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## "Because of Sex"

Jack B. Harrison

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## “BECAUSE OF SEX”

*Jack B. Harrison\**

*Many Americans currently believe that federal law prohibits discrimination because of sexual orientation and gender identity in the workplace. While it is true that Title VII of the Civil Rights Act of 1964 (“Title VII”) prohibits employers from discriminating because of an employee’s race, color, religion, sex, or national origin, courts and legislators have historically been slow to extend these protections to LGBT workers. The result of this reluctance is that LGBT employees remain largely unprotected under an unpredictable patchwork of laws and policies, consisting of presidential executive orders, private employer initiatives, city and county ordinances, gubernatorial executive orders, and state legislation. As a result, discrimination in the workforce remains a constant in the lived experience of LGBT persons.*

*As of 2016, thirty-two states and the District of Columbia had taken some steps, either legislatively or through executive action, to limit or prohibit workplace discrimination on the bases of gender identity or sexual orientation. Yet even among these states, victims of workplace discrimination based on sexual orientation or gender identity were provided redress through a private right of action in only twenty-two states and the District of Columbia. Section I of this article discusses this background.*

*Section II article discusses development of the prohibition against discrimination “because of sex” that is contained in Title VII,*

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*including the legislative history of Title VII and the initial interpretations of the meaning of “because of sex” in the Title VII context. Section III is focused on general questions regarding the applications of Title VII to claims of discrimination based on sexual orientation, with Sections IV and V focused more specifically on treatment by the EEOC and the courts, respectively, of the question of whether Title VII prohibits discrimination based on sexual orientation. Section VI, the concluding section of this article, examines the theories through which Title VII has been seen by courts to prohibit discrimination based on sexual orientation. Ultimately, this article attempts to propose a unified theory under which discrimination based on sexual orientation would be included under Title VII’s prohibition against discrimination “because of sex.”*

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## I. INTRODUCTION: GENDER IDENTITY AND SEXUAL ORIENTATION DISCRIMINATION IN THE WORKPLACE

While much justifiable celebration occurred among gay and lesbian persons and their allies following the decision in *Obergefell v. Hodges*,<sup>1</sup> it is critical to place this historic turn in its proper place along a continuum toward greater inclusion of gay and lesbian persons within American society. Professor Katie Eyer has smartly argued that while the decision in *Obergefell* may have many parallels with the decision in *Loving v. Virginia*,<sup>2</sup> which found bans on interracial marriage unconstitutional, there is a profound and fundamental difference between where these two decisions lie along the trajectory toward “the institutionalization of a formal equality regime (that is, a legal regime in which discrimination against a group is presumptively unlawful).”<sup>3</sup> Now, several years following the decision in *Obergefell*, it seems clear that Professor Eyer is correct in her assessment of the historical placement of *Obergefell*.

*Obergefell* leaves gay and lesbian persons in a rather odd position. On one hand, their marriages are legally protected in every state in the union and at the federal level. On the other hand, they are denied protections against discrimination in employment,<sup>4</sup> housing, or public

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1. 135 S. Ct. 2584 (2015).

2. 388 U.S. 1 (1967).

3. See Katie Eyer, Brown, *Not Loving: Obergefell and the Unfinished Business of Formal Equality*, 125 YALE L.J. F. 1, 1–2 (2015) [hereinafter Eyer, Brown, *Not Loving*]. As Professor Eyer points out:

Whereas *Loving* marked the endpoint of an era of the institutionalization of formal racial equality norms in constitutional Equal Protection doctrine and in federal statutory law, *Obergefell* stands much closer to the beginning of such a process. Indeed, although the L/G/B rights movement has achieved substantial success—in shifting public opinion, and in securing litigation victories—explicit guarantees of formal equality have—at least at the federal level—largely remained elusive.

*Id.* at 2 (footnotes omitted). In her essay, Professor Eyer defines “formal equality” in the following manner: “‘formal equality’ signifies a legal regime in which invidious use of a particular classification is deemed presumptively unlawful. In the statutory domain, this generally takes the form of an explicit statutory proscription on discrimination on the basis of a particular characteristic, and, in the contemporary constitutional domain, generally takes the form of ‘protected class’ status triggering heightened scrutiny.” *Id.* at 1 n.3; see also Tomiko Brown-Nagin, *The Civil Rights Canon: Above and Below*, 123 YALE L.J. 2698, 2719–21 (2014); Devon Carbado et al., *After Inclusion*, 4 ANN. REV. L. & SOC. SCI. 83, 87 (2008); Katie R. Eyer, *Have We Arrived Yet? LGBT Rights and the Limits of Formal Equality*, 19 L. & SEXUALITY 160 (2010) [hereinafter Eyer, *LGBT Rights*].

4. Eyer, Brown, *Not Loving*, *supra* note 3, at 8 n.31 (providing a demonstrative list of employment cases brought under Title VII alleging discrimination based on sexual orientation, wherein the disposition of the case in favor of the employer was based on the lack of any formal equality statutory scheme protecting against discrimination based on sexual orientation). This

accommodations<sup>5</sup> at the federal level and in the twenty-nine states that do not have statewide protections based on sexual orientation or gender identity.<sup>6</sup> Thus, for example, gay and lesbian couples can be married and have their marriage legally recognized in Ohio or Kentucky today, and then be lawfully fired from their job or evicted from their home tomorrow simply for being gay or lesbian; a fact that might be revealed when employees exercise their constitutional right to marry someone of the same gender.<sup>7</sup> Likewise, *Obergefell* does not answer whether it was unlawful for an employer to deny spousal benefits to gay and lesbian couples who were legally married in one state prior to *Obergefell*, on the basis that the couple's state of residence and employment did not recognize their marriage.<sup>8</sup> This lack of institutional formal equality will define and drive the next steps in

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Article primarily focuses on LGBT rights in the context of the workplace. However, as this section briefly discusses, LGBT advocates are fighting for equality in many other areas of everyday life, such as public accommodations and housing. See Carlie Armstrong, *Slow Progress: New Federal Rules Only Begin to Address Housing Discrimination Based on Sexual Orientation and Gender Identity*, 9 MOD. AM. 1 (2013); Justin Muehlmeier, *Toward a New Age of Consumer Access Rights: Creating Space in the Public Accommodation for the LGBT Community*, 19 CARDOZO J.L. & GENDER 781 (2013).

5. As Eyer notes:

Public accommodations law (the body of antidiscrimination law governing access to services like restaurants hotels and service providers) also is largely governed by statute, rather than the Constitution. There is very little, if any, ability for L/G/B litigants to bring public accommodations claims under federal law, because federal law does not proscribe sex discrimination in public accommodations, and sex discrimination is the primary argument that L/G/B litigants have relied on in the absence of explicit protections for sexual orientation.

Eyer, Brown, *Not Loving*, *supra* note 3, at 7–8 n.30; see also Jack B. Harrison, *At Long Last Marriage*, 24 AM. U. J. GENDER & SOC. POL'Y & THE L. 1, 56–60 (2015).

6. Eyer, Brown, *Not Loving*, *supra* note 3, at 7–11; see also, e.g., David S. Cohen & Leonore Carpenter, *Anti-gay Bias Legal in Indiana Before New Law*, USA TODAY (Mar. 31, 2015, 4:58 PM), <http://www.usatoday.com/story/opinion/2015/03/31/indiana-religious-freedom-restoration-act-discrimination-anti-gay-column/70723684> (noting that twenty-nine states do not prohibit sexual orientation discrimination, and that few protections exist under federal law).

7. For information on state protections for individuals based on sexual orientation or gender identity, see *State Maps of Laws and Policies*, HUMAN RTS. CAMPAIGN, <http://www.hrc.org/state-maps> (last updated June 11, 2018).

8. See *Obergefell v. Hodges*, 135 S. Ct. 258 (2015). This issue forms the crux of a lawsuit recently filed against Walmart, alleging that Walmart's pre-2014 policy of denying benefits to same-sex couples, unless required by state law, was unlawful. See Steven Nelson, *Wal-Mart Sued for Alleged Anti-Gay Discrimination*, U.S. NEWS & WORLD REP. (July 14, 2015), <https://www.usnews.com/news/articles/2015/07/14/wal-mart-sued-for-alleged-anti-gay-discrimination>. Ultimately, Walmart elected not to contest the plaintiff's interpretation of Title VII, opting instead to settle the case for \$7.5 million. See Mark Joseph Stern, *The Gay Rights Movement Just Scored a Massive Legal Victory Thanks to Walmart*, SLATE (Dec. 5, 2016, 3:27 PM), <https://slate.com/human-interest/2016/12/gay-rights-movement-scores-a-massive-victory-thanks-to-walmart.html>.

the trajectory of LGBT<sup>9</sup> inclusion.

In an oddly prescient fashion, the concerns raised by the dissenters in *Obergefell* regarding the protection of the religious liberties of those opposed to same-sex marriage have provided an ongoing framework within which LGBT persons continue the struggle to achieve institutional formal equality. Can public officials, such as county clerks, charged by state law with issuing marriage licenses, opt out of the constitutional requirements for marriages between persons of the same sex recognized in *Obergefell* based on their own personal religious objections?<sup>10</sup> Can places of public accommodation, such as hotels, wedding venues, restaurants, or bakeries, in the absence of a state law prohibiting discrimination because of sexual orientation or gender identity in public accommodations, simply refuse to provide wedding services to gay and lesbian persons based on their own personal religious objections?<sup>11</sup> Under Title VII of the Civil Rights Act of 1964 (“Title VII”), can an employer fire an employee for being gay or lesbian, a fact made known to the employer as a result of the employee’s wedding?<sup>12</sup>

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9. This Article will use this acronym throughout to represent LGBT people generally. At times, however, this Article will also use lesbian and gay, where the proposition or source does not include transgender persons.

10. See, e.g., Adam Beam, *Clerk Prayed Over Decision to Stop Issuing Marriage Licenses*, AP NEWS (July 20, 2015), <https://apnews.com/7052404793bf4e19aed429e308027215>; Robert P. Jones, *After Same-Sex Marriage, Then What?*, THE ATLANTIC (June 24, 2015), <http://www.theatlantic.com/politics/archive/2015/06/after-same-sex-marriage-then-what/396659/>; Tribune wire rep., *Same-Sex Marriage Fight Turns to Clerks Who Refuse Licenses*, NEW YORK TIMES (June 30, 2015), <http://www.nytimes.com/aponline/2015/06/30/us/ap-us-gay-marriage.html>.

11. See generally Matthew W. Green Jr., *Same-Sex Sex and Immutable Traits: Why Obergefell v. Hodges Clears a Path to Protecting Gay and Lesbian Employees from Workplace Discrimination under Title VII*, 20 J. GENDER, RACE & JUST. 1 (2017); Nancy J. Knauer, *Religious Exemptions, Marriage Equality, and the Establishment of Religion*, 84 UMKC L. REV. 749 (2016); Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516 (2015); Elizabeth Sepper, *The Role of Religion in State Public Accommodations Laws*, 60 ST. LOUIS U. L.J. 631 (2016); Kyle C. Velte, *All Fall Down: A Comprehensive Approach to Defeating the Religious Right’s Challenges to Antidiscrimination Statutes*, 49 CONN. L. REV. 1 (2016); Deborah A. Widiss, *Intimate Liberties and Antidiscrimination Law*, 97 B.U. L. REV. 2083 (2017); see also Garrett Epps, *When Beliefs and Identities Clash in Court*, THE ATLANTIC (Sept. 18, 2017), <https://www.theatlantic.com/politics/archive/2017/09/when-beliefs-and-identities-clash-in-court/540069/>; Amy Howe, *Argument Analysis: Conservative Majority Leaning Toward Ruling for Colorado Baker*, SCOTUS BLOG (Dec. 5, 2017), <http://www.scotusblog.com/2017/12/argument-analysis-conservative-majority-leaning-toward-ruling-colorado-baker/>; Jones, *supra* note 10.

12. See Melissa Boughton, *Charlotte Catholic School Teacher Fired for Same-Sex Marriage Announcement Files Federal Suit*, NC POL’Y WATCH: THE PROGRESSIVE PULSE (Jan. 11, 2017), <http://pulse.ncpolicywatch.org/2017/01/11/charlotte-catholic-school-teacher-fired-sex-marriage->



Following *Loving*, federal and state structures were already in place that made it unlawful for public officials, such as county clerks, who are charged by state law with issuing marriage licenses, to opt out of the constitutional requirements for marriages of persons between different races based on their own personal religious objections. These constitutional exemptions also applied to places of public accommodation, such as hotels, wedding venues, restaurants, or bakeries, to simply refuse to provide wedding services for interracial couples based on their own personal religious objections.<sup>13</sup> By the time of *Loving*, there were also legal protections in place against discrimination in housing, employment, and public accommodations based on race.<sup>14</sup>

Despite the fact that *Obergefell* was a significant victory for the LGBT community, in the aftermath, a same-sex couple who gets married over the weekend may be fired from their jobs on Monday for simply displaying or posting pictures of their wedding.<sup>15</sup> Because no

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announcement-files-federal-suit/#sthash.csqKyUIj.dpbs; see also Dave Bakke, *Wedding Announcement Costs Gay Woman Her Job at Benedictine University*, THE ST. J.-REG., <http://www.sj-r.com/x1109354817/Newspaper-wedding-announcement-costs-gay-woman-her-job-at-Benedictine-University> (last updated Nov. 10, 2010, 9:11 AM); Chris Brennan, *Firing of Teacher in Same-Sex Marriage Roils Philadelphia Catholic School*, THE PHILA. INQUIRER (July 8, 2015, 6:41 AM), [http://www.philly.com/philly/education/20150708\\_Firing\\_of\\_teacher\\_in\\_same-sex\\_marriage\\_roils\\_Catholic\\_school.html](http://www.philly.com/philly/education/20150708_Firing_of_teacher_in_same-sex_marriage_roils_Catholic_school.html) <http://www.post-gazette.com>.

13. Eyer, Brown, *Not Loving*, *supra* note 3, at 12. As Professor Eyer writes:

But marriage’s political, cultural, and social significance should not be mistaken for its legal centrality. Unlike *Loving*, a favorable ruling for marriage equality in *Obergefell* is unlikely to establish a broader legal regime of formal equality in constitutional doctrine; and it is sure not to do so in the context of statutory rights. As such, while *Obergefell* will no doubt have real significance—social, political, and, in part, legal—it should not be mistaken for formal equality. For that unfinished business, as after *Brown*, much continuing work—in the courts, in the legislature, and among the people—lies ahead.

*Id.*

14. See generally Brown-Nagin, *supra* note 3 (noting that many contemporary civil rights leaders, including Martin Luther King Jr., understood that formal equality would not alone be enough to achieve real equality for African Americans); D. Wendy Greene, *Categorically Black, White, or Wrong: “Misperception Discrimination” and the State of Title VII Protection*, 47 U. MICH. J.L. REFORM 87 (2013); Anne-Marie G. Harris, *A Survey of Federal and State Public Accommodations Statutes: Evaluating Their Effectiveness in Cases of Retail Discrimination*, 13 VA. J. SOC. POL’Y & L. 331 (2006); Brian K. Landsberg, *Public Accommodations and the Civil Rights Act of 1964: A Surprising Success?* HAMLIN J. PUB. L. & POL’Y 1 (2014); Nancy Leong & Aaron Belzer, *The New Public Accommodations: Race Discrimination in the Platform Economy*, 105 GEO. L.J. 1271 (2017); Leonard S. Rubinowitz & Ismail Alsheik, *A Missing Piece: Fair Housing and the 1964 Civil Rights Act*, 48 HOW. L.J. 841, 903–04 (Spring, 2005); Widiss, *supra* note 11.

15. Brandon Lorenz, *Historic Marriage Equality Ruling Generates Momentum for New Non-Discrimination Law*, HUM. RTS. CAMPAIGN (July 7, 2015), <http://www.hrc.org/blog/entry/historic-marriage-equality-ruling-generates-momentum-for-new-non-discrimina/>.

explicit federal antidiscrimination law encompassing LGBT persons exists in the United States, the employer's action in firing an employee because they were gay or lesbian would be legal in a majority of states.<sup>16</sup> Therefore, marriage equality ironically makes employment discrimination against LGBT workers easier, in that employers are now more aware of who in their workforce identifies as LGBT because of their marital status and request for spousal benefits.<sup>17</sup>

In 2013, the year the Supreme Court invalidated the Defense of Marriage Act in *United States v. Windsor*,<sup>18</sup> approximately twenty percent of same-sex couples were married.<sup>19</sup> In contrast, by October 2015, four months after the *Obergefell* decision, approximately forty-five percent of same-sex couples reported being married.<sup>20</sup> As a result of this trend, same-sex couples are increasingly demanding spousal benefits from their employers; constructively notifying their employers of their sexual orientation. These requests for spousal benefits potentially increase the vulnerability of these employees to adverse employment actions. Accordingly, the necessity that discrimination because of gender identity and sexual orientation be clearly cognizable under Title VII has become even more critical. LGBT employees should not be faced with the choice of being married or being employed.

Many Americans currently believe that federal law prohibits discrimination on the basis of sexual orientation and gender identity in the workplace.<sup>21</sup> While it is true that Title VII prohibits employers from discriminating because of an employee's race, color, religion,

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16. *Sexual Orientation Discrimination*, WORKPLACE FAIRNESS, <https://www.workplacefairness.org/sexual-orientation-discrimination> (last visited Aug. 23, 2018) (“Outside of the newly clarified right to marry, there is currently no federal law prohibiting other types of sexual orientation discrimination.”).

17. Emma Green, *Can States Protect LGBT Rights Without Compromising Religious Freedom?*, THE ATLANTIC (Jan. 6, 2016), <https://www.theatlantic.com/politics/archive/2016/01/lgbt-discrimination-protection-states-religion/422730/>.

18. 133 S. Ct. 2675 (2013).

19. *Id.* at 2680; GARY J. GATES & TAYLOR N. T. BROWN, MARRIAGE AND SAME-SEX COUPLES AFTER OBERGEFELL 3 (The Williams Inst. Nov. 2015), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Marriage-and-Same-sex-Couples-after-Obergefell-November-2015.pdf>.

20. Brown, *supra* note 19, at 1. Indeed, 96,000 same-sex couples got married within four months of the *Obergefell* ruling. *Id.* at 3.

21. *Civil Rights—Employment Discrimination—Executive Order Prohibits Federal Government and Contractor Employment Discrimination on the Basis of Sexual Orientation or Gender Identity.—Exec. Order No. 13,672, 79 Fed. Reg. 42,971 (July 23, 2014)*, 128 HARV. L. REV. 1304, 1305 (2015) [hereinafter *Exec. Order No. 13,672*] (footnote omitted).

sex, or national origin, courts and legislators have historically been slow to extend these protections to LGBT workers.<sup>22</sup> This reluctance leaves LGBT employees largely unprotected under an unpredictable patchwork of laws and policies, consisting of presidential executive orders, private employer initiatives, city and county ordinances, gubernatorial executive orders, and state legislation.<sup>23</sup> Thus, discrimination in the workforce remains a constant in the lived experience of LGBT persons.<sup>24</sup>

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22. See 42 U.S.C. § 2000e-2 (2012); Stephanie Rotondo, *Employment Discrimination Against LGBT Persons*, 16 GEO J. GENDER & L. 103, 104 (2015).

23. Ted Johnson, *Next LGBT Battle Must Be Legislation on Employment, Housing, Education*, VARIETY (July 1, 2015, 3:00 PM), <http://www.variety.com/2015/biz/news/lgbt-comprehensive-legislation-employment-housing-education-1201531938/>.

24. As one commentator noted:

Scholars estimate that more than eight million individuals within the current workforce identify as gay, lesbian, bisexual, or transgender. In 2008, the University of Chicago's National Opinion Research Center conducted the "General Social Survey." The survey found that 42% of gay, lesbian, or bisexual respondents "experienced at least one form of employment discrimination because of their sexual orientation at some point in their lives and 27% had experienced [employment] discrimination" within the five years preceding the survey. Of the respondents who were open about their sexuality at work, "56% had experienced at least one form of employment discrimination . . . at some point in their lives, and 38% had experienced [such] discrimination within the five years" preceding the survey. Comparatively, of the gay, lesbian, or bisexual respondents who were not open about their sexuality at work, only ten percent reported experiencing employment discrimination within the five years preceding the survey. Additionally, 58% of gay, lesbian, or bisexual respondents in a 2009 survey "reported hearing derogatory comments about sexual orientation and gender identity in their workplaces."

