the

respondents' decision to terminate him. Since McKnight's "bisexual[ity]…played a part in" his termination, McKnight can recover Title VII damages under *Bostock*, and the district court should have allowed his case to proceed to a jury.

The record contains significant evidence that the City of Pickens and the Pickens Police Department did not properly train employees on issues related to discrimination and that this failure contributed to McKnight's unlawful termination. When testifying on behalf of the City of Pickens, Dennis Harmon stated that there was no requirement for special training before an individual begins work as either the Chief of Police or the City Administrator. (JA 317:23-318:16). He also testified that Pickens has no policy for vetting employees for biases related to sexual orientation or marginalized groups. (JA 333:14-22). Riggs testified that he could not recall any training related to diversity, sensitivity, harassment, or discrimination. (JA 352:3-22). There is, at a minimum, a strong inference that lack of training contributed to the City of Pickens terminating McKnight because of his sexual orientation.

The above-described evidence also supports McKnight's Section 1983 claim. McKnight has adduced and submitted evidence that Harmon and Riggs were deliberately indifferent to, and participated in the deprivation of, his constitutional rights. McKnight has also shown: (1) he is in a protected class; (2) the conduct he engaged in was similar to that of persons outside the class; and (3) the discipline against him was more severe. See, e.g., *Cook v. CSX Transportation Corp.*, 988 F.2d 507 (4th. Cir.

1993) (citing *Moore v. City of Charlotte*, 754 F.2d 1100 (4th Cir) *cert. denied* 472 U.S. 1021 (1985)).

Setting aside the Magistrate's improper determination of the facts, Riggs' reliance on Hickey's complaint dooms the Respondents' case. "An employer may not illegally discriminate simply because some third-party urges or pressures him to do so." *Platner v. Cash & Thomas Contractors, Inc.,* 908 F.2d 902, 905 n5 (11th Cir. 1990). "[I]t would be totally anomalous if we were to allow the preferences and prejudices of the customers to determine whether the sex discrimination was valid." *Diaz v. Pan American World Airways, Inc.*, 442 F.2d 384, 389 (5th Cir. 1971); *accord Fernandez v. Wynn Oil Co.*, 653 F.2d 1273, 1276 (9th Cir.1981); *see also Robinson v. Lorillard Corp.*, 444 F.2d 791, 799 (4th Cir. 1971) (favorably citing *Diaz* as having "explicitly held that mere customer preference would not justify continuation of a discriminatory hiring policy, even in the context of a claim of . . . .a 'bona fide occupational qualification' exception."). Indeed, a judgment of discrimination against an employer can be supported by evidence that the employer relied on a complaint that had "overtones" of the very type of discrimination that the plaintiff alleges. *Williams v. Trans World Airlines, Inc.*, 660 F.2d 1267, 1269-70 (8th Cir. 1981).

Hickey's complaint to Riggs was devoid of indicia of concern about sex or sexual orientation. But that was in stark contrast to Hickey's complaint to Lawson, who forwarded it to Riggs. Anyone whose job is to investigate could not have missed the differences between what Hickey sent to a relatively unknown audience (Riggs) compared to what he sent to an

audience he knew well (Lawson). In writing to Riggs, Hickey uses gender-neutral "kids" and never comments on the content of the sexual proposition, just its existence. (JA 77). By contrast, he wrote to Lawson in sex-specific terms. "I know your **son** attended Pickens High just like mine does and I know your[sic] a christian man." (JA 80). McKnight's action was sending "sexual messages to **boys** at the high school **wanting to do certain acts to them**." (JA 80). Hickey went on to call the message "pretty disgusting." (JA 80). Both the sex-specific references to "sons" and "boys" (especially having just emailed a gender-neutral complaint hours earlier) and the pejorative description of the sex being "do[ing] certain acts to them" and "pretty disgusting" contain at least overtones of sexual orientation bias.

Moreover, Hickey's only reference to the age of the recipients is his unsure belief "they were over 16." (JA 80). And his concern is not limited to McKnight's duties at the school but extends to the fact "that he is also a ref for the recreation center." (JA 77). Hickey's complaint undermines the respondents' case even if Riggs did not commit the fatal mistake of relying upon Hickey's complaint in his decision-making. As the only written complaint in the record, it bolsters McKnight's argument as to the motivation for his termination. Hickey suggests that being 17 is not a problem but being the male recipient of a male officer's sexual proposal is problematic anywhere, not just at school.

II. A plaintiff must have recourse when a trial court invades the province of the jury by making factual determinations and weighing the evidence.

The district court erred in granting summary judgment by issuing a ruling based upon the Magistrate's weighing of the evidence and determination of fact questions. McKnight has a right to present facts to a jury and seek compensation under Title VII. 42 U.S.C. § 2000e-2(a)(1); *Bostock v. Clayton Cnty.*, 590 U.S. 140, 140 S. Ct. 1731, 207 L. Ed. 2d 218 (2020). The district court invaded the province of the jury by determining "Plaintiff was terminated for conduct that showed remarkably bad judgment…" (JA 414). Whether McKnight exercised poor judgment and whether it was that judgment or McKnight's sexual orientation that resulted in his termination are questions of fact for a jury.

The district court further invaded the jury's province by remarking that, "…it was certainly understandable that Chief Riggs would be extremely troubled by of one (*sic*) of his officers soliciting sex from an underage student at the local high school." (JA 414). Whether Chief Riggs was troubled and, more importantly, *why* he was troubled are questions for a jury. If Chief Riggs was troubled because the plaintiff interacted with a male – an inference that must be made when considering a motion for summary judgment – then Riggs violated Title VII when he terminated McKnight. Further, the district court's use of the phrase "underage student" is problematic. It is uncontested that Nelms was not below the age of

sexual consent and was, therefore, not "underage" at the time of his communications with McKnight.

In granting summary judgment, the district court also made factual determinations about the McKnight's suspension, stating:

> Regardless of whether the conduct amounted to a crime, it was certainly understandable that Chief Riggs would be extremely troubled by of one of his officers soliciting continued sex from an underage student at the local high school. That Plaintiff to argue with Chief Riggs about whether it is wrong to solicit sex from 16- and 17-year-old high school students, even in the face of Chief Riggs's admonishment, gave Chief Riggs even more cause for concern. Thus, once Chief Riggs received another parent complaint and a specific request from the District that Plaintiff not be allowed in their schools, it was entirely understandable that Chief Riggs suspended Plaintiff with pay as he decided how to respond, and nothing seems unreasonable about his final decision that discharge was warranted. (JA 414).

The magistrate's narrative concludes that McKnight's defense of his past conduct as legal was tantamount to a vow to repeat his actions, that Riggs' fear was realized by a new complaint, and that Riggs' decision to suspend and terminate McKnight was based upon that complaint and a request from the school district

to banish McKnight from the schools. Notably in his appeal letter to Harmon, McKnight specifically noted that his social media communication with Nelms had created the issue and that he had "decided to stop talking to him [Nelms]." (JA 71-76). As a result of the May 3 meeting with Riggs and Harmon, McKnight's suspension was cut in half, resulting in him immediately resuming his job duties. A reasonable – if not the only inference – from the May 3 meeting is that the employer did not view McKnight's defense of his actions as a vow to continue them, but instead as an at least somewhat persuasive point about how his conduct should be judged.

Further, the parents' complaint and the school's request provide no support for the magistrate's conclusions. Looking at Exhibit 63-5 in its entirety reveals that Chris Hickey emailed two "complaints" on May 7, 2018 – one to Riggs, the other to Marion Lawson, then deputy superintendent of the school system. (JA 77-80). The latter complaint reveals on its face that Hickey is not referring to new misconduct but instead what McKnight messaged "[t]wo or three weeks ago." (JA 77-80). After receiving Hickey's complaint, Lawson and Riggs talked, and Riggs memorialized his conversation with Lawson in a memo to the file. The memo clarifies the limited nature of the school's request: it was not the banishment request depicted in the Discussion section of the Magistrate's opinion, but merely a request that McKnight not be around schools while a decision was being made. ("The School District asked that we take him off the list to work until everything is settled and then they will be able to look at the entire event and

make a decision."). (JA 77-80). Riggs understood the temporary nature of Lawson's request, responding that McKnight would be taken off the School Officer list "and would not be back on until a final outcome." (JA 77-80).