"Harassment was the most [widely] reported form of sexual orientation-based discrimination by [employees] who were open" with their sexuality at work. Thirty-five percent of openly gay, lesbian, or bisexual respondents reported experiencing workplace harassment within their lifetime, and 27% reported experiencing harassment within the five years preceding the survey. Further, 16% of openly gay, lesbian, or bisexual respondents reported having lost a job due to their sexual orientation within their lifetimes, and seven percent reported losing a job within the five years preceding the survey. Finally, other studies have shown that up to 41% of gay, lesbian, or bisexual employees have experienced verbal or physical abuse in the workplace or have had their workspaces vandalized.

In 2011, the National Center for Transgender Equality and the National Gay and Lesbian Task Force published the findings of the largest, most comprehensive transgender discrimination survey ever conducted. The survey produced devastating statistics surrounding transgender discrimination in the workplace. First, transgender individuals experience "[d]ouble the rate of unemployment . . . of the general population," while transgender people of color are unemployed at "up to four times" the rate of the general population. Respondents who had been terminated due to gender-identity discrimination are four times more likely to experience homelessness than respondents who had not. An astounding 90% of transgender individuals experience harassment in the workplace—almost triple the rate reported by the gay, lesbian, and bisexual survey. Approximately 47% of respondents indicated they had experienced an adverse employment action—such as losing their job or not being hired—because of

As of 2016, thirty-two states and the District of Columbia had taken some steps, either legislatively or through executive action, to limit or prohibit workplace discrimination on the bases of gender identity or sexual orientation.<sup>25</sup> Yet even among these states, victims of workplace discrimination based on sexual orientation or gender identity were provided redress through a private right of action in only twenty-one states and the District of Columbia.<sup>26</sup>

After *Obergefell*, much work remains to be done in building a regime of institutional formal equality that provides protection for gay and lesbian persons. Not only is this formal equality important in the context of marriage, but also in the much wider context of where individuals work, live, and choose to seek services.<sup>27</sup> Some of this

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their status as transgender. Further, of the transgender individuals fired due to biases, 16% reported being “compelled to engage in underground employment”—11% reported resorting to sex work. Perhaps the most devastating finding revealed that 41% of the transgender respondents indicated having “attempt[ed] suicide[,] compared to 1.6% of the general population.” Indeed, 55% of transgender respondents who had lost a job due to gender identity discrimination reported having attempted suicide.

Tessa M. Register, *The Case for Deferring to the EEOC’s Interpretations in Macy and Foxx to Classify LGBT Discrimination as Sex Discrimination under Title VII*, 102 IOWA L. REV. 1397, 1408–10 (2017); see M.V. Lee Badgett et al., *Bias in the Workplace: Consistent Evidence of Sexual Orientation and Gender Identity Discrimination 1998–2008*, 84 CHI.-KENT L. REV. 559, 559–60 (2009); Jennifer C. Pizer et al., *Evidence of Persistent and Pervasive Workplace Discrimination Against LGBT People: The Need for Federal Legislation Prohibiting Discrimination and Providing for Equal Employment Benefits*, 45 LOY. L.A. L. REV. 715, 719 (2012); see also Alex Reed, *Redressing LGBT Employment Discrimination via Executive Order*, 29 NOTRE DAME J.L. ETHICS & PUB. POL’Y 133 (2015); Jaime M. Grant et al., *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*, THE NAT’L LGBTQ TASK FORCE (2011), <http://www.thetaskforce.org/injustice-every-turn-report-national-transgender-discrimination-survey/>; *State Maps of Laws & Policies*, HUMAN RTS. CAMPAIGN, <http://www.hrc.org/state-maps/employment> (last visited Aug. 23, 2018); BRAD SEARS & CHRISTY MALLORY, DOCUMENTED EVIDENCE OF EMPLOYMENT DISCRIMINATION & ITS EFFECTS ON LGBT PEOPLE 1 (The Williams Inst. 2011), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Sears-Mallory-Discrimination-July-20111.pdf>.

25. Jerome Hunt, *A State-by-State Examination of Nondiscrimination Laws and Policies*, CTR. FOR AM. PROGRESS (2012), <https://www.americanprogress.org/issues/lgbt/reports/2012/06/11/11696/a-state-by-state-examination-of-nondiscrimination-laws-and-policies/> (identifying California, Colorado, Connecticut, Hawaii, Illinois, Iowa, Maine, Massachusetts, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington as states that provide legal recourse for both sexual orientation and gender identity discrimination, while Wisconsin and New Hampshire only provide legal recourse for sexual orientation discrimination).

26. *Id.*

27. For example, on July 16, 2015, the United States Equal Opportunity Commission (“EEOC”) held, for the first time, in *Baldwin v. Foxx*, No. 0120133080, 2015 WL 4397641 (EEOC July 16, 2015), that the prohibition against discrimination based on “sex” contained in Title VII of the Civil Rights Act of 1964 includes a prohibition against discrimination based on sexual orientation. As the EEOC stated:

Sexual orientation discrimination is sex discrimination because it necessarily entails

critical and important work related to workplace protections is taking place within the courts. It is this process that is the focus of this Article. *Obergefell* remains the beginning of the work, not the end.

Section II of this Article discusses development of the prohibition against discrimination “because of sex” that is contained in Title VII,<sup>28</sup> including the legislative history of Title VII and the initial interpretations of the meaning of “because of sex” in the Title VII context.<sup>29</sup> Section III is focused on general questions regarding the applications of Title VII to claims of discrimination based on sexual orientation, while Sections IV and V focus more specifically on treatment by the United States Equal Opportunity Commission (“EEOC”) and the courts, respectively, on the question of whether Title VII prohibits discrimination based on sexual orientation.<sup>30</sup> Section VI, the concluding section of this Article, examines the theories through which Title VII has been seen by courts to prohibit

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treating an employee less favorably because of the employee’s sex. *For example, assume that an employer suspends a lesbian employee for displaying a photo of her female spouse on her desk, but does not suspend a male employee for displaying a photo of his female spouse on his desk. The lesbian employee in that example can allege that her employer took an adverse action against her that the employer would not have taken had she been male. That is a legitimate claim under Title VII that sex was unlawfully taken into account in the adverse employment action. See Los Angeles Dep’t of Water & Power v. Manhart, 435 U.S. 702, 711 (1978) (“Such a practice does not pass the simple test of whether the evidence shows ‘treatment of a person in a manner which but for that person’s sex would be different.’”). The same result holds true if the person discriminated against is straight. Assume a woman is suspended because she has placed a picture of her husband on her desk but her gay colleague is not suspended after he places a picture of his husband on his desk. The straight female employee could bring a cognizable Title VII claim of disparate treatment because of sex.*

*Baldwin v. Foxx*, No. 0120133080, 2015 WL 4397641, at \*6–7 (EEOC July 16, 2015) (emphasis added).

28. Section 2002e(a) states:

It shall be an unlawful employment practice for an employer:

(1) 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; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a)(1) (2012).

29. See *infra* Part II. An earlier version of this discussion of the historical development of the understanding of Title VII appeared in Jack B. Harrison, “*To Sit or Stand*”: *Transgender Persons, Gendered Restrooms, and the Law*, 40 U. HAW. L. REV. 49, 63–83 (2017).

30. See *infra* Parts III–V.

discrimination based on sexual orientation.<sup>31</sup> Ultimately, this Article attempts to propose a unified theory under which discrimination based on sexual orientation would be included under Title VII’s prohibition against discrimination “because of sex.”

## II. DISCRIMINATION “BECAUSE OF SEX” UNDER TITLE VII

### A. *Genesis of Title VII*

Title VII makes it unlawful for an employer to “discriminate against any individual with respect to his [or her] compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin. . . .”<sup>32</sup> “Although the protected classifications of Title VII may appear to be self-explanatory on their face, the meaning of ‘[because of] sex’ under Title VII has been subject to intense debate in academic and judicial circles” since its inception.<sup>33</sup>

In part, this debate originates from the fact that the legislative history of Title VII contains little to no guidance for determining what constitutes discrimination “because of sex” under Title VII. As introduced in the House of Representatives, the legislation that ultimately became Title VII did not mention discrimination based on sex.<sup>34</sup> The statutory text of Title VII never defines the terms “discriminate” or “sex.”<sup>35</sup> Attempting to determine the legislative intent of the term “sex” is further complicated by the fact that the documentary record is meager.<sup>36</sup> The legislative record contains only one afternoon of debate and, surprisingly, no committee reports or legislative hearings on the issue of discrimination “because of sex.”<sup>37</sup>

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31. See *infra* Part VI; see also Luke A. Boso, *Acting Gay, Acting Straight: Sexual Orientation Stereotyping*, 83 TENN. L. REV. 575 (2016); Brian Soucek, *Hively’s Self-Induced Blindness*, 127 YALE L.J. F. 115 (2017); Brian Soucek, *Perceived Homosexuals: Looking Gay Enough for Title VII*, 63 AM. U. L. REV. 715 (2014); Jessica A. Clarke, *Frontiers of Sex Discrimination Law*, 115 MICH. L. REV. 809 (2016) (reviewing KIMBERLY A. YURACKO, *GENDER NONCONFORMITY AND THE LAW* (2016)).

32. 42 U.S.C. § 2000e-2(a)(1) (2012).

33. See Harrison, *supra* note 29, at 63.

34. Charles R. Calleros, *The Meaning of “Sex”: Homosexual and Bisexual Harassment under Title VII*, 20 VT. L. REV. 55, 55–56 (1995).

35. Cary Franklin, *Inventing the “Traditional Concept” of Sex Discrimination*, 125 HARV. L. REV. 1307, 1319 (2012).

36. *Id.* at 1318.

37. *Id.*

On January 31, 1964, following the assassination of President Kennedy, the House of Representatives took up debate on H.R. 7152, a civil rights bill championed by Kennedy before his death the previous November.<sup>38</sup> The House debate lasted only eleven days before a passing vote was cast on February 10.<sup>39</sup> In those eleven days, some eighteen amendments to the bill were adopted.<sup>40</sup> The “Smith Amendment,” adding “sex” as one of the classes protected under Title VII, was offered only two days before final passage by House Rules Committee Chairman Howard W. Smith, a Democrat from Virginia.<sup>41</sup> The original rationale for the amendment, which added “sex” as a class protected under Title VII’s employment discrimination rubric, has long been the subject of debate among legal scholars and congressional historians.<sup>42</sup>

Some have argued that Smith’s record as a staunch conservative on civil rights, exemplified by quotes such as, “[t]he Southern people have never accepted the colored race as a race of people who had equal intelligence. . . as the white people of the South,” formed the basis for his efforts to add “sex” to the legislation, hoping that it would serve as a “poison pill” insuring that the bill would not pass.<sup>43</sup> This attempted sabotage, according to some scholars and courts, led to the ambiguity of the meaning of “sex” under Title VII.<sup>44</sup> As one court noted, “sex was added to the list of prohibited grounds of discrimination by a congressional opponent at the last moment in the hopes that it would dissuade his colleagues from approving the bill; it did not,” and, as a result, the court reasoned that the “legislators had very little preconceived notion of what types of sex discrimination they were dealing with when they enacted Title VII.”<sup>45</sup>

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38. U.S. EQUAL EMP’T OPPORTUNITY COMM’N, LEGISLATIVE HISTORY OF TITLES VII AND XI OF CIVIL RIGHTS ACT OF 1964, at 10 (1968).

39. *Id.*

40. *Id.*

41. *See id.*; Jo Freeman, *How “Sex” Got into Title VII: Persistent Opportunism as a Maker of Public Policy*, 9 L. & INEQUALITY: J. OF THEORY & PRAC. 163, 178 (1991).

42. Freeman, *supra* note 41.

43. CHARLES W. WHALEN & BARBARA WHALEN, *THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT* 115–17 (2010); *see* Francine Tilewick Bazluke & Jeffrey J. Nolan, “*Because of Sex*”: *The Evolving Legal Riddle of Sexual vs. Gender Identity*, 32 J.C. & U.L. 361, 363 (2006); Calleros, *supra* note 34, at 57.

44. *See Doe ex rel. Doe v. City of Belleville (City of Belleville I)*, 119 F.3d 563, 572 (7th Cir. 1997). In support of this proposition, the *City of Belleville* decision cited *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986).

45. *City of Belleville I*, 119 F.3d at 572 (citations omitted); *see also* Calleros, *supra* note 34,

Other scholars have argued that, in light of H.R. 7152's likely passage in both houses and with President Johnson ready to sign the bill, Smith added "sex" as a protective measure for white women who would otherwise be relegated to the back of the hiring line if no protective measures for sex were added.<sup>46</sup> Proponents of this theory often point to Smith's address to the House upon introduction of the amendment.<sup>47</sup>

In introducing the amendment, Smith read excerpts from a letter he received from a "lady" in which the letter writer chastised the government for the numerical disparity apparent in the male and female populations of the United States.<sup>48</sup> Referencing the 1960 census, the letter asserted that the imbalance of 2,661,000 more females in the United States than males was due in large part to wars occasioned by prior administrations and policies of the U.S. government.<sup>49</sup> Smith's reading of these excerpts, coupled with his own wry cynical wit, was met with laughter on the House floor.<sup>50</sup> However, in concluding his statement, Smith's tone took a markedly more serious turn: "I read that letter just to illustrate that women have some real grievances and some real rights to be protected. I am serious about this thing. I just hope that the committee will accept it."<sup>51</sup>

Whatever his motivation in introducing the amendment, when called upon to offer support for it during debate, Smith responded with strong, serious arguments in favor of adding sex to level the playing field for white women, whom he feared would face a serious disadvantage in employment matters if race were protected, but not sex.<sup>52</sup>

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at 57 (noting that the last-minute nature of the amendment including "sex" confused legislators); Major Velma Cheri Gay, *50 Years Later . . . Still Interpreting the Meaning of "Because of Sex" Within Title VII and Whether It Prohibits Sexual Orientation Discrimination*, 73 A.F. L. REV. 61, 67 (2015) (noting that, because the House of Representatives debate on the amendment was very brief, the legislators' reasoning is largely a mystery).

46. See generally Michael E. Gold, *A Tale of Two Amendments: The Reasons Congress Added Sex to Title VII and Their Implication for the Issue of Comparable Worth*, 19 DUQ. L. REV. 453, 453 (1981) (challenging "[t]he conventional view . . . that sex was added as a protected class to the employment discrimination title of the Civil Rights Act of 1964 for the purpose of defeating it by making it unacceptable to some of its supporters or by laughing it to death.").

47. *Id.* at 458.

48. 110 CONG. REC. 2547, 2577 (daily ed. Feb. 8, 1964) (statement of Rep. Smith).

49. *Id.*

50. See *id.* at 2578; WHALEN, *supra* note 43, at 116–117.

51. 110 CONG. REC. 2547, 2577 (daily ed. Feb. 8, 1964) (statement of Rep. Smith).

52. As Smith asserted in debate:

I put a question to you on behalf of the white women of the United States. Let us assume



Discussion of the “Smith Amendment” was but a moment when compared to H.R. 7152’s eleven days and eighteen amendments on the House floor and what would eventually become the longest legislative debate in Senate history.<sup>53</sup> After eighty-three days of debate, which included the invocation of cloture to break the filibuster orchestrated by Southern senators vehemently opposed to civil rights measures, the bill was passed in the Senate and signed into law by President Johnson on July 2, 1964.<sup>54</sup>

*B. Early Understandings of the Meaning of “Because of Sex”*

Shortly after Title VII became law, EEOC Chairman Franklin D. Roosevelt, Jr. stated to President Lyndon B. Johnson that “[i]mplementation of Title VII’s prohibition against discrimination on account of sex has been a particularly challenging assignment for the Commission.”<sup>55</sup> Roosevelt admitted that some “traditional ideas” about women’s roles needed to be “drastically revisited” in response to Title VII.<sup>56</sup> Turning a broad, general mandate into comprehensive and comprehensible standards of employer conduct proved so difficult for the EEOC that Luther Holcomb, Vice Chairman of the EEOC, went so far as to request that Congress remove the prohibition of sex discrimination from the law.<sup>57</sup>

Much of the EEOC’s frustration was increased by the lack of guidance given by Congress.<sup>58</sup> In Congress’s brief debate regarding the amendment prohibiting discrimination based on sex, it did not

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that two women apply for the same job and both of them are equally eligible, one a white woman and one a Negro woman. The first thing that the employer will look at [unless the Smith amendment is approved] will be the provision with regard to the records he must keep. If he does not employ that colored woman and has to make that record, that employer will say, “Well, now, if I hire the colored woman I will not be in any trouble, but if I do not hire the colored woman and hire the white woman, then the [Equal Employment Opportunity] Commission is going to be looking down my throat and will want to know why I did not. I may be in a lawsuit.” That will happen as surely as we are here this afternoon. You all know it.

*Id.* at 2583.

53. See Whalen & Whalen, *supra* note 43; U.S. EQUAL EMP’T OPPORTUNITY COMM’N, *supra* note 38, at 10.

54. U.S. EQUAL EMP’T OPPORTUNITY COMM’N, *supra* note 38, at 11.

55. Franklin, *supra* note 35, at 1329 (quoting *EEOC Reports to President on First 100 Days of Activity*, [1965-1968 Transfer Binder] Empl. Prac. Dec. (CCH) ¶8024, at 6036 (Nov. 12, 1965); see also, Franklin, *supra* note 35, at 1380.

56. Franklin, *supra* note 35, at 1329.

57. *Id.* at 1333.

58. See *id.*

reach a consensus about post-enactment viability.<sup>59</sup> Moreover, in these debates, advocates of the amendment did not even consider whether Title VII would prevent employers from making distinctions between males and females.<sup>60</sup> Further complicating the situation was the fact that much of the EEOC staff had little experience in the field of sex discrimination or women's rights.<sup>61</sup>

These factors, among others, led to some early EEOC decisions that are contradictory in light of the current understanding of Title VII. For example, just three months after Title VII took effect, the EEOC concluded that the practice of employment advertisement seeking only men or only women did not qualify as sex discrimination because “[c]ulture and mores, personal inclinations, and physical limitations will operate to make many job categories primarily of interest to men or women.”<sup>62</sup> The EEOC, at the time, believed this was not sex discrimination as segregating ads by sex allowed both applicants and employers to find appropriate employment opportunities more efficiently.<sup>63</sup>

In the late 1960s and early 1970s, courts also consistently held that discrimination based on a woman being or becoming pregnant did not constitute sex-based discrimination.<sup>64</sup> The most notable case came before the Supreme Court in *General Electric Co. v. Gilbert*.<sup>65</sup> In *Gilbert*, female plaintiffs brought a class action challenging General Electric's disability plan.<sup>66</sup> This plan provided non-occupational sickness and accident benefits to all of its employees, but disabilities

59. *Id.* at 1330.

60. *Id.*

61. *Id.* at 1335.

62. *Id.* at 1340; HUGH DAVIS GRAHAM, CIVIL RIGHTS AND THE PRESIDENCY: RACE AND GENDER IN AMERICAN POLITICS 1960–1972 111 (1992) (citation omitted).

63. John Herbers, *Help Wanted: Picking the Sex for the Job*, N.Y. TIMES, Sept. 28, 1965, at A4.

64. *See generally* *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977) (finding that company policy denying accumulating seniority during pregnancy leave was considered discrimination but excluding pregnancy from sick leave compensation was not considered discrimination); *Geduldig v. Aiello*, 417 U.S. 484 (1974) (holding the exclusion of public unemployment benefits from disability due to pregnancy was not considered sex discrimination because it did not discriminate against the people whom the policy intended to protect); *Narragansett Elec. Co. v. R.I. Comm'n for Human Rights*, 374 A.2d 1022 (R.I. 1977) (finding that the policy treating pregnancy disabilities differently than other disabilities is not sex discrimination under the State Fair Employment Practice Act because pregnancy is a unique disability).

65. 429 U.S. 125 (1976).

66. *Id.* at 125.

arising from pregnancy were excluded.<sup>67</sup> The Court ruled that in order for the plaintiffs to prevail, sex-based discrimination must have occurred within the meaning of section 703(a)(1) of Title VII.<sup>68</sup> The Court reasoned that an exclusion of pregnancy from a disability benefits plan was not gender-based discrimination under Title VII.<sup>69</sup> The Court determined that there was no showing that the exclusion of pregnancy disability benefits from General Electric's plan was a pretext for discriminating against women.<sup>70</sup> The Court noted that although pregnancy is confined to women, it is significantly different from typically covered diseases or disabilities.<sup>71</sup>

Following *Gilbert* and several other cases that ruled that discriminating on the basis of pregnancy was not discrimination "because of sex," Congress enacted the Pregnancy Discrimination Act ("PDA") in 1978.<sup>72</sup> With the PDA, Congress rejected the court's interpretation that discrimination against pregnant women was not discrimination "based on sex."<sup>73</sup> Many legislators in favor of the bill expressed surprise that it was necessary to clarify that discrimination against pregnant women was, in fact, discrimination "because of sex." In their view, "the assumption that women will become pregnant and leave the labor force . . . [was] at the root of the discriminatory practices which keep women in low-paying and dead-end jobs."<sup>74</sup>

### III. SEXUAL ORIENTATION AND TITLE VII

Following the passage of Title VII, gay and lesbian individuals brought Title VII sex discrimination claims in which they claimed that they had experienced discrimination based on their sexual orientation.<sup>75</sup> Victims of same-sex discrimination suffered various degrees of harassment, including unwanted physical touching, sexual

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67. *Id.*

68. *Id.* at 134–36 (citing *Geduldig*, 417 U.S. at 494).

69. *Gilbert*, 429 U.S. at 139–40.

70. *Id.* at 135–36.

71. *Id.* at 126.

72. 42 U.S.C. § 2000e(k) (2012).

73. *Id.*

74. Franklin, *supra* note 35, at 1366–67 (citing H.R. REP. NO. 95-948, at 3 (1978), as reprinted in 1978 U.S.C.C.A.N. 4749, 4751).

75. See, e.g., *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989), *cert. denied*, 493 U.S. 1089 (1990); *DeSantis v. Pac. Tel. & Tel. Co., Inc.*, 608 F.2d 327, 331 (9th Cir. 1979), *abrogated by Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864 (9th Cir. 2001); *Smith v. Liberty Mut. Ins. Co.*, 569 F.2d 325, 326–27 (5th Cir. 1978).

innuendo, and verbal abuse at the hands of co-workers.<sup>76</sup> Nevertheless, courts consistently held that discrimination on the basis of sexual orientation was not discrimination “because of sex” under Title VII.<sup>77</sup> In the view of most courts, discrimination suffered by these plaintiffs was not covered by Title VII, since it was discrimination because of sexual “preference,” and not gender.

#### A. *Price Waterhouse and Sex Stereotyping*

Despite the fact that lesbian and gay individuals historically have been unable to maintain a sex-based discrimination claim centered on allegations of sexual orientation discrimination, such claims have been allowed to proceed where the plaintiff has shown that the discrimination is on the basis of sex stereotyping.<sup>78</sup> In *Price Waterhouse v. Hopkins*,<sup>79</sup> the Supreme Court expanded the reach of Title VII by concluding that the discrimination “because of sex” prohibited by Title VII was not limited only to cases where the discrimination was based on biological sex.<sup>80</sup>

In *Price Waterhouse*, Ann Hopkins was a Senior Manager in a large accounting firm.<sup>81</sup> In 1982, Hopkins was proposed for partnership in the firm.<sup>82</sup> She was neither offered nor denied the partnership; instead, further consideration of her candidacy was postponed for one year.<sup>83</sup> However, the firm ultimately refused to further consider her candidacy to become partner.<sup>84</sup> Hopkins brought suit in federal district court under Title VII.<sup>85</sup> The district court found in favor of Hopkins, ruling that Price Waterhouse “unlawfully discriminated against her on the basis of sex by consciously giving credence and effect to partners’ comments about her that resulted from

76. *See, e.g.*, *Carreno v. Local Union No. 226, Int’l Bhd. of Elec. Workers*, No. 89-4083-S, 1990 U.S. Dist. LEXIS 13817 (D. Kan. Sept. 26, 1990); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252 (1st Cir. 1999).

77. *See, e.g.*, *Dillon v. Frank*, No. 90-2290, 1992 U.S. App. LEXIS 766, at \*12 (6th Cir. Jan. 15, 1992); *Williamson*, 876 F.2d at 70; *DeSantis*, 608 F.2d at 331; *Hinman v. Dep’t of Pers. Admin.*, 213 Cal. Rptr. 410 (Cal. Ct. App. 1985).

78. *See Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

79. 490 U.S. 228 (1989).

80. *See id.*

81. *Id.* at 231.

82. *Id.*

83. *Id.*

84. *Id.* at 231–32.

85. *Id.* at 232.

sex stereotyping.”<sup>86</sup> The court of appeals affirmed<sup>87</sup> and the Supreme Court granted certiorari.<sup>88</sup>

In evaluating Hopkins’s claims, the Court took into consideration her achievements in the workplace, personality traits, and workplace relationships.<sup>89</sup> The record reflected that Hopkins was praised for her accomplishments. She was praised by both clients and partners for being “‘an outstanding professional’ who had a ‘deft touch,’ a ‘strong character, independence and integrity.’”<sup>90</sup> She was described by a State Department official as being “‘extremely competent, intelligent,’”<sup>91</sup> “‘strong and forthright, very productive, energetic and creative.’”<sup>92</sup>

Despite having top-notch professional qualities, Hopkins’s interpersonal skills, according to her former employers, needed improvement.<sup>93</sup> On many occasions she was aggressive and abrasive to staff members.<sup>94</sup> Partners evaluating her work counseled her to improve her interpersonal skills.<sup>95</sup> In her bid for the partnership, both supporters and opponents of her candidacy, “‘indicated that she was sometimes overly aggressive, unduly harsh, difficult to work with and impatient with staff.’”<sup>96</sup>

Nevertheless, the record indicated that it was not her aggressive personality alone that caused Hopkins to be denied partnership.<sup>97</sup> In fact, Hopkins’s lack of femininity in terms of her gender presentation and/or expression also played a role in the decision.<sup>98</sup> Partners and co-workers made statements that she “‘overcompensated for being a woman,’” was “‘macho,’” needed to take a “‘course at charm school,’” and was not appropriately feminine.<sup>99</sup> Finally, when inquiring about why her candidacy was placed on hold, she was advised to “‘walk more femininely, talk more femininely, dress more femininely, wear make-

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86. *Id.* at 237.

87. *Id.* at 232.

88. *Id.*

89. *Id.* 233–37.

90. *Id.* at 234.

91. *Id.*

92. *Id.*

93. *See id.* at 234–35.

94. *Id.*

95. *Id.* at 234.

96. *Id.* at 235.

97. *See id.*

98. *Id.*

99. *Id.*

up, have her hair styled, and wear jewelry.”<sup>100</sup>

Price Waterhouse attempted to rebut Hopkins’s claim by asserting that even if a plaintiff showed that her gender played a role in the firm’s employment decision, it was still her burden to show the decision would have been different if the employer had not discriminated.<sup>101</sup> The Court rejected Price Waterhouse’s argument.<sup>102</sup> In doing so, the Court noted that “Congress’ intent to forbid employers to take gender into account in making employment decisions appears on the face of the statute.”<sup>103</sup> The Court further determined that “the words ‘because of’ do not mean ‘solely because of,’” and that Title VII was “meant to condemn even those decisions based on a mixture of legitimate and illegitimate considerations.”<sup>104</sup> Thus, the Court concluded, when an employer considered both gender and legitimate factors in making an employment decision, such a decision would be “because of sex.”<sup>105</sup>

Because of these conclusions, the Court ruled that when a plaintiff in a Title VII case proves that gender played a motivating factor in their employment, the defendant could only avoid liability by proving, by a preponderance of the evidence, that the defendant would have made the same decision even if it had not taken the plaintiff’s gender into consideration.<sup>106</sup>

### *B. Oncale and Same-Sex Sexual Harassment*

Soon after Title VII became law, courts quickly established opposite-sex sexual harassment as a cognizable claim under Title VII.<sup>107</sup> However, according to Justice Scalia, the federal courts had

100. *Id.*

101. *Id.* at 237–38.

102. *Id.* at 253 (“We are persuaded that the better rule is that the employer must make this showing by a preponderance of the evidence.”).

103. *Id.* at 239.

104. *Id.* at 241.

105. *Id.*

106. *Id.* at 252–53 (“The courts below held that an employer who has allowed a discriminatory impulse to play a motivating part in an employment decision must prove by clear and convincing evidence that it would have made the same decision in the absence of discrimination. We are persuaded that the better rule is that the employer must make this showing by a preponderance of the evidence.”).

107. *See Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977) (holding that the plaintiff employee’s gender was an indispensable factor in conditioning her job retention on being receptive to the sexual advances of her opposite-sex employer); *see also Morgan v. Hertz Corp.*, 542 F. Supp. 123 (W.D. Tenn. 1981) (holding that sexually indecent comments towards female coworkers is sexual harassment prohibited by Title VII); *Heelan v. Johns-Manville Corp.*, 451 F. Supp. 1382 (D. Colo.

taken a “bewildering variety of stances” in determining whether plaintiffs alleging same-sex sexual harassment actually had an actionable claim under Title VII.<sup>108</sup> Some circuits allowed plaintiffs to move forward with same-sex sexual harassment claims just the same as an opposite-sex sexual harassment claim under Title VII.<sup>109</sup> Other circuits would consider the plaintiff’s same-sex sexual harassment claim as actionable under Title VII only if the harassed was heterosexual and the harasser was homosexual.<sup>110</sup> The majority of circuits rejected same-sex sexual harassment, finding that it was outside the scope of Congress’s intent to provide an actionable claim for same-sex harassment under Title VII.<sup>111</sup>

In 1998, the Supreme Court ultimately settled the circuit split with its decision in *Oncale v. Sundowner Offshore Services, Inc.*<sup>112</sup> In *Oncale*, the male plaintiff was subjected to humiliating, degrading, and lewd sex-related actions at the hands of his male co-workers.<sup>113</sup> At one point, Oncale was even threatened with rape.<sup>114</sup> Oncale complained to Sundowner’s supervisory personnel about the

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1978) (finding that employment terminated after refusal of repeated sexual advances by employer and discrimination against female employee was not evidenced with males in the same position).

108. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998) (“Federal courts have taken a bewildering variety of stances. Some . . . have held that same-sex sexual harassment claims are never cognizable under Title VII. . . . Other decisions say that such claims are actionable . . .”).

109. *See Gay, supra* note 45, at 80–81; *see also Doe ex rel. Doe v. City of Belleville (City of Belleville I)*, 119 F.3d 563, 569 (7th Cir. 1997) (finding same-sex harassment actionable as sex discrimination); *Sardinia v. Dellwood Foods*, No. 94 Civ. 5458 (LAP), 1995 U.S. Dist. LEXIS 16073 (S.D.N.Y. Oct. 30, 1995) (finding same-sex harassment actionable under Title VII); *Raney v. District of Columbia*, 892 F. Supp. 283 (D.D.C. 1995) (denying defendants’ motion for summary judgment on same-sex harassment under Title VII). *Contra Hamner v. St. Vincent Hosp. & Health Care Ctr.*, 224 F.3d 701 (7th Cir. 2000) (denying relief under Title VII where doctor harassed male nurse by “lipping at him” and “flipping his wrist” because the actions were considered “homophobic” rather than discriminatory).

110. *See Yeary v. Goodwill Industries-Knoxville, Inc.*, 107 F.3d 443, 446–48 (6th Cir. 1997) (rejecting the Fourth Circuit’s view that “a claim under Title VII for same-sex ‘hostile work environment’ harassment may lie where the perpetrator of the sexual harassment is homosexual,” but that sexual harassment between two heterosexual males “cannot be ‘considered to be because of the [target’s] sex.’” (alteration in original)); *see also McWilliams v. Fairfax Cty. Bd. of Supervisors*, 72 F.3d 1191, 1195–96 (4th Cir. 1996) (finding no claim for Title VII harassment where alleged harasser and victims were heterosexuals of the same sex), *abrogated by Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998).

111. *See generally Gay, supra* note 45, at 80–81; *see also Goluszek v. Smith*, 697 F. Supp. 1452 (N.D. Ill. 1988) (finding Congress did not intend to sanction same-sex harassment when it enacted Title VII).

112. *Oncale*, 523 U.S. at 75–82.

113. *Id.* at 77.

114. *Id.*

harassment, but no action was taken.<sup>115</sup> Since his supervisor took no action and the harassment continued, Oncale ultimately quit his job.<sup>116</sup> Subsequently, he brought a Title VII claim against Sundowner and the co-workers who harassed him, alleging that he had been discriminated against because of his sex.<sup>117</sup> The district court granted summary judgment, finding that Oncale had no claim under Title VII because the harassment was caused by his male co-workers. The Fifth Circuit court of appeals affirmed, and the Supreme Court granted certiorari.<sup>118</sup>

In a unanimous opinion, the Supreme Court held that nothing in Title VII necessarily barred a claim of discrimination “because of sex” simply because the parties were of the same sex.<sup>119</sup> The Court noted that male-on-male sexual harassment in the workplace was not the principal evil Congress was concerned about when it enacted Title VII, however, “statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our law rather than the principal concerns of our legislators by which we are governed.”<sup>120</sup>

The Court further established three ways plaintiffs alleging same-sex sexual harassment may have an actionable claim through Title VII’s “because of sex” provision.<sup>121</sup> First, the Court determined that same-sex sexual harassment should not be treated differently from opposite-sex sexual harassment if the plaintiff can show credible evidence that the harasser is homosexual.<sup>122</sup> Second, the Court concluded that the harassing conduct need not be motivated by sexual

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at 79.

120. *Id.* at 79–80. Justice Scalia, writing for the majority, stated:

We see no justification in the statutory language or our precedents for a categorical rule excluding same-sex harassment claims from the coverage of Title VII. As some courts have observed, male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed. Title VII prohibits “discriminat[ion] . . . because of . . . sex” in the “terms” or “conditions” of employment. Our holding that this includes sexual harassment must extend to sexual harassment of any kind that meets the statutory requirements.

*Id.*

121. *See id.* at 80–81.

122. *Id.* at 80.



desire to support an inference of sex based discrimination.<sup>123</sup> The Court found that a claim under Title VII's sex provision could also be actionable if the harasser was motivated by general hostility to the presence of the opposite sex in the workplace.<sup>124</sup> Lastly, the court established that a plaintiff claiming same-sex harassment could also prove "because of sex" discrimination through "comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace."<sup>125</sup> The court cautioned that regardless of the evidentiary route the plaintiff chooses, "he or she must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted 'discrimina[tion] . . . because of . . . sex.'"<sup>126</sup>

#### IV. EEOC DECISIONS INTERPRETING TITLE VII IN THE AFTERMATH OF *PRICE WATERHOUSE* AND *ONCALE*

Although the *Price Waterhouse* and *Oncale* decisions expanded the understanding of what constitutes "because of sex" discrimination under Title VII, there has been debate amongst scholars, lower federal courts, and the EEOC as to how far the reach of these decisions may actually be.<sup>127</sup> Following the rulings in *Oncale* and *Price Waterhouse*, claims came before lower courts alleging "because of sex" discrimination under Title VII on the grounds of both same-sex sexual harassment and gender stereotyping.<sup>128</sup> Despite the guidance given by

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123. *Id.*

124. *See id.*

125. *Id.* at 81.

126. *Id.*

127. *See* Andrea Meryl Kirshenbaum, "Because of . . . Sex": Rethinking the Protections Afforded Under Title VII in the Post-Oncale World, 69 ALB. L. REV. 139, 142–43 (2005) ("Oncale and its progeny demonstrate that the assumptions underlying the traditional employment discrimination construct can no longer be relied upon to conceptualize the full panoply of sexual harassment and discrimination actionable under Title VII."); *see also* B.J. Chisholm, *The (Back)door of Oncale v. Sundowner Offshore Services, Inc.: Outing Heterosexuality as a Gender-Based Stereotype*, 10 L. & SEXUALITY: REV. LESBIAN, GAY, BISEXUAL & TRANSGENDER LEGAL ISSUES 239 (2001) (arguing that "Oncale is little more than a temporary hole in the wall of refusal to protect . . . LGBT employees' rights" and that Congress should "pass broad legislation to prohibit [sexual orientation] discrimination."). *But see* John W. Whitehead, *Eleventh Hour Amendment or Serious Business: Sexual Harassment and the United States Supreme Court's 1997–1998 Term*, 71 TEMP. L. REV. 773, 806 (1998) ("In *Oncale*, the Supreme Court failed to distinguish between the terms sexual harassment and sex-based harassment . . . . According to the EEOC, '[s]exual harassment is a form of sex discrimination in which the prohibited conduct is sexual in nature, not just sex-based.'").

128. *See, e.g.*, *Love v. Motiva Enters., LLC*, No. 07-5970, 2008 U.S. Dist. LEXIS 69978 (E.D. La. Sept. 16, 2008) (granting plaintiff's motion for summary judgment in claim of same-sex sexual

the Supreme Court in *Oncale* and *Price Waterhouse*, lower federal courts have interpreted these claims in a variety of ways.<sup>129</sup> Moreover, *Oncale* and *Price Waterhouse* sparked a slew of claims from plaintiffs claiming discrimination “because of sex” based on sexual orientation and on transgender status or gender identity.<sup>130</sup> Likewise, the EEOC’s stance on what constitutes discrimination on the basis of sex under Title VII has evolved following *Oncale* and *Price Waterhouse*.<sup>131</sup>

Additionally, lesbian, gay, and transgender employees attempted to bring Title VII actions claiming that their discrimination flowed

harassment and gender stereotyping claims against employer); *Jones v. Pac. Rail Servs.*, No. 00 C 5776, 2001 U.S. Dist. LEXIS 1549 (N.D. Ill. Feb. 12, 2001) (relying on *Oncale* in denying motion to dismiss same-sex harassment and gender-based stereotyping against plaintiff’s employer); *EEOC v. TruGreen Ltd. P’ship.*, 122 F. Supp. 2d 986 (W.D. Wis. 1999) (holding plaintiff failed to prove defendant harassed plaintiff ‘because of’ his failure to adhere to gender stereotypes).

129. Matthew Fedor, *Can Price Waterhouse and Gender Stereotyping Save the Day for Same-Sex Discrimination Plaintiffs Under Title VII? A Careful Reading of Oncale Compels an Affirmative Answer*, 32 SETON HALL L. REV. 455 (2002). In *Oncale*, Justice Scalia noted that some courts have held that “same-sex sexual harassment claims are never cognizable under Title VII.” *Oncale.*, 523 U.S. at 79 (citing *Goluszek v. H.P. Smith*, 697 F. Supp. 1452 (N.D. Ill. 1988)). Moreover, Scalia pointed out that a few courts have held that such claims are actionable “only if the plaintiff can prove that the harasser is homosexual.” *Id.* (comparing *McWilliams v. Fairfax Cty. Bd. of Supervisors*, 72 F.3d 1191 (4th Cir. 1996), with *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138 (4th Cir. 1996)). Justice Scalia also observed that other courts have suggested that “workplace harassment that is sexual in content is always actionable, regardless of the harasser’s sex, sexual orientation, or motivations.” *Id.* (citing *Doe ex rel. Doe v. City of Belleville*, 119 F.3d 563 (7th Cir. 1997)).

130. *See Oiler v. Winn-Dixie La., Inc.*, No. 00-3114, 2002 U.S. Dist. LEXIS 17417 (E.D. La. Sept. 16, 2002) (the phrase “sex” has not been interpreted to include sexual identity or gender identity); *see also Johnson v. Fresh Mark, Inc.*, 337 F. Supp. 2d 996 (N.D. Ohio 2003) (employee born male and identifying as female was fired after using both men’s and women’s bathrooms and refusing to identify with a specific gender); *Doe v. United Consumer Fin. Servs.*, No. 1:01 CV 1112, 2001 WL 34350174 (N.D. Ohio Nov. 9, 2001) (employee who had Gender Identity Disorder terminated because her appearance and behavior did not fit into the company’s sex stereotypes).