Setting aside the Magistrate's improper determination of the facts, Riggs' reliance on Hickey's complaint dooms the Respondents' case. "An employer may not illegally discriminate simply because some third-party urges or pressures him to do so." *Platner v. Cash & Thomas Contractors, Inc.,* 908 F.2d 902, 905 n5 (11th Cir. 1990). "[I]t would be totally anomalous if we were to allow the preferences and prejudices of the customers to determine whether the sex discrimination was valid." *Diaz v. Pan American World Airways, Inc.*, 442 F.2d 384, 389 (5th Cir. 1971); *accord Fernandez v. Wynn Oil Co.*, 653 F.2d 1273, 1276 (9th Cir.1981); *see also Robinson v. Lorillard Corp.*, 444 F.2d 791, 799 (4th Cir. 1971) (favorably citing *Diaz* as having "explicitly held that mere customer preference would not justify continuation of a discriminatory hiring policy, even in the context of a claim of . . . .a 'bona fide occupational qualification' exception."). Indeed, a judgment of discrimination against an employer can be supported by evidence that the employer relied on a complaint that had "overtones" of the very type of discrimination that the plaintiff alleges. *Williams v. Trans World Airlines, Inc.*, 660 F.2d 1267, 1269-70 (8th Cir. 1981).

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is to investigate could not have missed the differences between what Hickey sent to a relatively unknown audience (Riggs) compared to what he sent to an audience he knew well (Lawson). In writing to Riggs, Hickey uses gender-neutral "kids" and never comments on the content of the sexual proposition, just its existence. (JA 77). By contrast, he wrote to Lawson in sex-specific terms. "I know your **son** attended Pickens High just like mine does and I know your[sic] a christian man." (JA 80). McKnight's action was sending "sexual messages to **boys** at the high school **wanting to do certain acts to them**." (JA 80). Hickey went on to call the message "pretty disgusting." (JA 80). Both the sex-specific references to "sons" and "boys" (especially having just emailed a gender-neutral complaint hours earlier) and the pejorative description of the sex being "do[ing] certain acts to them" and "pretty disgusting" contain at least overtones of sexual orientation bias.

Moreover, Hickey's only reference to the age of the recipients is his unsure belief "they were over 16." (JA 80). And his concern is not limited to McKnight's duties at the school but extends to the fact "that he is also a ref for the recreation center." (JA 77). Hickey's complaint undermines the respondents' case even if Riggs did not commit the fatal mistake of relying upon Hickey's complaint in his decision-making. As the only written complaint in the record, it bolsters McKnight's argument as to the motivation for his termination. Hickey suggests that being 17 is not a problem but being the male recipient of a male officer's sexual proposal is problematic anywhere, not just at school.

Similarly, the district court further usurped the jury's power by weighing and discounting Mayor Perry's testimony. Perry testified that McKnight's sexuality played some role in his termination. This is unlawful. The magistrate acknowledged McKnight's testimony that Perry and McKinney, "both stated that [the City] was a small-town, biblical community" and "that this action is not acceptable here." (JA 417). Remarkably, the magistrate declared that the depiction of Pickens as a "biblical community" was not "in tension with Chief Riggs's position that the victim's status as a student was the critical factor and that Plaintiff's sexual orientation was beside the point." (JA 417-418). The Bible's disapproval of same-sex sexual relations is explicit and widely understood as such. By contrast, the Bible does not prescribe ages for sexual relations, and does not mention student status. Further, when directly questioned about whether he believes "that it is a sin to engage in homosexuality," Perry asked, "based upon the Bible?" (JA 204:23-205:3). In doing so, he inserted the Bible into the discussion and indicated that, within the context of "a biblical community," homosexuality cannot be tolerated.

It was improper for the district court to make determinations on genuine issues of material fact and to prevent a jury from weighing the evidence as mandated by the Seventh Amendment. Further, the district court's reliance on *Ennis v. Nat'l Ass'n of Bus. & Educ. Radio, Inc.*, 53 F. 3d 55 (4th Cir. 1995) is misplaced, as Perry's testimony was not merely speculation. Perry knows the decision makers involved, works alongside them, has a professional

interest in their decisions, and personally interacted with McKnight. His testimony was based upon his knowledge and involvement in the events giving rise to this action, not conjecture. The district court ignored evidence that, if weighed in McKnight's favor, proves that Riggs and Harmon terminated McKnight because they believed a bisexual officer should not work for Pickens. In doing so, it improperly invaded the province of the jury to weigh the evidence and make factual determinations.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully submits that this Court grant the Petitioner's Writ for Certiorari.

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