131. EEOC, MEMORANDUM OF UNDERSTANDING BETWEEN THE U.S. DEP’T OF LABOR, WAGE AND HOUR DIV. AND THE U.S. EQUAL EMP’T OPPORTUNITY COMM’N (Jan. 6, 2017) (Title VII’s prohibition against sex discrimination includes discrimination because of pregnancy, childbirth, or related medical conditions; gender identity (including transgender status); and sexual orientation); *see also Baldwin v. Foss*, No. 0120133080, 2015 WL 4397641, at \*6–8 (EEOC July 16, 2015) (holding that (1) discrimination because of sexual orientation is premised on sex-based preferences, assumptions, expectations, stereotypes, or norms. “Sexual orientation” as a concept cannot be defined or understood without reference to sex; (2) sexual orientation discrimination is also sex discrimination because it is associational discrimination because of sex; and (3) sexual orientation discrimination also is sex discrimination because it necessarily involves discrimination based on gender stereotypes); EEOC, MEMORANDUM OF UNDERSTANDING BETWEEN THE EQUAL EMP’T OPPORTUNITY COMM’N AND THE DEP’T OF HEALTH AND HUMAN SERVS. OFFICE FOR CIVIL RIGHTS (Jan. 13, 2017) (describing EEOC laws broadly prohibiting employment discrimination against individuals on the basis of race, color, religion, sex (including pregnancy, gender identity, and sexual orientation), national origin, age (40 or older), disability, genetic information, or an individual’s opposition to discrimination or participation in an EEOC proceeding).

from the fact that they did not conform to traditional sex stereotypes.<sup>132</sup> Unfortunately, lower federal courts often ignored evidence of gender stereotyping and effectively characterized the harassment as based on the individual's perceived sexual orientation, rather than sex stereotyping rooted in normative gender understandings.<sup>133</sup> Since discrimination based on sexual orientation historically has not been actionable under Title VII, courts consistently ruled against these plaintiffs.<sup>134</sup>

However, in *Smith v. City of Salem*,<sup>135</sup> the United States Court of Appeals for the Sixth Circuit recognized that a transgender employee could conceivably bring a valid Title VII claim under a sex stereotyping theory of recovery.<sup>136</sup> In *Smith*, Jimmie Smith, a biological male, was a lieutenant in the Salem, Ohio Fire Department.<sup>137</sup> Smith had been with the Salem Fire Department for seven years.<sup>138</sup> Smith was diagnosed with Gender Identity Disorder (“GID”) and began dressing and acting more femininely.<sup>139</sup> Following these changes, Smith's co-workers began to treat him differently, commenting on how his appearance and mannerisms were not “masculine enough.”<sup>140</sup> Smith also informed his supervisor of his

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132. See *Johnson v. Fresh Mark, Inc.*, 337 F. Supp. 2d 996 (N.D. Ohio 2003); see also *Oiler*, 2002 U.S. Dist. LEXIS 17417 (transgender male plaintiff filed Title VII action); *Doe v. United Consumer Fin. Servs.*, No. 1:01 CV 1112, 2001 WL 34350174 (N.D. Ohio Nov. 9, 2001) (transgender female plaintiff filed Title VII action).

133. Fedor, *supra* note 129, at 470–71; see also *Spearman v. Ford Motor Co.*, 231 F.3d 1080, 1084–86 (7th Cir. 2000) (finding Title VII sex harassment claim based on perceived sexual orientation was not harassment based on gender), *overruled by Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339 (7th Cir. 2017).

134. See *Bibby v. Phila. Coca Cola Bottling Co.*, 85 F. Supp. 2d 509 (E.D. Pa. 2000) (granting defendant's motion for summary judgment because sexual harassment claim was based on sexual orientation and not ‘sex’); see also *Metzger v. Compass Grp. U.S.A., Inc.*, No. 98-2386-GTV, 1999 WL 714116 (D. Kan. Sept. 1, 1999) (finding plaintiff did not establish sexual harassment occurred where defendant made hostile remarks regarding homosexuals but not women); *Salvatore v. KLM Royal Dutch Airlines*, No. 98 Civ. 2450 (LAP), 1999 WL 796172 (S.D.N.Y. Sep. 30, 1999) (finding harassment based on plaintiff's sexual orientation could not be the basis for a Title VII sex discrimination claim); *Higgins v. New Balance Athletic Shoe, Inc.*, 21 F. Supp. 2d 66 (D. Me. 1998) (upholding lower court's grant of summary judgment on Title VII discrimination claim based on sexual orientation).

135. 378 F.3d 566 (6th Cir. 2004).

136. *Id.* at 572–73. For a more fulsome discussion of the application of Title VII and Title IX to discrimination against transgender persons, see generally Harrison, *supra* note 29.

137. *Smith*, 378 F.3d at 568.

138. *Id.*

139. *Id.*

140. *Id.*

intent to make a complete transformation from male to female.<sup>141</sup> As a result of Smith’s new conduct, city officials discussed their intentions of using Smith’s transsexualism as a basis for terminating his employment.<sup>142</sup> After Smith faced adverse employment action in the form of a suspension, he felt the suspension was unjust and filed suit claiming Title VII sex discrimination.<sup>143</sup>

The district court dismissed his claims, which were subsequently appealed to the United States Court of Appeals for the Sixth Circuit.<sup>144</sup> The court of appeals first addressed whether Smith had stated a claim for relief, pursuant to *Price Waterhouse*’s prohibition on sex stereotyping.<sup>145</sup> The court of appeals agreed with Smith that he had stated a claim for relief pursuant to *Price Waterhouse*.<sup>146</sup> The court of appeals determined that Smith’s “failure to conform to sex stereotypes concerning how a man should look and behave was the driving force behind Defendants’ actions.”<sup>147</sup> As a result, the court of appeals concluded that Smith had sufficiently pleaded claims of sex stereotyping and gender discrimination.<sup>148</sup>

The court of appeals further concluded that the lower court had reached its decision using a series of federal appellate cases pre-*Price Waterhouse* that held transsexuals, as a class, were not entitled to Title VII protection because “Congress had a narrow view of sex in mind” and “never considered nor intended that [Title VII] apply to anything other than the traditional concept of sex.”<sup>149</sup> The court of appeals noted that these decisions had been “eviscerated by *Price Waterhouse*.”<sup>150</sup>

141. *Id.*

142. *Id.*

143. *Id.* at 569.

144. *Id.* at 566–67.

145. *Id.* at 571.

146. *Id.* at 572–73.

147. *Id.* at 572.

148. *Id.* at 575.

149. *Id.* at 572 (construing “sex” in Title VII narrowly to mean only anatomical and biological sex rather than gender) (citing *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1084 (7th Cir. 1984)), *overruled by Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 351–352 (7th Cir. 2017) (sexual orientation discrimination is actionable under Title VII); *see also Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982) (holding transsexuals are not protected under Title VII because “the ‘plain meaning’ must be ascribed to the term ‘sex’ in the absence of clear congressional intent to do otherwise.”); *Holloway v. Arthur Anderson & Co.*, 566 F.2d 659, 661–63 (9th Cir. 1977) (declining to extend protection of Title VII to transsexual plaintiff who was terminated following her sex change operation because the “traditional meaning” of “sex” refers to present anatomical characteristics).

150. *Smith*, 378 F.3d at 573.

The court of appeals determined that *Price Waterhouse* and the facts underlying Smith's claim were analogous.<sup>151</sup> The court of appeals reasoned that an employer who discriminates against women because they fail to wear dresses or makeup is no different from an employer who discriminates against men because they do wear dresses and makeup.<sup>152</sup>

While cases such as *Price Waterhouse*, *Oncale*, and *Smith* provided some limited mechanisms through which homosexual and transgender individuals could maintain a claim under Title VII, recent EEOC rulings suggest that full Title VII protections for discrimination based on sexual orientation and transgender status may be on the horizon.<sup>153</sup> These EEOC rulings recognized discrimination because of sexual orientation or transgender status as sex based discrimination under Title VII, without requiring that such an argument be rooted in gender stereotyping or gender non-conformity.

#### A. Application of Title VII to Gender Identity: *Macy v. Holder*

In *Macy v. Holder*,<sup>154</sup> the plaintiff, Mia Macy, was a biological male whose gender identity was female.<sup>155</sup> Macy was a detective in Phoenix, Arizona, but wanted to relocate to San Francisco for family reasons.<sup>156</sup> To accomplish her goal of moving to California, Macy applied for an open position with the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") at its Walnut Creek crime laboratory.<sup>157</sup> Initially, Macy presented herself as a man in phone interviews and was given assurances she would get the job following a successful background check.<sup>158</sup>

Aspen, the contractor responsible for filling the position, then contacted Macy and had her fill out the necessary employment paperwork, including paperwork for a background check.<sup>159</sup> Macy "informed Aspen via email she was in the process of transitioning from male to female" and requested that the director of the Walnut

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151. *Id.* at 575.

152. *Id.* at 574.

153. *Baldwin v. Foxx*, No. 0120133080, 2015 WL 4397641, at \*10 (EEOC July 16, 2015); *see also Macy v. Holder*, No. 0120120821, 2012 WL 1435995, at \*11 (EEOC Apr. 20, 2012).

154. No. 0120120821, 2012 WL 1435995.

155. *Id.* at \*1.

156. *Id.*

157. *See id.*

158. *Id.*

159. *Id.*

Creek crime laboratory be informed.<sup>160</sup> Five days after Aspen informed the director, Macy received an email from the director stating that the position was no longer available due to budget cuts.<sup>161</sup> In fact, the position was not cut, but was filled by another candidate.<sup>162</sup>

Macy believed the decision not to hire her was because she was transgender and she filed an equal opportunity complaint with the ATF.<sup>163</sup> In her complaint, Macy alleged discrimination based on “gender identity” and “sex stereotyping.”<sup>164</sup> The ATF accepted her complaint, but determined that her claims initially had to be processed according to Department of Justice (“DOJ”) administrative policy.<sup>165</sup> The DOJ had separate systems for adjudicating claims, “one system for adjudicating claims of sex discrimination under Title VII and a separate system for adjudicating complaints of sexual orientation and gender identity discrimination.”<sup>166</sup> The DOJ process for sexual orientation and gender identity discrimination did not include the same rights offered under Title VII.<sup>167</sup> As a result, Macy appealed to the EEOC.<sup>168</sup>

On appeal, the EEOC held that discrimination against a transgender individual because of their transgender status is, in fact, discrimination because of sex and violates Title VII.<sup>169</sup> The EEOC determined that when an employer discriminates against an employee because the employee has expressed his or her gender in a non-traditional manner, the employer is making a gender-based evaluation.<sup>170</sup> As a result, the employer would be violating the law as established by *Price Waterhouse*, because an employer may not take gender into account when making an employment decision.<sup>171</sup>

### *B. Application of Title VII to Sexual Orientation: Baldwin v. Foxx*

In *Baldwin v. Foxx*,<sup>172</sup> David Baldwin, the plaintiff, was a

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160. *Id.*

161. *Id.*

162. *Id.* at \*2.

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.* at \*3.

169. *Id.* at \*4.

170. *Id.* at \*7.

171. *Id.*

172. No. 0120133080, 2015 WL 4397641 (EEOC July 16, 2015).

Supervisory Air Traffic Control Specialist.<sup>173</sup> Baldwin was allegedly passed over for a promotion due to his sexual orientation.<sup>174</sup> As a result, Baldwin filed a complaint with the agency alleging unlawful employment discrimination under Title VII.<sup>175</sup> Baldwin's complaint was dismissed, and he appealed to the EEOC.<sup>176</sup>

On appeal, the EEOC determined that a claim for sex discrimination under Title VII could be maintained if the discrimination was a result of an individual's sexual orientation.<sup>177</sup> The EEOC determined that sexual orientation discrimination is, in fact, "discrimination on the basis of sex."<sup>178</sup> In the EEOC's view, sex and sexual orientation are inseparable.<sup>179</sup> According to the EEOC, "discrimination on the basis of sexual orientation is premised on sex-based preferences, assumptions, expectations, stereotypes, or norms."<sup>180</sup> As a result, the EEOC concluded that "'sexual orientation' as a concept cannot be defined or understood without reference to sex."<sup>181</sup> This conclusion rested on the fact that it is not possible to determine whether an individual is "gay" or "straight" without first taking his or her sex into consideration.<sup>182</sup> The EEOC stated that:

An employee could show that the sexual orientation discrimination he or she experienced was sex discrimination because it involved treatment that would not have occurred but for the individual's sex; because it was based on the sex of the person(s) the individual associates with; and/or because it was premised on the fundamental sex stereotype, norm, or expectation that individuals should be attracted only to those of the opposite sex.<sup>183</sup>

The EEOC further concluded that sexual orientation discrimination is sex discrimination, because it is based on gender stereotyping.<sup>184</sup> This argument had been used by homosexual

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173. *Id.* at \*1.

174. *Id.* at \*2.

175. *Id.* at \*1.

176. *Id.*

177. *See id.* at \*10.

178. *Id.*

179. *Id.* at \*5.

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.* at \*10.

184. *Id.* at \*7, \*10.

plaintiffs in past Title VII sex discrimination claims, but to no avail.<sup>185</sup> Prior to this ruling, homosexual plaintiffs could only find relief for sex based discrimination if they could show they were being treated differently not because they were homosexual, but because they did not act “masculine” or “feminine” enough for their particular biological sex.<sup>186</sup>

Undoubtedly, the *Baldwin* opinion is a victory for the LGBT community. However, the implications of the case are still evolving, as the decision is only binding on federal agencies.<sup>187</sup> Guidance from the EEOC concerning the interpretation of Title VII will only be considered by federal courts as persuasive authority. However, over the past two years, we have seen federal courts increasingly willing to entertain arguments over the scope of protections provided by Title VII against discrimination based on sexual orientation and gender identity.

## V. TITLE VII LITIGATION ADDRESSING SEXUAL ORIENTATION

In recent years, federal courts have been increasingly willing to entertain arguments over the scope of protections provided by Title VII against discrimination based on sexual orientation and gender identity. These cases have centered not only on the prohibition against gender stereotyping articulated in *Price Waterhouse*, but have also focused on the text of Title VII itself.

For example, in *Bouillier v. Hartford Public Schools*,<sup>188</sup> where an elementary school teacher brought an action against her former school district alleging sexual orientation discrimination in violation of Title VII “because of . . . sex,” the court held that Title VII protects individuals who are discriminated against on the basis of sex because of their sexual orientation.<sup>189</sup> In recognizing the applicability of the

185. *Id.* at \*9; *see also* Dawson v. Bumble & Bumble, 398 F.3d 211 (2d Cir. 2005) (holding that employee alleging discrimination based on her lesbianism could not satisfy the first element of a prima facie case under Title VII because it did not recognize homosexuals as a protected class); Martin v. N.Y. State Dep’t of Corr. Servs., 224 F. Supp. 2d 434 (N.D.N.Y. 2002) (holding that harassment was purely sexual in nature rather than based on gender).

186. *See* Smith v. City of Salem, 378 F.3d 566, 573 (6th Cir. 2004); *see also* Prowel v. Wise Bus. Forms, Inc., 579 F.3d 285 (3d Cir. 2009) (holding that employee’s harassment and termination were due to sexual discrimination, though employee alleged they were due to gender stereotyping).

187. *See* 29 C.F.R. §1614.110 (2017).

188. 221 F. Supp. 3d 255 (D. Conn. 2016).

189. *Id.* at 255.



*Price Waterhouse* holding to Title VII claims based on same-sex attraction as a non-conforming gender stereotype, the court asserted, “stereotypes concerning sexual orientation are probably the most prominent of all sex related stereotypes, which can lead to discrimination based on what the Second Circuit refers to interchangeably as gender non-conformity.”<sup>190</sup>

Whereas, in *Winstead v. Lafayette County Board of County Commissioners*,<sup>191</sup> where a former county emergency medical services employee brought a claim of employment discrimination based on sexual orientation,<sup>192</sup> the district court held that sexual orientation discrimination was actionable under Title VII, concluding that “[t]o hold that Title VII’s prohibition on discrimination “because of sex” includes a prohibition on discrimination based on an employee’s homosexuality or bisexuality or heterosexuality” simply “requires close attention to the text of Title VII [and] common sense.”<sup>193</sup> Further, the court stated that all that was required to reach this conclusion was an understanding that “[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.”<sup>194</sup>

In *Heller v. Columbia Edgewater Country Club*,<sup>195</sup> a lesbian employee alleged discrimination and harassment in violation of Title VII.<sup>196</sup> In confronting the employer’s argument that Title VII was not applicable to claims of discrimination based on sexual orientation, the court asserted:

Defendant contends that Title VII is inapplicable here because the discrimination was on the basis of sexual orientation. I disagree. Nothing in Title VII suggests that

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190. *Id.* at 269.

191. 197 F. Supp. 3d 1334 (N.D. Fla. 2016).

192. *Id.* at 1335.

193. *Id.* at 1347. Quoting Justice Scalia’s language in *Oncale*, the court stated:

No one doubts that discrimination against people based on their sexual orientation was not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.

*Id.* (quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79–80 (1998)) (internal quotation marks omitted).

194. *Id.* (quoting *City of L.A., Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 707 (1978)).

195. 195 F. Supp. 2d 1212 (D. Or. 2002).

196. *Id.* at 1212.

Congress intended to confine the benefits of that statute to heterosexual employees alone. Rather, Congress intended that all Americans should have an opportunity to participate in the economic life of the nation.<sup>197</sup>

In *Christiansen v. Omnicom Group Inc.*,<sup>198</sup> the United States Court of Appeals for the Second Circuit reversed and remanded the lower court's dismissal of a Title VII discrimination claim where an employee was offered and rejected an employment package following harassment regarding beliefs about his HIV status and for allegedly failing to live up to gender stereotypes of how men should behave.<sup>199</sup> In reversing the lower court's dismissal of the employee's complaint, the appellate court articulated three ways in which a plaintiff could successfully allege Title VII discrimination against employers who engaged in sexual orientation discrimination:

First, plaintiffs could demonstrate that if they had engaged in identical conduct but been of the opposite sex, they would not have been discriminated against. Second, plaintiffs could demonstrate that they were discriminated against due to the sex of their associates. Finally, plaintiffs could demonstrate that they were discriminated against because they do not conform to some gender stereotype, including the stereotype that men should be exclusively attracted to women and women should be exclusively attracted to men.<sup>200</sup>

The court concluded by asserting that “in the context of an appropriate case our Court should consider reexamining the holding that sexual orientation discrimination claims are not cognizable under Title VII.”<sup>201</sup>

Thus, we have seen courts increasingly expanding the understanding of what constitutes prohibited discrimination because of sex under Title VII. What follows is an analysis of three critical cases addressing these issues over the last year.

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197. *Id.* at 1222.

198. 852 F.3d 195 (2d Cir. 2017).

199. *Id.* at 195.

200. *Id.* at 207.

201. *Id.*

A. *Evans v. Georgia Regional Hospital*<sup>202</sup>

In *Evans*, Jameka Evans filed a pro se complaint against Georgia Regional Hospital, Charles Moss, Lisa Clark, and Senior Human Resources Manager Jamekia Powers, alleging employment discrimination under Title VII.<sup>203</sup> Evans was employed “at the Hospital as a security officer from August 1, 2012, to October 11, 2013, when she left voluntarily.”<sup>204</sup>

Evans’s complaint alleged that “[d]uring her time at the Hospital, she was denied equal pay or work, harassed, and physically assaulted or battered.”<sup>205</sup> She alleged that she was subjected to this discriminatory treatment because of sex, in that she was “targeted” because she failed to carry herself in a “traditional woman[ly] manner.”<sup>206</sup> While Evans is lesbian, she stated that “she did not broadcast her sexuality” within the workplace.<sup>207</sup> Yet, she alleged that “it was ‘evident’ that she identified with the male gender,” because of the manner in which she chose to present herself—“male uniform, low male haircut, shoes, etc.”<sup>208</sup>

Evans attached a “Record of Incidents” to her complaint, in which she outlined some of the treatment to which she had been subjected.<sup>209</sup> Among these were allegations that Moss repeatedly shut the door on Evans “in a rude manner,” that Evans experienced scheduling issues and changes in her work shift that were designed to punish her, and that Corporal Shanika Johnson was promoted to be her supervisor, even though Johnson was less qualified than Evans.<sup>210</sup> Evans alleged “that someone had tampered with her equipment, including her radio, clip, and shoulder microphone.”<sup>211</sup> She also included several emails and letters from other employees that she asserted provided support for her claims of discrimination.<sup>212</sup>

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202. 850 F.3d 1248 (11th Cir. 2017), *cert. denied*, No. 17-370, 138 S. Ct. 557 (Dec. 11, 2017).

203. *Id.* at 1250–51.

204. *Id.* at 1251.

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.* The court of appeals described this additional evidence in the following manner:

Evans also included an e-mail from Harvey Sanchez Pegues, which stated that Moss had harassed Pegues on a daily basis, had a habit of favoritism, changed Pegues’s schedule frequently, had created a tense and unpleasant work environment, and had a habit of

Following review of her complaint, the federal magistrate judge assigned to the case issued a report and recommendation (“R&R”), in which the court rejected the claim of discrimination based on Evans’s sexual orientation.<sup>213</sup> In the R&R, the magistrate judge concluded that, based on decisions from all the courts of appeals that had addressed the issue, Title VII “was not intended to cover discrimination against homosexuals.”<sup>214</sup> Regarding Evans’s claim of discrimination based on gender non-conformity or sexual stereotyping, the magistrate judge incorrectly held that such a claim was “just another way to claim discrimination based on sexual orientation.”<sup>215</sup> Additionally, the magistrate judge recommended dismissal of the retaliation claim, concluding that no allegation was included in the complaint that Evans had opposed a recognized unlawful employment action.<sup>216</sup> The magistrate judge recommended that all the claims be dismissed, with prejudice, without leave to amend the complaint; concluding that Evans had pled no actionable claim, nor was likely to be able to do so in the future.<sup>217</sup>

Evans objected to the R&R, arguing “that her gender non-conformity and sexual orientation discrimination claims were actionable under Title VII as sex-based discrimination.”<sup>218</sup> Additionally, she asserted that the magistrate judge had erred in not giving her the opportunity to amend her complaint, arguing that “new supplemental evidence ha[d] arisen that affirm[ed] the consistency of the claims alleged in [her] complaint with the claims investigated in

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targeting people for termination. Evans also attached a letter from Jalisia Bedgard, which stated that Johnson and Moss had expected Evans to quit because of Johnson’s promotion and, if not, because of a bad shift change that would cause Evans scheduling conflicts. Another attached letter from Cheryl Sanders, Employee Relations Coordinator in the human resources department at the Hospital, indicated that the Hospital had investigated Evans’s complaints of favoritism, inconsistent and unfair practices, and inappropriate conduct, and had found no evidence that she had been singled out and targeted for termination. Finally, Evans attached e-mail correspondence between Pegues and Evans, which indicated that: (1) Pegues believed that Moss was trying to target Evans for termination because she had substantial evidence of wrongdoing against him, and (2) Moss had changed the qualifications of a job to prevent other candidates from qualifying.

*Id.* at 1251–52.

213. *Id.* at 1252.

214. *Id.*

215. *Id.* at 1252, 1254–55.

216. *Id.* at 1252.

217. *Id.*

218. *Id.*

the EEOC charge, satisfying the administrative consistency doctrine.”<sup>219</sup>

Lambda Legal Defense and Education Fund, Inc. (“Lambda Legal”) sought permission to file an amicus curiae brief in support of the objections to the R&R.<sup>220</sup> The district court granted this request.<sup>221</sup> In its filing, “Lambda Legal argued that an employee’s status as lesbian, gay, bisexual or transgender (“LGBT”), does not defeat a claim based on gender non-conformity” under *Price Waterhouse* and its progeny.<sup>222</sup> Lambda Legal also asserted that the magistrate judge was incorrect in concluding “that sexual orientation is not an actionable basis under Title VII.”<sup>223</sup>

In response to Evans’s objections and the filing by Lambda Legal, the district court conducted a de novo review of the entire record.<sup>224</sup> Following this review, the district court “adopted—without further comment—the R&R, dismissed the case with prejudice, and appointed counsel from Lambda Legal to represent Evans on appeal.”<sup>225</sup>

On appeal to the U.S. Court of Appeals for the Eleventh Circuit, Evans, supported by the EEOC as amicus curiae, argued “that the [lower] court erred in dismissing her claim that she was discriminated against for failing to conform to gender stereotypes,” asserting that the Eleventh Circuit had allowed “a separate discrimination claim for gender non-conformity.”<sup>226</sup> Additionally, Evans argued that “sexual orientation discrimination is, in fact, sex discrimination under Title VII.”<sup>227</sup>

Oral argument was held in the case on December 15, 2016.<sup>228</sup> Judge Pryor<sup>229</sup> quickly articulated the issues on appeal, stating “I read the complaint as, as potentially raising two different kinds of claims, right? One would be a claim of discrimination based on gender

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219. *Id.* (alteration in original).

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.* at 1253.

225. *Id.*

226. *Id.* at 1253–54.

227. *Id.* at 1253.

228. *11th Cir. 15-15234 Case History*, EQUAL. CASE FILES, <http://files.eqcf.org/cases/11th-cir-15-15234-case-history> (last updated July 14, 2017).

229. *15-15234 Oral Argument*, Evans v. Georgia Regional Hospital, No. 15-15234 (11th Circuit), *Notes from Oral Argument, December 15, 2016*, EQUAL. CASE FILES, <http://files.eqcf.org/cases/15-15234-oral-argument> (last visited Sept. 9, 2018).

nonconformity in conduct or behavior, right, which this court has recognized as actionable under Title VII,” and a claim of discrimination based on sexual orientation.<sup>230</sup> As to the former, Judge Pryor noted that while the original complaint might be deficient in stating sufficient facts to state a claim for discrimination based on gender nonconformity, one remedy might be to remand the case to the district court, ordering that an amended complaint be allowed.<sup>231</sup> As to the latter claim of discrimination based on sexual orientation, Judge Pryor noted that, prior to the division of the Fifth Circuit resulting in the creation of the Eleventh Circuit, the Fifth Circuit had rejected such claims. Accordingly, based on that precedent, the court of appeals was bound to conclude that Title VII does not protect against sexual orientation discrimination.<sup>232</sup> In responding to Judge Pryor’s questions, Greg Nevins of Lambda Legal,<sup>233</sup> arguing in support of Evans, asserted that the line of cases being raised by Judge Pryor are no longer good law.<sup>234</sup> In light of that, Nevins urged the court to revisit these prior decisions.<sup>235</sup> Judge Pryor noted that the en banc court of appeals might consider that option, should it be necessary.<sup>236</sup>

During the oral argument, Judge Rosenbaum<sup>237</sup> implied that great difficulty lay in attempting to separate sexual orientation from gender nonconformity in the context of sex discrimination, asking “where can [the court] draw an intellectually honest line between gender stereotyping based on gender norms” and discrimination based on sexual orientation.<sup>238</sup> Accordingly, Judge Rosenbaum appeared to be skeptical of the idea that Title VII did not directly prohibit

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230. Oral Argument at 01:11, 02:11, *Evans v. Ga. Reg’l Hosp.*, 850 F.3d 1248 (11th Cir. 2016) (No. 15-15234), <http://files.eqcf.org/cases/15-15234-oral-argument-audio>.

231. *15-15234 Oral Argument*, *Evans v. Georgia Regional Hospital*, No. 15-15234 (11th Circuit), *Notes from Oral Argument, December 15, 2016*, EQUAL CASE FILES, <http://files.eqcf.org/cases/15-15234-oral-argument> (last visited Sept. 9, 2018).

232. Oral Argument at 02:20, 03:32, *Evans v. Ga. Reg’l Hosp.*, 850 F.3d 1248 (11th Cir. 2016) (No. 15-15234), <http://files.eqcf.org/cases/15-15234-oral-argument-audio>.

233. *15-15234 Oral Argument*, *Evans v. Georgia Regional Hospital*, No. 15-15234 (11th Circuit), *Notes from Oral Argument, December 15, 2016*, EQUAL CASE FILES, <http://files.eqcf.org/cases/15-15234-oral-argument> (last visited Sept. 9, 2018).

234. *Id.* at 05:11.

235. *Id.* at 07:26, 10:05, 12:58.

236. *Id.* at 14:13.

237. *15-15234 Oral Argument*, *Evans v. Georgia Regional Hospital*, No. 15-15234 (11th Circuit), *Notes from Oral Argument, December 15, 2016*, EQUAL CASE FILES, <http://files.eqcf.org/cases/15-15234-oral-argument> (last visited Sept. 9, 2018).

238. *Id.* at 16:26.

discrimination based on sexual orientation.<sup>239</sup> She was sympathetic to the argument that claims for discrimination based on sexual orientation might, at times, go forward as claims based on gender nonconformity.<sup>240</sup>

On March 10, 2017, the court of appeals issued its decision, affirming the decision of the lower court in dismissing the claim for discrimination based on sexual orientation and reversing the decision of the lower court dismissing the claim for discrimination based on gender nonconformity, ordering that Evans be allowed to amend her complaint on remand.<sup>241</sup> Judge Martinez authored the decision of the court, with Judge Pryor writing a separate concurrence.<sup>242</sup> Judge Rosenbaum also authored a separate opinion, concurring in part and dissenting in part,<sup>243</sup> in which she agreed with the majority that Evans should be permitted to amend her complaint to allege a gender nonconformity claim, but disagreed with the majority on the Title VII question.<sup>244</sup>

In writing for the majority, Judge Martinez concluded that the district court had erred in dismissing Evans's gender non-conformity discrimination claim.<sup>245</sup> As he noted, the law of the Eleventh Circuit permits Evans to bring a separate discrimination claim based on gender stereotyping or gender non-conformity.<sup>246</sup> Based on this, the

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239. *Id.* at 07:29.

240. *Id.* at 16:26.

241. *Evans v. Ga. Reg'l Hosp.*, 850 F.3d 1248, 1248, 1255 (11th Cir. 2017), *cert. denied*, No. 17-370, 138 S. Ct. 557 (2017) (mem.).

242. *Id.* at 1248.

243. *Id.* at 1261.

244. *Id.* (Rosenbaum, J., concurring in part and dissenting in part).

245. *Id.* at 1254–55 (majority opinion).

246. *Id.* In so holding, Judge Martinez wrote:

Even though we hold . . . that discrimination based on gender non-conformity is actionable, Evans's *pro se* complaint nevertheless failed to plead facts sufficient to create a plausible inference that she suffered discrimination. In other words, Evans did not provide enough factual matter to plausibly suggest that her decision to present herself in a masculine manner led to the alleged adverse employment actions. Therefore, while a dismissal of Evan's gender non-conformity claim would have been appropriate on this basis, these circumstances entitle Evans an opportunity to amend her complaint one time unless doing so would be futile.

. . . .

. . . [A]nd it cannot be said that any attempt to amend would be futile with respect to her gender non-conformity claim and possibly others. Discrimination based on failure to conform to a gender stereotype is sex-based discrimination . . . . We hold that the lower court erred because a gender non-conformity claim is not "just another way to claim discrimination based on sexual orientation," but instead, constitutes a separate, distinct avenue for relief under Title VII.

court of appeals vacated the order of the district court dismissing the part of Evans’s claim based on gender non-conformity.<sup>247</sup> The court remanded the case to the district court to allow Evans to amend her claim to more specifically allege discrimination based on gender non-conformity.<sup>248</sup>

Regarding Evans’s claim that Title VII prohibited discrimination on the basis of sexual orientation, Judge Martinez noted that the precedent of the Eleventh Circuit in *Blum v. Gulf Oil Corporation*, which held that Title VII did not prevent discharge from a job on the basis of an employee’s sexual orientation, prohibited the court from ruling in Evans’s favor in this case.<sup>249</sup> Judge Martinez explained, “[u]nder our prior precedent rule, we are bound to follow a binding precedent in this Circuit unless and until it is overruled by this court en banc or by the Supreme Court.”<sup>250</sup>

Writing separately in concurrence, Judge Pryor sought to challenge and “to explain the error of the argument of the Equal Employment Opportunity Commission and the dissent that a person who experiences discrimination because of sexual orientation necessarily experiences discrimination for deviating from gender stereotypes.”<sup>251</sup> Judge Pryor asserted that the EEOC and the dissent (as well as the majority in *Hively*) were in error in treating discrimination based on sexual orientation as if it were simply another manifestation of sex discrimination rooted in gender non-conformity or stereotyping.<sup>252</sup> Judge Pryor articulated this very narrow

*Id.* (citations omitted).

247. *Id.* at 1255.

248. *Id.*

249. *Id.*

250. *Id.* (quoting *Offshore of the Palm Beaches, Inc. v. Lynch*, 741 F.3d 1251, 1256 (11th Cir. 2014)).

251. *Id.* at 1258 (Pryor, J., concurring).

252. *See id.* at 1258–59. In describing his analysis of this point, Judge Pryor wrote:

Although a person who experiences the former [discrimination based on sexual orientation] will sometimes also experience the latter [discrimination based on gender non-conformity], the two concepts are legally distinct. And the insistence otherwise by the Commission and the dissent relies on false stereotypes of gay individuals . . . .

The majority opinion correctly holds that a claim of discrimination for failure to conform to a gender stereotype is not “just another way to claim discrimination based on sexual orientation.” Like any other woman, Evans can state a claim that she experienced, for example, discrimination for wearing a “male haircut” if she includes enough factual allegations. But just as a woman cannot recover under Title VII when she is fired because of her heterosexuality, neither can a gay woman sue for discrimination based on her sexual orientation. Deviation from a particular gender stereotype may correlate disproportionately with a particular sexual orientation, and plaintiffs who allege



understanding of Title VII claims arising from discrimination based on gender non-conformity in the following manner:

The doctrine of gender nonconformity is not an independent vehicle for relief; it is instead a proxy a plaintiff uses to help support her argument that an employer discriminated on the basis of the enumerated sex category by holding males and females to different standards of behavior.

Because a claim of gender nonconformity is a behavior-based claim, not a status-based claim, a plaintiff still “must show that the employer actually relied on her gender in making its decision.”

. . . . [T]he doctrine of gender nonconformity is not and cannot be an independent vehicle for relief because the only status-based classes that provide relief are those enumerated within Title VII.<sup>253</sup>

Thus, according to Judge Pryor, only those specific “status-based classes” identified within the statutory language of Title VII itself could legitimately seek protection from discrimination under Title VII.<sup>254</sup>

In concurring in part and dissenting in part, Judge Rosenbaum first agreed with the panel that the district court erred in dismissing Evans’s claim based on gender non-conformity.<sup>255</sup> However, she strongly disagreed with the majority’s decision regarding the question of whether Title VII prohibited discrimination based on sexual orientation.<sup>256</sup> Judge Rosenbaum argued that the decision in *Price Waterhouse* superseded the court of appeals prior decision in *Blum*, such that the court was no longer bound by that precedent.<sup>257</sup>

Directly responding to the concurrence of Judge Pryor, Judge Rosenbaum wrote:

Plain and simple, when a woman alleges, as Evans has, that she has been discriminated against because she is a lesbian,

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discrimination on the basis of gender nonconformity will often also have experienced discrimination because of sexual orientation. But under Title VII, we ask only whether the individual experienced discrimination for deviating from a gender stereotype.

*Id.* (citations omitted).

253. *Id.* at 1260.

254. *Id.*

255. *See id.* at 1261 (Rosenbaum, J., concurring in part and dissenting in part).

256. *See id.* at 1262–65.

257. *See id.* at 1270.

she necessarily alleges that she has been discriminated against because she failed to conform to the employer's image of what women should be—specifically, that women should be sexually attracted to men only. And it is utter fiction to suggest that she was not discriminated against for failing to comport with her employer's stereotyped view of women. That is discrimination “because of . . . sex,” and it clearly violates Title VII under *Price Waterhouse*.<sup>258</sup>

Following the appellate court's decision, Evans sought to have the panel's decision reviewed en banc by the court of appeals.<sup>259</sup> On July 6, 2017, the court issued a per curiam opinion declining to review the decision en banc.<sup>260</sup>

On September 7, 2017, following the en banc decision by the United States court of appeals for the Seventh Circuit in *Hively v. Ivy Tech*, Lambda Legal, on behalf of Evans, filed a Petition for a Writ of Certiorari, asking the Supreme Court to review the decision of the court of appeals in this case.<sup>261</sup> In the petition, the Supreme Court was asked to answer the following question: Whether the prohibition in Title VII of the Civil Rights Act of 1964 against employment

258. *Id.* at 1261 (citation omitted). Judge Rosenbaum further wrote in response to the concurrence of Judge Pryor:

But in the concurrence's world, only the person who acts on her feelings enjoys the protection of Title VII. This makes no sense from a practical, textual, or doctrinal point of view.

As a practical matter, this construction protects women who act or dress in ways that the employer perceives as gay, because that behavior fails to conform to the employer's view of how a woman should act. But it allows employers to freely fire women that the employer perceives to be lesbians—as long as the employer is smart enough to say only that it fired the employee because it thought that the employee was a lesbian, without identifying the basis for the employer's conclusion that she was a lesbian. It cannot possibly be the case that a lesbian who is private about her sexuality—or even a heterosexual woman who is mistakenly perceived by her employer to be a lesbian—can be discriminated against by the employer because she does not comport with the employer's view of what a woman should be, while the outwardly lesbian plaintiff enjoys Title VII protection.

. . . Nothing in *Price Waterhouse's* reasoning or construction of Title VII justifies limiting *Price Waterhouse's* holding to cases involving discrimination against women for their behavior, as opposed to discrimination against women for being women or for their interests and attractions. Nor, for the reasons I have discussed, does it make sense to do so.

*Id.* at 1267–68.

259. See *Evans v. Ga. Reg'l Hosp.*, 850 F.3d 1248 (11th Cir. July 6, 2017) (No. 15-15234) (per curiam).

260. *Id.* (declining to review the panel decision en banc).

261. *Evans v. Georgia Regional Hospital*, LAMBDA LEGAL, [https://www.lambdalegal.org/in-court/cases/ga\\_evans-v-ga-regional-hospital](https://www.lambdalegal.org/in-court/cases/ga_evans-v-ga-regional-hospital) (last visited Aug. 25, 2018).

discrimination “because of . . . sex” encompasses discrimination based on an individual’s sexual orientation.<sup>262</sup>

On October 10, 2017, seventy-six businesses and organizations, seventeen anti-discrimination legal scholars and eleven LGBT organizations filed briefs on behalf of Evans asking the Supreme Court to review the case.<sup>263</sup> On the following day, October 11, 2017, eighteen state attorneys general filed brief in support of Evans’s petition.<sup>264</sup>

On December 11, 2017, the Supreme Court denied the Petition for a Writ of Certiorari filed by Lambda Legal, on behalf of Evans, asking the Court to review the decision of the court of appeals in this case.<sup>265</sup>

### B. Hively v. Ivy Tech Community College<sup>266</sup>

On August 15, 2014, after five years of applying for a full-time position with Ivy Tech, a community college in Indiana, Kimberly Hively filed a pro se complaint in the United States District Court for the Northern District of Indiana.<sup>267</sup> Ms. Hively’s allegations against the school were simple:

I have applied for several positions at IVY TECH, fulltime, in the last 5 years. I believe I am being blocked from fulltime employment without just cause. I believe I am being discriminated against based on my sexual orientation. I believe I have been discriminated against and that my rights under the Title VII of the Civil Rights Act of 1964 were violated.<sup>268</sup>

In dismissing Ms. Hively’s complaint on the merits, the district court expressed sympathy for her position, but concluded that it was bound by the precedent established in *Hamner v. St. Vincent Hospital and Health Care Center, Inc.*<sup>269</sup> In *Hamner*, the United States Court of Appeals for the Seventh Circuit ruled against a plaintiff who had

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262. *See id.*

263. *Id.*

264. *Id.*

265. *Evans v. Ga. Reg’l Hosp.*, 138 S. Ct. 557 (2017) (No. 17-370) (mem.).

266. *Hively v. Ivy Tech Cmty. Coll. of Indiana*, 853 F.3d 339 (7th Cir. 2017).

267. *Hively v. Ivy Tech Cmty. Coll. (Hively I)*, 2015 WL 926015, at \*1 (S.D. Ind., 2015), *aff’d*, 830 F.3d 698 (7th Cir. 2016), *rev’d en banc*, 853 F.3d 339 (7th Cir. 2017).

268. *Id.* at \*1–2.

269. *Id.* at \*5–6; 224 F.3d 701 (7th Cir. 2000).

alleged discrimination in violation of Title VII, when a co-worker repeatedly harassed him based on his sexual orientation, eventually leading to his termination.<sup>270</sup> In its decision, the court of appeals squarely addressed the applicability of Title VII to claims of discrimination based on sexual orientation, ruling that “harassment based solely upon a person’s sexual preference or orientation (and not on one’s sex) [was] not an unlawful employment practice under Title VII.”<sup>271</sup>

Nearly two years after Ms. Hively filed her pro se complaint, while she subsequently had assistance from Lambda Legal, the court of appeals delivered a similarly sympathetic, yet lamenting, decision affirming the lower court’s ruling.<sup>272</sup> After a comprehensive review of claims of sexual orientation discrimination as a form of actionable discrimination “because of . . . sex” under Title VII, a three-judge panel of the court of appeals ultimately ruled that such discrimination was not actionable, unless and until, “either the legislature or the Supreme Court says it is so.”<sup>273</sup> However, Hively filed a petition for an en banc rehearing, which was granted by the court of appeals in October of 2016,<sup>274</sup> with oral arguments being heard in November of that same year.<sup>275</sup>

On April 4, 2017, the en banc panel of the court of appeals reversed the decision that had been reached by the three-judge panel.<sup>276</sup>

Writing for a five-judge plurality of the court, Chief Judge Wood acknowledged that it was beyond the power of the court to amend the language of Title VII to include gay employees as a protected class.<sup>277</sup> However, this was not the task with which the court was charged. Rather, the court had been asked to determine what it means to discriminate because of sex in violation of Title VII, and, whether actions taken because of sexual orientation are within the scope of

270. *Hammer v. St. Vincent Hosp. & Health Care Ctr.*, 224 F.3d 701, 701 (7th Cir. 2000).

271. *Id.* at 704.

272. *Hively v. Ivy Tech Cmty. Coll. (Hively II)*, 830 F.3d 698, 718 (7th Cir. 2016), *rev’d en banc*, 853 F.3d 339 (7th Cir. 2017).

273. *Id.* at 709.

274. *Hively v. Ivy Tech Cmty. Coll. (Hively III)*, No. 15-1720, 2016 U.S. App. LEXIS 20302, at \*1.

275. *Hively v. Ivy Tech Cmty. Coll. of Indiana*, 853 F.3d 339, 339 (7th Cir. 2017).

276. *Id.*

277. *Id.* at 343.

Title VII's prohibition against discrimination "on the basis of sex."<sup>278</sup>

In reversing the original three-judge panel, the en banc court first found that the absence of the words "sexual orientation" from Title VII's language was "of no moment" to the analysis of whether discrimination on such basis was in fact "because of . . . sex" discrimination.<sup>279</sup> Relying upon the decision in *Oncale*, Judge Wood reiterated the late Justice Scalia's conclusions that "it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."<sup>280</sup>

The court's holding in *Hively* ultimately rested on two distinct, yet interrelated, arguments. First, Judge Wood noted that in *Price Waterhouse*, the Supreme Court held that sex discrimination encompasses sexual stereotyping, in that treating an employee in a discriminatory manner because she fails to conform to gender stereotypes constitutes unlawful sex discrimination.<sup>281</sup> In analyzing this first argument, the court applied a comparative method, "to be sure that only the variable of the plaintiff's sex is allowed to change."<sup>282</sup> Under this methodology, the court is to ask whether substituting a different gendered employee for the employee in question would produce a different result in the factual scenario at hand.<sup>283</sup> In describing the application of this method to the context of this case, Judge Wood stated:

The fundamental question is not whether a lesbian is being treated better or worse than gay men, bisexuals, or transsexuals, because such a comparison shifts too many pieces at once. Framing the question that way swaps the critical characteristic (here, sex) for both the complainant and the comparator and thus obscures the key point—whether the complainant's protected characteristic played a role in the adverse employment decision. The counterfactual we must use is a situation in which *Hively* is a man, but everything else stays the same: in particular, the sex or gender of the

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278. *Id.* (footnote omitted).

279. *See id.* at 349.

280. *Id.* at 344 (quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79–80 (1998)).

281. *Id.* at 345–46.

282. *Id.* at 345.

283. *Id.*

partner.<sup>284</sup>

In other words, for the court in *Hively*, the central question under the comparative analysis approach was: if Hively had been a man with a female partner at home, or a woman with a male partner at home, would any adverse employment action have occurred?<sup>285</sup>

As the court acknowledged, such clear differential treatment is paradigmatic discrimination based on the sex of the employee in question.<sup>286</sup> On this first argument, the court rejected the idea that a “gossamer-thin” line exists between a gender non-conformity claim under *Price Waterhouse* and a sexual orientation claim.<sup>287</sup> Considering Hively’s same-sex relationship as gender non-conforming activity was, in the court’s opinion, no different from considering a woman seeking employment in traditionally male-dominated workplaces to be gender nonconforming activity.<sup>288</sup> In

284. *Id.*

285. *Id.*

286. *Id.* As Judge Wood wrote:

Hively alleges that if she had been a man married to a woman (or living with a woman, or dating a woman) and everything else had stayed the same, Ivy Tech would not have refused to promote her and would not have fired her. (We take the facts in the light most favorable to her, because we are here on a Rule 12(b)(6) dismissal; naturally nothing we say will prevent Ivy Tech from contesting these points in later proceedings.) This describes paradigmatic sex discrimination. To use the phrase from *Ulane*, Ivy Tech is disadvantaging her *because she is a woman*. Nothing in the complaint hints that Ivy Tech has an anti-marriage policy that extends to heterosexual relationships, or for that matter even an anti-partnership policy that is gender-neutral.

Viewed through the lens of the gender non-conformity line of cases, Hively represents the ultimate case of failure to conform to the female stereotype (at least as understood in a place such as modern America, which views heterosexuality as the norm and other forms of sexuality as exceptional): she is not heterosexual. Our panel described the line between a gender nonconformity claim and one based on sexual orientation as gossamer-thin; we conclude that it does not exist at all. Hively’s claim is no different from the claims brought by women who were rejected for jobs in traditionally male workplaces, such as fire departments, construction, and policing. The employers in those cases were policing the boundaries of what jobs or behaviors they found acceptable for a woman (or in some cases, for a man).

... Just so here: a policy that discriminates on the basis of sexual orientation does not affect every woman, or every man, but it is based on assumptions about the proper behavior for someone of a given sex. The discriminatory behavior does not exist without taking the victim’s biological sex (either as observed at birth or as modified, in the case of transsexuals) into account. Any discomfort, disapproval, or job decision based on the fact that the complainant—woman or man—dresses differently, speaks differently, or dates or marries a same-sex partner, is a reaction purely and simply based on sex. That means that it falls within Title VII’s prohibition against sex discrimination, if it affects employment in one of the specified ways.

*Id.* at 346–47 (emphasis in original).

287. *Id.* at 346.

288. *Id.*

discriminating based on Hively's failure to meet the expected gender stereotype, namely, sexual attraction to a man, Ivy Tech engaged in actionable discrimination under Title VII's "because of . . . sex" language.<sup>289</sup>

Second, Judge Wood relied upon *Loving v. Virginia* in analyzing whether Hively was unlawfully discriminated against under an "associational theory" of sex discrimination.<sup>290</sup> According to the court, "[i]t is now accepted that a person who is discriminated against because of the protected characteristic of one with whom she associates is actually being disadvantaged because of her own traits."<sup>291</sup> Under this 'associational theory' of discrimination, developed in *Loving* with respect to racial discrimination, when an employer mistreats a worker for marrying or associating with a person of a different race, the employer has violated Title VII's ban on race discrimination.<sup>292</sup>

Wood easily transferred this logic over to the sex discrimination context, by asserting that when Ivy Tech refused to promote Hively because of her orientation, it discriminated against her for intimately associating with people of the same sex.<sup>293</sup> This point had been made with some force by Judge Easterbrook during the oral arguments in *Hively*.<sup>294</sup> In underscoring this conclusion, the court stated:

The Court in *Loving* recognized that equal application of a law that prohibited conduct only between members of different races did not save it. Changing the race of one partner made a difference in determining the legality of the conduct, and so the law rested on "distinctions drawn according to race," which were unjustifiable and racially discriminatory. *Loving*, 388 U.S. at 11, 87 S.Ct. 1817. So too, here. If we were to change the sex of one partner in a lesbian relationship, the outcome would be different. This reveals that the discrimination rests on distinctions drawn according

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289. *Id.* at 347.

290. *Id.*

291. *Id.*

292. *Id.* at 347–49.

293. *Id.* at 349.

294. Oral Argument at 31:46–33:30, *Hively v. Ivy Tech Cmty. Coll.*, 2016 U.S. App. LEXIS 20302 (2016) (No. 15-1720), [http://media.ca7.uscourts.gov/sound/2016/nr.15-1720.15-1720\\_11\\_30\\_2016.mp3](http://media.ca7.uscourts.gov/sound/2016/nr.15-1720.15-1720_11_30_2016.mp3).

to sex.<sup>295</sup>

By anchoring its decision in the associational jurisprudence of *Loving* and tying it to the gender stereotyping line of cases beginning with *Price Waterhouse*, the court articulated a clear framework for finding that the prohibitions against sex discrimination found in Title VII and Title IX include prohibitions against discrimination based on sexual orientation and gender identity.<sup>296</sup>

In concurring with the judgment of the court, Judge Posner argued that while Title VII's drafters did not mean to protect gay employees, their intent is of no matter.<sup>297</sup> He first identified three separate methods of statutory interpretation: (1) an originalist approach; (2) "interpretation by unexpressed intent"; and (3) "judicial interpretive updating."<sup>298</sup> In his concurrence, Judge Posner put himself squarely in support of this third method, writing:

[I]nterpretation can mean giving a fresh meaning to a statement (which can be a statement found in a constitutional or statutory text)—a meaning that infuses the statement with vitality and significance today. An example of this last form of interpretation—the form that in my mind is most clearly applicable to the present case—is the Sherman Antitrust Act, enacted in 1890, long before there was a sophisticated understanding of the economics of monopoly and competition. Times have changed; and for more than thirty years the Act has been interpreted in conformity to the modern, not the nineteenth-century, understanding of the relevant economics. The Act has thus been updated by, or in the name of, judicial interpretation—the form of interpretation that consists of making old law satisfy modern

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295. *Hively*, 853 F.3d at 348–49. Expanding on this idea, Judge Wood wrote:

The dissent would instead have us compare the treatment of men who are attracted to members of the male sex with the treatment of women who are attracted to members of the female sex, and ask whether an employer treats the men differently from the women. But even setting to one side the logical fallacy involved, *Loving* shows why this fails. In the context of interracial relationships, we could just as easily hold constant a variable such as "sexual or romantic attraction to persons of a different race" and ask whether an employer treated persons of different races who shared that propensity the same. That is precisely the rule that *Loving* rejected, and so too must we, in the context of sexual associations.

*Id.* at 349.

296. *Id.* at 348–49.

297. *Id.* at 353 (Posner, J., concurring).

298. *Id.* at 352–53.



needs and understandings. And a common form of interpretation it is, despite its flouting “original meaning.” Statutes and constitutional provisions frequently are interpreted on the basis of present need and present understanding rather than original meaning—constitutional provisions even more frequently, because most of them are older than most statutes.<sup>299</sup>

The role of courts, Judge Posner asserted, should be to interpret statutes in a manner that “infuses” them “with vitality and significance today” rather than relying on their original meaning.<sup>300</sup> Judge Posner contrasted “judicial interpretive updating” with the conservative “originalism” approach to interpretation championed by Justice Antonin Scalia.<sup>301</sup>

Judge Posner concluded his concurrence by agreeing with the judgment of the court that Title VII’s prohibition against discrimination because of sex encompasses a prohibition against discrimination based on sexual orientation.<sup>302</sup> However, Judge Posner rejected the interpretive analysis of Judge Wood’s opinion for the

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299. *Id.*

300. *Id.* at 352.

301. *Id.* at 353–54. Judge Posner described this contrast in this manner:

It is well-nigh certain that homosexuality, male or female, did not figure in the minds of the legislators who enacted Title VII. I had graduated from law school two years before the law was enacted. Had I been asked then whether I had ever met a male homosexual, I would have answered: probably not; had I been asked whether I had ever met a lesbian I would have answered “only in the pages of *À la recherché du temps perdu*.” Homosexuality was almost invisible in the 1960s. It became visible in the 1980s as a consequence of the AIDS epidemic; today it is regarded by a large swath of the American population as normal. But what is certain is that the word “sex” in Title VII had no immediate reference to homosexuality; many years would elapse before it could be understood to include homosexuality.

A diehard “originalist” would argue that what was believed in 1964 defines the scope of the statute for as long as the statutory text remains unchanged, and therefore until changed by Congress’s amending or replacing the statute. But as I noted earlier, statutory and constitutional provisions frequently are interpreted on the basis of present need and understanding rather than original meaning. Think for example of Justice Scalia’s decisive fifth vote to hold that burning the American flag as a political protest is protected by the free-speech clause of the First Amendment, provided that it’s your flag and is not burned in circumstances in which the fire might spread. *Texas v. Johnson*, 491 U.S. 397, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989); *United States v. Eichman*, 496 U.S. 310, 110 S.Ct. 2404, 110 L.Ed.2d 287 (1990). Burning a flag is not speech in the usual sense and there is no indication that the framers or ratifiers of the First Amendment thought that the word “speech” in the amendment embraced flag burning or other nonverbal methods of communicating.

*Id.*

302. *Id.* at 356.

court, stating:

The majority opinion states that Congress in 1964 “may not have realized or understood the full scope of the words it chose.” This could be understood to imply that the statute forbade discrimination against homosexuals but the framers and ratifiers of the statute were not smart enough to realize that. I would prefer to say that theirs was the then-current understanding of the key word—sex. “Sex” in 1964 meant gender, not sexual orientation. What the framers and ratifiers understandably didn’t understand was how attitudes toward homosexuals would change in the following half century. They shouldn’t be blamed for that failure of foresight. We understand the words of Title VII differently not because we’re smarter than the statute’s framers and ratifiers but because we live in a different era, a different culture. Congress in the 1960s did not foresee the sexual revolution of the 2000s. What our court announced in *Doe v. City of Belleville*, 119 F.3d 563, 572 (7th Cir. 1997), is what Congress had declared in 1964: “the traditional notion of ‘sex.’”<sup>303</sup>

In a powerful and eloquent dissent, joined by two other members of the en banc court, Judge Sykes rejected the methodology employed by both the majority and by Judge Posner. Instead, she embraced the originalist methodology that was derided by Judge Posner and stated:

Respect for the constraints imposed on the judiciary by a system of written law must begin with fidelity to the traditional first principle of statutory interpretation: When a statute supplies the rule of decision, our role is to give effect to the enacted text, interpreting the statutory language as a reasonable person would have understood it at the time of enactment. We are not authorized to infuse the text with a

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303. *Id.* at 357. Judge Posner further explained his position as follows:

I would prefer to see us acknowledge openly that today we, who are judges rather than members of Congress, are imposing on a half-century-old statute a meaning of “sex discrimination” that the Congress that enacted it would not have accepted. This is something courts do fairly frequently to avoid statutory obsolescence and concomitantly to avoid placing the entire burden of updating old statutes on the legislative branch. We should not leave the impression that we are merely the obedient servants of the 88th Congress (1963–1965), carrying out their wishes. We are not. We are taking advantage of what the last half century has taught.

*Id.*

new or unconventional meaning or to update it to respond to changed social, economic, or political conditions.

\* \* \*

Judicial statutory updating, whether overt or covert, cannot be reconciled with the constitutional design. The Constitution establishes a procedure for enacting and amending statutes: bicameralism and presentment. *See* U.S. CONST. art. I, § 7. Needless to say, statutory amendments brought to you by the judiciary do not pass through this process. That is why a textualist decision method matters: When we assume the power to alter the original public meaning of a statute through the process of interpretation, we assume a power that is not ours. The Constitution assigns the power to make and amend statutory law to the elected representatives of the people. However welcome today's decision might be as a policy matter, it comes at a great cost to representative self-government.<sup>304</sup>

While Judge Sykes agrees with the majority that “the scope of Title VII is not limited by the subjective intentions of the enacting legislatures,” she rejects both theories employed by the majority, the comparative method of proof and the associational doctrine rooted in *Loving*.<sup>305</sup> The heart of Judge Sykes's dissent is that the common

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304. *Id.* at 360 (Sykes, J., dissenting).

305. *Id.* at 362–67. In responding to Judge Flaum's concurrence, Judge Sykes makes clear her objection to the comparator analysis used by the majority, writing:

Judge Flaum's concurrence offers a somewhat different way to think about sexual-orientation discrimination: “Fundamental to the definition of homosexuality is the sexual attraction to individuals of the ‘same sex.’ . . . One cannot consider a person's homosexuality without also accounting for their sex: doing so would render ‘same’ . . . meaningless.” Flaum, J., concurring, at p. 358. But an employer who categorically won't hire homosexuals is not “accounting for” a job applicant's sex in the sense meant by antidiscrimination law; a hiring policy of “no homosexuals need apply” is gender blind. The next sentence in the analysis likewise doesn't follow: “As such, discriminating against that employee because they are homosexual constitutes discriminating against an employee because of (A) the employee's sex, *and* (B) their sexual attraction to individuals of the *same sex*.” *Id.* Part (B) is true; part (A) is not. An employer who refuses to hire a lesbian applicant because she is a lesbian only “accounts for” her sex in the limited sense that he notices she is a woman. But that's not the object of the employer's discriminatory intent, not even in part. Her sex isn't a motivating factor for the employer's decision; the employer objects only to her sexual orientation. This attempt to conceptually split homosexuality into two parts—a person's sex and his or her sexual attraction to persons of the same sex—doesn't make sexual-orientation discrimination actionable as sex discrimination.

*Id.* at 367 n.5. *But see* Franchina v. City of Providence, 881 F.3d 52, 52–53 (1st Cir. 2018) (rejecting

understanding of the meaning of “because of sex” is to be used in interpreting Title VII.<sup>306</sup>

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the narrow comparator analysis championed by Judge Sykes in *Hively*). In upholding a jury verdict of more than \$700,000, plus \$184,000 in legal fees for a firefighter, Judge Ojetta Rogeriee Thompson in *Franchina* described the treatment experienced by the plaintiff in the following manner:

“Cunt,” “bitch,” “lesbo”: all are but a smattering of the vile verbal assaults the plaintiff in this gender discrimination case, Lori Franchina, a former lieutenant firefighter, was regularly subjected to by members of the Providence Fire Department (“the Department”). She was also spit on, shoved, and — in one particularly horrifying incident — had the blood and brain matter of a suicide-attempt victim flung at her by a member of her own team.

*Id.* at 37. In rejecting the type of rigid evidentiary comparator for which Judge Sykes in *Hively* and the DOJ in *Zarda* asserted was the proper analytical framework, Judge Thompson wrote:

The City, it seems, believes that under a sex-plus theory, plaintiffs are required to identify a corresponding sub-class of the opposite gender and show that the corresponding class was not subject to similar harassment or discrimination. Thus, for Franchina to succeed, the City tells us she is required to have presented evidence at trial of a comparative class of gay male firefighters who were not discriminated against. Without such a showing, the City contends, it would not be possible to prove that any sort of differential treatment a plaintiff experiences is necessarily predicated on his or her gender.

This approach—one that we have never endorsed—has some rather obvious flaws. Indeed, at oral argument, the City recognized one of them in its concession that such a standard would permit employers to discriminate free from Title VII recourse so long as they do not employ any subclass member of the opposite gender. But, of course, that cannot be. Under such an approach, for example, discrimination against women with children would be unactionable as long as the employer employed no fathers. *But see, Chadwick*, 561 F.3d at 41. The result that would follow from the City’s approach would, thus, be inapposite to Title VII’s mandate against sex-based discrimination.

Indeed, at the advent of sex-plus claims, courts recognized that “[t]he effect of [Title VII] is not to be diluted because discrimination adversely affects only a portion of the protected class.” *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971), *cert denied*, 404 U.S. 991, 92 S.Ct. 536, 30 L.Ed.2d 543 (1971); *see also Chadwick*, 561 F.3d at 42 n.4 (explaining that “discrimination against one employee cannot be remedied solely by nondiscrimination against another employee in that same group”). Similarly, the effect of Title VII is not to be diluted because discrimination adversely affects a plaintiff who is unlucky enough to lack a comparator in his or her workplace.

*Id.* at 52–53.

306. *Hively*, 853 F.3d at 362–67 (Sykes, J., dissenting). In making this argument, Judge Sykes wrote:

To a fluent speaker of the English language—then and now—the ordinary meaning of the word “sex” does not fairly include the concept of “sexual orientation.” The two terms are never used interchangeably, and the latter is not subsumed within the former; there is no overlap in meaning. Contrary to the majority’s vivid rhetorical claim, it does not take “considerable calisthenics” to separate the two. Majority Op. at p. 350. The words plainly describe different traits, and the separate and distinct meaning of each term is easily grasped. More specifically to the point here, discrimination “because of sex” is not reasonably understood to include discrimination based on sexual orientation, a different immutable characteristic. Classifying people by sexual orientation is different than classifying them by sex. The two traits are categorically distinct and widely

In rejecting the majority's associational theory of liability under Title VII, Judge Sykes argues that *Loving* and the cases that translated the *Loving* analysis to the Title VII context are fundamentally different from this case, in that all those cases ultimately turned on racial discrimination.<sup>307</sup> As she wrote:

As these passages from the Court's opinion make clear, *Loving* rests on the inescapable truth that miscegenation laws are inherently racist. They are premised on invidious ideas about white superiority and use racial classifications toward the end of racial purity and white supremacy. Sexual-orientation discrimination, on the other hand, is not inherently *sexist*. No one argues that sexual-orientation discrimination aims to promote or perpetuate the supremacy of one sex. In short, *Loving* neither compels nor supports the majority's decision to upend the long-settled understanding that sex discrimination and sexual-orientation discrimination are distinct.<sup>308</sup>

Judge Sykes agreed that if Hively "was denied a job because of her sexual orientation, she was treated unjustly."<sup>309</sup> However, she did not agree that such unjust treatment is unlawful under Title VII, in that a remedy for discrimination based on sexual orientation must come from Congress.<sup>310</sup> In conclusion, Judge Sykes wrote:

It's understandable that the court is impatient to protect lesbians and gay men from workplace discrimination without waiting for Congress to act. Legislative change is arduous and can be slow to come. But we're not authorized to amend Title VII by interpretation. The ordinary, reasonable, and fair meaning of sex discrimination as that term is used in Title VII does not include discrimination based on sexual orientation, a wholly different kind of discrimination.<sup>311</sup>

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recognized as such. There is no ambiguity or vagueness here.

*Id.* at 363.

307. *Id.* at 368.

308. *Id.*

309. *Id.* at 372.

310. *Id.*

311. *Id.* at 373.

C. Zarda v. Altitude Express, Inc.<sup>312</sup>

Donald Zarda was a skydiving instructor, working for Altitude Express.<sup>313</sup> As a skydiving instructor, Zarda often jumped in tandem with people so that he could pull the parachute and ensure the safety of clients while jumping.<sup>314</sup> When jumping in tandem with female clients, he would often notify them that he was homosexual, doing this primarily because he believed it helped “mitigate any awkwardness that might arise from the fact that he was strapped tightly to [a] woman.”<sup>315</sup>

In the workplace, Zarda was open about his sexuality with his fellow employees.<sup>316</sup> Zarda was never offended when his sexual orientation was discussed by his colleagues.<sup>317</sup> During his employment, Zarda concedes, “he was treated just like everyone else” at Altitude Express; neither treated differently nor picked on more than others because of his sexual orientation.<sup>318</sup>

In 2010, David Kengle and Rosanna Orellana came to Altitude Express with the intention of skydiving.<sup>319</sup> Both Kengle and Orellana requested a tandem dive for safety.<sup>320</sup> Zarda was designated to be Orellana’s partner for the dive.<sup>321</sup> At some point prior to the jump, Orellana apparently believed that “Zarda was touching her inappropriately.”<sup>322</sup> Zarda “had his hand on [her] hip” and was “resting his chin on [her] shoulder.”<sup>323</sup> Kengle noticed that no other diving instructor was touching the customer in the same way.<sup>324</sup> During the jump, “[Zarda] sensed that [Orellana] was uncomfortable.”<sup>325</sup> It was only then that he disclosed to her that he was homosexual.<sup>326</sup> Specifically, he told her that “I hope I didn’t make you

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312. 855 F.3d 76 (2d Cir. 2017), *aff’d in part, vacated in part en banc*, 883 F.3d 100 (2d Cir. 2018).

313. *Id.* at 79.

314. *Id.* at 80.

315. *Id.*

316. Defendants’ Rule 56.1 Statement of Material Facts at 7, *Zarda v. Altitude Express, Inc.*, No. 10-4334 (E.D.N.Y. Feb. 11, 2013).

317. *Id.*

318. *Id.*

319. *Zarda*, 855 F.3d at 80.

320. *Id.*

321. *Id.*

322. Defendants’ Rule 56.1 Statement of Material Facts, *supra* note 316, at 9.

323. *Id.*

324. *Id.*

325. *Id.*

326. *Id.*

feel uncomfortable on the plane, I'm gay."<sup>327</sup> He also told her that he had recently broken up with his boyfriend.<sup>328</sup>

After the jump was over, Orellana and Kengle discussed their experience of the jump.<sup>329</sup> During the conversation, Orellana told Kengle about Zarda's disclosure of his sexual orientation.<sup>330</sup> Following this conversation, Kengle called Altitude Express to complain about his girlfriend's experience and about Zarda's behavior.<sup>331</sup> He believed that the complaint was warranted because he felt that Zarda's actions were inappropriate.<sup>332</sup>

Shortly after this conversation, Zarda's manager, Ray Maynard, sat down to discuss the incident with Zarda.<sup>333</sup> Maynard reiterated the fact that Orellana was apparently uncomfortable during the entire jump with Zarda.<sup>334</sup> Subsequently, Maynard suspended and later fired Zarda.<sup>335</sup> When firing Zarda, Maynard explained to Zarda that "it wasn't a gay issue."<sup>336</sup> Maynard told Zarda that, in fact, if it had been any other employee in the same situation, Maynard would do the same thing.<sup>337</sup>

Thus, Altitude Express (and Maynard) contended at trial that Zarda was fired, not because of his sexual orientation, but because "he failed to provide an enjoyable experience for a customer."<sup>338</sup> On the other hand, Zarda asserted that he had never acted unreasonably with customers and that he was appropriate at all times.<sup>339</sup> Zarda claimed that Altitude Express fired him "either because of his supervisor's prejudice against homosexuals or because he informed a client about his sexuality."<sup>340</sup>

Following these events, Zarda filed an action in the Eastern

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327. *Id.*

328. *Id.* at 10.

329. Zarda v. Altitude Express, Inc., 855 F.3d 76, 80 (2d Cir. 2017), *aff'd in part, vacated in part en banc*, 883 F.3d 100 (2d Cir. 2018).

330. *Id.*

331. *Id.*

332. Defendants' Rule 56.1 Statement of Material Facts, *supra* note 316, at 12.

333. *Id.* at 13.

334. *Id.* at 14.

335. *Id.* at 15–16.

336. *Id.* at 16.

337. *Id.*

338. Zarda v. Altitude Express, Inc., 855 F.3d 76, 80 (2d Cir. 2017), *aff'd in part, vacated in part en banc*, 883 F.3d 100 (2d Cir. 2018).

339. *Id.*

340. *Id.*

District of New York against his former employer, Altitude Express, and its owner, Ray Maynard.<sup>341</sup> In his complaint, Zarda asserted that he was discriminatorily fired because of his sexual orientation “in violation of New York law.”<sup>342</sup> He also claimed that Altitude Express violated Title VII’s prohibition on sex discrimination because they “terminated [him] for failing to conform to sex stereotypes.”<sup>343</sup>

In the Eastern District of New York, the judge found “a triable issue of fact as to whether Zarda, as an employee, faced discrimination because of his sexual orientation in violation of New York state law.”<sup>344</sup> Nevertheless, the jury subsequently found for the employer on the state-law claim.<sup>345</sup> The Title VII claim did not even make it that far.<sup>346</sup> Before trial, Zarda produced several instances where he believed his employer discriminated against him for not conforming to gender stereotypes. Specifically, Zarda alleged that “his employer ‘criticized [Zarda’s] wearing of the color pink at work’ and his practice of painting his toenails pink, notwithstanding Zarda’s ‘typically masculine demeanor.’”<sup>347</sup> The district court granted summary judgment for Altitude Express on the Title VII claim.<sup>348</sup> The court’s conclusion was rooted in the fact that “Zarda failed to establish the requisite proximity between his termination and his proffered instances of gender non-conformity.”<sup>349</sup> Thus, he had no viable Title VII claim for discrimination based on a failure to adhere to gender stereotypes.<sup>350</sup>

Following the district court’s decision on summary judgment and a trial on the state law discrimination claim, Zarda appealed both the state law claim and the Title VII claim.<sup>351</sup> On appeal, Zarda requested that the United States Court of Appeals for the Second Circuit “reconsider [its] interpretation of Title VII in order to hold that Title VII’s prohibition on discrimination based on ‘sex’ encompasses

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341. *Id.* at 79.

342. *Id.* at 77.

343. *Id.* at 80–81.

344. *Id.* at 79.

345. *Id.* at 79–80.

346. *Id.* at 80.

347. *Id.* at 81.

348. *Id.* at 79.

349. *Id.* at 81.

350. *Id.* at 80.

351. *Id.* at 80.



discrimination based on ‘sexual orientation.’”<sup>352</sup> Zarda did not, however, appeal the district court’s ruling that he failed to establish an association between his employment and termination for failing to adhere to gender stereotypes.<sup>353</sup> The court of appeals was then faced with the question of whether to either reconsider its *Simonton v. Runyon*<sup>354</sup> precedent regarding treatment of sexual orientation claims under Title VII or to continue following *Simonton*.<sup>355</sup>

*Simonton* has been the precedent for the Second Circuit in Title VII disputes regarding sexual orientation discrimination since 2000. In *Simonton*, the plaintiff, Dwayne Simonton, was employed by the United States Postal Service in Farmingdale, New York.<sup>356</sup> Throughout his twelve-year career, he always received outstanding performance reviews.<sup>357</sup> Though his work was commendable, the work environment was not.<sup>358</sup> Simonton was homosexual, and all his co-workers were aware of it.<sup>359</sup> On a daily basis, Simonton was subjected to abuse, uncouth taunts, and severe verbal abuse by his co-workers.<sup>360</sup> The constant morally reprehensible conduct directed at Simonton ended in him having a heart attack.<sup>361</sup>

Following his heart attack, Simonton sued his employer; bringing a claim under Title VII “for abuse and harassment suffered by reason of his sexual orientation.”<sup>362</sup> After reviewing the case, the court in the Eastern District of New York dismissed Simonton’s Title VII action on the grounds that it failed to state a viable claim.<sup>363</sup> The court’s reasoning was that “Title VII does not prohibit discrimination based on sexual orientation.”<sup>364</sup> Simonton then appealed the decision to the United States Court of Appeals for the Second Circuit.<sup>365</sup>

On appeal, the Second Circuit agreed that Simonton’s situation

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352. *Id.*

353. *Id.* at 82.

354. 232 F.3d 33 (2d Cir. 2000).

355. *Zarda v. Altitude Express, Inc.*, 855 F.3d 76, 82 (2d Cir. 2017), *aff’d in part, vacated in part en banc*, 883 F.3d 100 (2d Cir. 2018).

356. *Simonton*, 232 F.3d at 34.

357. *Id.*

358. *Id.*

359. *Id.* at 35.

360. *Id.*

361. *Id.* at 34.

362. *Id.*

363. *Id.*

364. *Id.*

365. *Id.*

was entirely abhorrent.<sup>366</sup> However, the court ultimately agreed with the prior decision by the United States Court of Appeals for the First Circuit in *Higgins v. New Balance Athletic Shoe, Inc.*,<sup>367</sup> in which the court concluded that “we are called upon here to construe a statute as glossed by the Supreme Court, not to make a moral judgment.”<sup>368</sup> Further, the court of appeals in *Simonton* noted:

When interpreting a statute, the role of a court is limited to discerning and adhering to legislative meaning. The law is well-settled in this circuit and in all others to have reached the question that *Simonton* has no cause of action under Title VII because Title VII does not prohibit harassment or discrimination because of sexual orientation.<sup>369</sup>

In *Zarda*, the primary argument on behalf of Zarda was that *Simonton* was outdated.<sup>370</sup> Specifically, Zarda argued that “*Simonton*, realistically, has been abrogated already—this Court just needs to say so: the weak pillars on which it stands have crumbled, and the agency charged with interpreting Title VII agrees.”<sup>371</sup> However, the appeal was unsuccessful because a three judge panel of the court of appeals refused to reinterpret Title VII to include sexual orientation as grounds for a sex discrimination claim.<sup>372</sup>

The panel held that the precedent set forth in *Simonton* could “only be overturned by the entire court sitting in banc.”<sup>373</sup> Along with this, the panel noted that it would be possible for Zarda to make a plausible argument for an actionable claim under Title VII if he could show that his termination was based on gender stereotyping rather than sexual orientation, noting that in *Christiansen v. Omnicom Group*, the court of appeals had remanded the case back to the district court after finding that the claim at bar was for gender stereotyping and, therefore, could be brought under Title VII.<sup>374</sup>

366. *Id.* at 35.

367. 194 F.3d 252, 259 (1st Cir. 1999).

368. *Zarda v. Altitude Express, Inc.*, 855 F.3d 76, 80 (2d Cir. 2017) (quoting *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999)), *aff’d in part, vacated in part en banc*, 883 F.3d 100 (2d Cir. 2018).

369. *Id.*

370. See Appellant’s Reply Brief at 6, *Zarda*, 855 F.3d 76 (No. 15-3775).

371. *Id.* at 4.

372. *Zarda*, 855 F.3d at 80.

373. *Zarda*, 883 F.3d at 82 (citing *Christiansen v. Omnicom Grp., Inc.*, 852 F.3d 195, 199 (2d Cir. 2017)).

374. *Id.*

While *Christiansen* might have provided fertile ground for Zarda, “that route is unavailable,” because the district court had concluded that Zarda could not establish the link between his failure to conform to gender stereotypes and his termination.<sup>375</sup> Zarda did not challenge this conclusion on appeal.<sup>376</sup> Thus, the only issue on appeal was whether Zarda could assert a discrimination claim asserting that his termination violated Title VII based on sexual orientation alone.<sup>377</sup> However, after reviewing all the issues, the panel embraced *Simonton* and affirmed the judgment of the district court.<sup>378</sup>

Following the appeal, one of the judges on the panel that had heard the case called for a poll of all the judges on the court of appeals.<sup>379</sup> The purpose of the poll of judges was to decide whether the court would sit en banc to rehear the case.<sup>380</sup> A majority of the active judges voted in favor of rehearing the case.<sup>381</sup>

The only question to be decided on rehearing is: “Does Title VII of the Civil Rights Act of 1964 prohibit discrimination on the basis of sexual orientation through its prohibition of discrimination ‘because of . . . sex’?”<sup>382</sup> On May 25, 2017, the court ordered that all entities and persons interested in the court’s decision on this issue produce amicus curiae briefs to support whatever position they held.<sup>383</sup>

Because of the intense interest in this case, particularly following the decisions in *Evans* and *Hively*, many interested persons and entities filed briefs on both sides of the case. As the briefs were submitted from various interested persons and entities, an interesting dispute arose. The Department of Justice (“DOJ”) took the unusual step of filing a brief that supported a finding that *Simonton* was correct, in that the language of Title VII does not encompass protections from discrimination based on sexual orientation.<sup>384</sup> The position taken by

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375. *Id.*

376. *Id.*

377. *Id.*

378. *Id.* at 82, 84.

379. *Zarda v. Altitude Express, Inc.*, No. 15-3775, 2017 U.S. App. LEXIS 13127, at \*6 (2nd Cir. May 25, 2017).

380. *Id.*

381. *Id.*

382. *Id.*

383. *Id.*

384. Diane Ruggiero & Madison Park, *DOJ Files Amicus Brief That Says Title VII Does Not Protect Sexual Orientation*, CNN (July 27, 2017, 12:47 PM), <https://www.cnn.com/2017/07/26/politics/doj-amicus-brief-title-vii-sexual-orientation/index.html>; see also Autumn Callan, *DOJ: Title VII Does Not Protect Against Discrimination Based On Sexual Orientation*, JURIST, (July 27,

the DOJ was in direct opposition to the position taken by the EEOC in the case.<sup>385</sup> The EEOC brief argued that the language of Title VII does indeed encompass protections from discrimination based on sexual orientation, calling upon the court of appeals to overrule *Simonton* and follow the analysis of the Seventh Circuit in *Hively*.<sup>386</sup>

## 1. En banc proceedings

### a. Arguments that Title VII of the Civil Rights Act of 1964 prohibits discrimination on the basis of sexual orientation

#### i. Brief of Appellants

Consistent with the position taken throughout the litigation, appellants argued that Zarda was fired because of his sex, in that sex is “inextricably intertwined with [his] sexual orientation.”<sup>387</sup> Indeed, appellants argued that this case is a textbook example of “the ultimate gender non-conforming stereotypes.”<sup>388</sup> Basically, while on a jump, Zarda disclosed to a customer that he was gay.<sup>389</sup> The customer, in turn, reported her negative experience to the manager who subsequently fired Zarda for talking openly about his sexuality with a customer.<sup>390</sup>

Appellants asserted that the inclusion of sexual orientation discrimination within the coverage of Title VII was not outside of the parameters established by the language of Title VII.<sup>391</sup> The appellants

2017, 12:40 PM), <http://www.jurist.org/paperchase/2017/07/doj-title-vii-does-not-protect-against-discrimination-based-on-sexual-orientation.php> (“The DOJ argues that Title VII of the Civil Rights Act of 1964 [materials], which bans sexual discrimination in the workplace, does not extend to protect against discrimination of sexual orientation where there is ‘no showing that an employer has treated ‘similarly situated employees’ of different sexes unequally.’”).

385. See Juan Vazquez, *Justice Department, EEOC Clash Over Civil Rights Act*, WWXI NEWS (July 28, 2017), <http://wxnews.org/post/justice-department-eEOC-clash-over-civil-rights-act>.

386. *Id.*; see also Gail Whittemore, *Justice Department Denies the Times in Sexual Orientation Discrimination Case*, PACE L. LIBR.: BLOGS (July 28, 2017), <https://lawlibrary.blogs.pace.edu/2017/07/28/justice-department-denies-the-times-in-sexual-orientation-discrimination-case/> (“Contradicting the position taken in the case by the U.S. Equal Employment Opportunity Commission (EEOC) that sexual orientation discrimination is barred under Title VII, the Justice Department brief asserts that the EEOC’s argument is ‘inconsistent with Congress’s clear ratification of the overwhelming judicial consensus that Title VII does not prohibit sexual orientation discrimination.’”).

387. Appellant’s Brief at 8, *Zarda v. Altitude Express, Inc.*, 855 F.3d 76 (2d Cir. 2017) (No. 15-3775).

388. *Id.* at 8–9.

389. *Id.* at 9.

390. *Id.* at 9–11.

391. *Id.* at 32–34, 37, 43.

noted that the states within the geographic boundary of the Second Circuit all had statutes that considered sexual orientation discrimination a prohibited practice in employment.<sup>392</sup> Appellants argued that, at the federal level within the Second Circuit, *Simonton* was hanging by a thread in the face of developing interpretations of the meaning of “because of . . . sex” within Title VII.<sup>393</sup> Thus, the outcome of this en banc rehearing will have a significant impact on how federal remedies for employment discrimination are seen and experienced by the LGBT population.<sup>394</sup>

Appellants further contended that the theory of associational discrimination developed in the sexual orientation context in *Hively* and by the EEOC should be applied.<sup>395</sup> Appellants pointed to the court of appeals’ decision in *Holcomb v. Iona College*<sup>396</sup> for the proposition that the court had already recognized that associational discrimination based on race is prohibited by Title VII.<sup>397</sup> It follows, appellants asserted, that the prohibition against “associational discrimination” under Title VII applies not only to cases involving racial discrimination, but also applies to cases involving sex discrimination, in that Title VII “equally prohibits discrimination on the basis of national origin, or the color, or the religion, or . . . sex of the associate.”<sup>398</sup> This theory applied in this case, appellants argued, because the disclosure by Zarda to Orellana that he was gay and that he was separated from his ex-husband resulted in his termination.<sup>399</sup> In short, appellants argued that Zarda was fired, in part, because the person to whom he had been married (associated) was male, leading to unlawful associational discrimination.<sup>400</sup>

Consistent with prior decisions in *Hively* and *Christiansen*, appellants asserted that same-sex attraction is an archetype of a non-conforming gender stereotype.<sup>401</sup> Thus, discrimination based on sexual orientation is sex discrimination, in that it is based on a failure to conform to an expected gender stereotype, something prohibited

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392. *Id.* at 26–27.

393. *Id.* at 39–40.

394. *Id.* at 40.

395. *Id.* at 32–34.

396. 521 F.3d 130 (2d Cir. 2008).

397. Appellant’s Brief, *supra* note 387, at 32–34.

398. *Id.* at 34.

399. *See id.* at 32–34.

400. *Id.* at 33.

401. *Id.* at 35–36.

under Title VII.<sup>402</sup> This argument is rooted in appellants’ assertion that “the line between sexual orientation discrimination and discrimination ‘because of sex’” is hardly clear.<sup>403</sup> As a result, appellants argued that distinguishing between what is sexual orientation discrimination and what is discrimination based on a failure to conform to an expected gender stereotype is, in many circumstances, virtually impossible.<sup>404</sup> Appellants encouraged the court to “recognize the unworkability of the line between permissible sex-stereotyping and sexual orientation discrimination.”<sup>405</sup>

Similarly, appellants argued that sexual orientation discrimination is *per se* sex discrimination.<sup>406</sup> Appellants contended that sexual orientation discrimination “treats otherwise similarly-situated people differently solely because of their sex,” which is a violation of Title VII.<sup>407</sup> Equally, discriminating against a person based on sex means that the discriminated person is “exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.”<sup>408</sup> Appellants argued that it is indisputable that in both discriminatory scenarios, some construction of “sex” was necessarily considered, making it impossible to assert that one scenario was permissible, while the other was not.<sup>409</sup>

Appellants argued “that *Simonton* was incorrectly decided” and has been “implicitly overruled” by cases like *Price Waterhouse* and *Oncale*.<sup>410</sup> According to the appellants, appellees mischaracterized *Simonton* and the cases on which it relies.<sup>411</sup> As appellants pointed out, even the EEOC, the government agency with power to interpret and enforce Title VII, took the “position that *Simonton* is feeble.”<sup>412</sup>

Lastly, appellants responded to the argument that congressional inaction, somehow, is dispositive on the question of whether Title VII

402. *Id.* at 35.

403. *Id.* at 35 (quoting *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 291 (3d Cir. 2009)).

404. *Id.*

405. *Id.* at 36.

406. *Id.* at 38.

407. *Id.* (quoting *Christiansen v. Omnicom Grp., Inc.*, 852 F.3d 195, 202 (2d Cir. 2017) (Katzmann, J. and Brodie, J., concurring)).

408. *Id.* (quoting *Christiansen*, 852 F.3d at 202).

409. *Id.* at 38–39.

410. *Id.* at 39.

411. *See id.* at 40–43.

412. *Id.* at 40.

protects against sexual orientation discrimination.<sup>413</sup> Appellants asserted that “[a] lack of Congressional action is always a weak, counter-intuitive manner in which to divine Congressional intent.”<sup>414</sup> The fact that Congress has not amended Title VII to expressly prohibit discrimination based on sexual orientation discrimination does not mean that decisions by courts on this question have no meaning or are somehow trumped by Congressional inaction.<sup>415</sup>

## ii. Reply brief of Appellants

In their reply, appellants sought to further the arguments made in their initial brief in support of the various theories under which they contended Title VII prohibits sexual orientation discrimination—sex stereotyping,<sup>416</sup> associational discrimination,<sup>417</sup> and that sexual orientation discrimination is *per se* sex discrimination under Title VII.<sup>418</sup> Appellants attempted to respond to certain arguments made by appellees and by various other interested persons and entities in their amicus curiae briefs.

Appellants began by responding to the arguments made by the court appointed amicus curiae, Adam Mortara, in his brief.<sup>419</sup> Appellants rejected Mortara’s contention that “verbal calisthenics” are necessary to fit sexual orientation into the definition of “sex” under Title VII.<sup>420</sup> Appellants argued that Mortara misrepresented the various cases he used for support in his brief.<sup>421</sup> According to Appellants, Mortara believes proving discrimination should require “hard data and scientific confirmation, as well as the strict rules of post-conviction proceedings.”<sup>422</sup> In opposition, appellants argued that while certainly proof of intent is required in a discrimination case under Title VII, the proof that is necessary does not require the kind of hard data or scientific confirmation for which Mortara argues.<sup>423</sup> In

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413. *Id.* at 43.

414. *Id.* at 44.

415. *See id.* at 45.

416. Appellant’s Reply Brief at 4, *Zarda v. Altitude Express, Inc.*, 855 F.3d 76 (2d Cir. 2017) (No. 15-3775).

417. *Id.* at 12.

418. *Id.* at 13.

419. *Id.* at 1.

420. *Id.*

421. *Id.* at 2–3.

422. *Id.* at 2. In their brief, Appellants rejected Mortara’s argument that “discrimination plaintiffs don’t win without evidence and strong inferences.” *Id.*

423. *Id.* at 2–3.

order to deal with the kind of proof necessary to establish a violation of Title VII and the difficulty that entails, “the Supreme Court has developed tests to find [intent] in certain scenarios.”<sup>424</sup> Appellants agreed that cases where evidence of discrimination was close to the surface proceed more easily, but argued that difficult factual cases, like Zarda’s, have merit in that discrimination can still be shown without hard data or scientific confirmation.<sup>425</sup>

Regarding the methodology of statutory interpretation to be employed in this case, appellants asserted that they were not advocating for “a Title VII ‘exception’ to statutory interpretation,” but rather were asking the court to see that not all statutes are “bound by Crazy Glue or governed by definitions found in grimy dictionaries.”<sup>426</sup> Citing *Lewis v. City of Chicago, Illinois*,<sup>427</sup> appellants agreed that “[i]t is not for us to rewrite the statute so that it covers only what we think is necessary to achieve what we think Congress really intended.”<sup>428</sup> However, as appellants noted, when one examines Title VII through a historical hermeneutic, one discovers a history where “[f]irst came the words ‘because of . . . sex’; then came sex stereotypes as a means to define discrimination; then came gay people, now constitutionally protected, demanding again a right to be read into accepted statutory interpretation.”<sup>429</sup> Echoing Judge Posner’s concurrence in *Hively*, appellants asserted that the mere fact that the statute’s interpretive meaning since 1964 has changed is evidence that the statute can be read (and interpreted) differently over time, while still being faithful to the intent of the drafters.<sup>430</sup>

Appellants further argued in reply in support of their assertion that sexual orientation discrimination is *per se* sex discrimination, explaining that “same-sex attraction is . . . the ultimate sex-stereotype [and] is as immutable as heterosexuality, or as any person’s physical[,] affectional, or romantic attraction (or lack thereof) to another person.”<sup>431</sup> As appellants noted, since *Price Waterhouse*,

424. *Id.* at 1–3.

425. *Id.* at 2–3.

426. *Id.* at 4.

427. 560 U.S. 205 (2010).

428. *Id.* at 9 (quoting *Lewis v. City of Chi., Ill.*, 560 U.S. 205, 215 (2010)).

429. Appellant’s Reply Brief at 4, *Zarda v. Altitude Express, Inc.*, 855 F.3d 76 (2d Cir. 2017) (No. 15-3775).

430. *Id.* at 4–5.

431. *Id.* at 16–17.



discrimination based on a failure to conform to expected gender stereotypes has been actionable under Title VII.<sup>432</sup> Courts have applied this gender stereotyping theory increasingly to cases involving discrimination based on sexual orientation or gender identity.<sup>433</sup> Appellants argued that discriminating against someone on the basis of sexual orientation necessarily involves gender stereotyping because it maintains an expectation as to whom a person of a particular gender should be attracted.<sup>434</sup>

Appellants also countered appellees' argument that what was being requested was an improper "advisory opinion."<sup>435</sup> Appellants asserted that the question of sexual orientation discrimination under Title VII was, indeed, before the court, because it was enough for Zarda to have alleged in his EEOC charge that his claim was of discrimination based on "sex discrimination."<sup>436</sup>

The EEOC, along with several legal organizations, individuals, and states accepted the court's invitation to submit briefs as amicus for the en banc rehearing of this case. In addition to the EEOC, included among those submitting briefs in support of Zarda were: Lambda Legal Defense and Education Fund (Lambda Legal), the National Education Association (NEA), Matthew Christiansen and Professor Anthony Michael Kreis (Christiansen and Kreis), Senators in support of the Equality Act, the states of Vermont, New York, and Connecticut, and the Legal Aid Society.

### iii. EEOC brief filed on behalf of Appellants

Congress delegated the EEOC with the responsibility to interpret and enforce Title VII in the employment context.<sup>437</sup> The EEOC had a

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432. *Id.* at 20–21.

433. *Id.*; *see, e.g.*, *Burnett v. Union R.R. Co.*, No. 17-101, 2017 U.S. Dist. LEXIS 97825, at \*2–3 (W.D. Pa. June 26, 2017) (allowing a sex-stereotyping claim to proceed where plaintiff was subjected to ongoing and pervasive sexually-explicit harassment by co-workers and supervisors); *EEOC v. Scott Med. Health Ctr., P.C.*, 217 F. Supp. 3d 834, 839–40 (W.D. Pa. 2016) (finding no meaningful difference between sexual orientation discrimination and gender stereotyping discrimination included under "because of... sex" in Title VII); *Thompson v. CHI Health Good Samaritan Hosp.*, No. 8:16CV160, 2016 U.S. Dist. LEXIS 132331, at \*5 (D. Neb. Sep. 27, 2016) (allowing a plaintiff "male who does not conform to sexual stereotypes" to proceed in his claim).

434. *See* Appellant's Reply Brief at 21, *Zarda v. Altitude Express, Inc.*, 855 F.3d 76 (2d Cir. 2017) (No. 15-3775) ("[S]ame-sex attraction is the ultimate sex stereotype whether it is suspected or held in the open.").

435. *Id.* at 25.

436. *Id.* at 25–26.

437. En Banc Brief of Amicus Curiae Equal Emp't Opportunity Comm'n in Support of Plaintiffs/Appellants and in Favor of Reversal at 1, *Zarda v. Altitude Express, Inc.*, 855 F.3d 76 (2d

significant interest in this case because Zarda’s claim “necessarily involve[d] impermissible consideration of [Zarda’s] sex, gender-based associational discrimination, and sex stereotyping.”<sup>438</sup> Zarda’s Title VII claim, the EEOC argued, resides within the confines of Title VII’s prohibition of “because of . . . sex” discrimination.<sup>439</sup> Thus, given its prior decisions in this area and its interpretation of Title VII, the EEOC submitted a brief in this case, asserting that Title VII’s prohibition of discrimination because of sex encompasses claims alleging discrimination based on sexual orientation.<sup>440</sup>

The EEOC has, for some time now, taken the position that Title VII prohibits discrimination based on sexual orientation, such as that which transpired in Zarda’s case.<sup>441</sup> The main three arguments offered in the EEOC brief for this position are that discrimination based on sexual orientation, “(1) involves impermissible sex-based considerations, (2) constitutes gender-based associational discrimination, and (3) relies on sex stereotyping.”<sup>442</sup>

Proponents of the position that sexual orientation is included in Title VII’s prohibition of discrimination “because of . . . sex” argue that when an employer discriminates against an employee based on sexual orientation, that employer must take the employee’s sex into account.<sup>443</sup> It is hard to imagine that one could consider a person’s sexual preference without also considering that person’s sex.<sup>444</sup> To do so would make little sense. In this case, the EEOC looked at the decision in *Los Angeles Department of Water & Power v. Manhart*<sup>445</sup> to provide a baseline for whether a sex-based violation of Title VII had occurred.<sup>446</sup> *Manhart* employed “the simple test of whether the evidence shows treatment of a person in a manner which, but for that person’s sex, would be different” to determine whether or not there had been a sex-based violation under Title VII.<sup>447</sup>

Employing this comparator analysis in cases similar to *Zarda*

Cir. 2017) (No. 15-3775) [hereinafter EEOC Zarda Amicus Brief].

438. *Id.*

439. *Id.* at 1, 4.

440. *Id.*

441. *Id.* at 4.

442. *Id.*

443. *Id.* at 7.

444. *See id.*

445. 435 U.S. 702 (1978).

446. EEOC Zarda Amicus Brief, *supra* note 437, at 5–6.

447. *Id.* at 6 (quoting *Manhart*, 435 U.S. at 711).

allows a court to focus on the fundamental question of whether a particular individual would have been treated adversely in the same situation had their sex been different.<sup>448</sup> A person who is discriminated against because of their sexual orientation is directly targeted because of their sex. Without the initial reference to that individual's sex, there would be no way to determine sexual orientation. Logically, this argument leads to the conclusion that sexual orientation discrimination necessitates referring to sex first; sexual orientation discrimination literally becomes discrimination "because of . . . sex" under Title VII.<sup>449</sup>

Along with discriminating purely on the basis of sex, "[s]exual orientation discrimination also violates Title VII's prohibition against sex discrimination because it treats individuals differently based on the sex of those with whom they associate."<sup>450</sup> Initially, courts recognized that associational discrimination violated Title VII by establishing racial discrimination in employment cases where an employee was discriminated against for interracial relationships with others.<sup>451</sup> Similarly, courts have now recognized that associational discrimination applies to more than just race.<sup>452</sup> As the Seventh Circuit explained in *Hively*:

The fact that *Loving*, *Parr*, and *Holcomb* deal with racial associations, as opposed to those based on color, national origin, religion, or sex is of no moment. The text of the statute draws no distinction, for this purpose, among the different varieties of discrimination it addresses . . . [T]o the extent that the statute prohibits discrimination on the basis of the race of someone with whom the plaintiff associates, it also prohibits discrimination on the basis of the national origin, or the color, or the religion, or (as relevant here) the sex of the associate.<sup>453</sup>

The EEOC asserted in its brief that "the analysis of race-based associational discrimination . . . should apply with equal force to claims of sex-based associational discrimination."<sup>454</sup> Specifically, in

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448. *Id.* at 5–9.

449. *Id.* at 5.

450. *Id.* at 10.

451. *Id.* at 10–11.

452. *Id.* at 11–12.

453. *Id.* (quoting *Hively v. Ivy Tech Cmty. Coll. Of Indiana*, 853 F.3d 339, 349 (7th Cir. 2017)).

454. *Id.* at 12.

this case, Zarda was in a relationship with another man. An adverse employment consequence occurred because he disclosed that information to a customer. Therefore, Zarda should be entitled to bring his discrimination claim using an associational discrimination theory under Title VII.<sup>455</sup>

As a matter of discrimination, sexual orientation discrimination naturally includes an appeal to sexual stereotypes.<sup>456</sup> The manifestation of sexual orientation by the employee is seen from the employer's point of view as either appropriate or inappropriate for a particular gender.<sup>457</sup> It is not disputed that discrimination based on sex stereotyping is a cognizable violation under Title VII based on *Price Waterhouse v. Hopkins*.<sup>458</sup> However, the plaintiff in *Zarda* had not challenged the district court's decision regarding sexual stereotyping on appeal.

The EEOC strongly argued in its brief that the precedent established by *Simonton* has long outlived its justification in the face of recent legal developments.<sup>459</sup> Specifically, the three main cases that *Simonton* relied on (*DeSantis v. Pacific Telephone & Telephone Company*,<sup>460</sup> *Williamson v. A.G. Edwards & Sons, Inc.*,<sup>461</sup> and *Wrightson v. Pizza Hut of America, Inc.*<sup>462</sup>) have all been overruled.<sup>463</sup> *DeSantis* held that Title VII does not protect against sex stereotypes.<sup>464</sup> This has been clearly abrogated by the decision in *Price Waterhouse*.<sup>465</sup> *Williamson* relied entirely on the decision in *DeSantis* and contains no further analysis.<sup>466</sup> Lastly, *Wrightson* relied entirely on both *DeSantis* and *Williamson*.<sup>467</sup> The derailment of *Simonton* begins here because the cases upon which the decision is based are no longer followed.<sup>468</sup>

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455. See *id.* at 13.

456. *Id.*

457. *Id.*

458. 490 U.S. 228 (1989); see EEOC Zarda Amicus Brief, *supra* note 437, at 14–15.

459. EEOC Zarda Amicus Brief, *supra* note 437.

460. 608 F.2d 327 (9th Cir. 1979), *abrogated by* *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864 (9th Cir. 2001).

461. 876 F.2d 69 (8th Cir. 1989).

462. 99 F.3d 138 (4th Cir. 1996).

463. EEOC Zarda Amicus Brief, *supra* note 437, at 18.

464. *Id.* at 19.

465. *Id.*

466. *Id.*

467. *Id.*

468. *Id.*

Along with asserting the lack of justification for continuing to treat *Simonton* as precedent, the EEOC also argued that *Simonton* could not distinguish between permissible sexual orientation discrimination and impermissible gender stereotyping.<sup>469</sup> Within the bounds of the Second Circuit, employers are not allowed to discriminate against their employees based on “animus toward their exhibition of behavior considered to be stereotypically inappropriate for their gender.”<sup>470</sup> Yet, they “*can* discriminate ‘because of sexual orientation.’”<sup>471</sup>

According to the EEOC, homosexuality is, in itself, a behavior which does not conform to gender stereotypes. Therefore, based on the precedence of *Simonton*, how could the court of appeals possibly distinguish between discrimination based on sex stereotyping and discrimination based on sexual orientation?<sup>472</sup> According to the EEOC, the logic necessary to distinguish between the two “leads to the absurd result that *only* those gay men who act ‘stereotypically feminine’ and those lesbians that act stereotypically masculine are entitled to protection from discrimination” under Title VII.<sup>473</sup> Receiving protection from discrimination under federal law should not be allowed to hinge on the capricious nature of the courts on a given day.<sup>474</sup>

The EEOC closed its brief by refuting opposing arguments rooted in inaction by both the Congress and the Supreme Court on the question of whether the protections of Title VII extend to discrimination based on sexual orientation.<sup>475</sup>

First, the argument that Congressional failure to amend Title VII to include sexual orientation is somehow dispositive in determining the meaning of the statute has been regularly refuted by the Supreme Court itself. As the Court has stated, “[s]ubsequent legislative history is . . . a particularly dangerous ground on which to rest an interpretation of a prior statute when it concerns . . . a proposal that

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469. *Id.* at 20.

470. *Id.* (quoting *Dawson v. Bumble & Bumble*, 398 F.3d 211, 217–18 (2nd Cir. 2005)).

471. *Id.* (quoting *Dawson*, 398 F.3d at 217–18).

472. *Id.*

473. *Id.* at 21 (quoting *Christiansen v. Omnicom Group, Inc.*, 852 F.3d 195, 200 (2nd Cir. 2017)).

474. *Id.*

475. *Id.* at 22–24.

does not become legislation.”<sup>476</sup> Inferences can easily be drawn that Congressional inaction regarding a statutory interpretation means that “existing legislature has already incorporated the offered change.”<sup>477</sup> Even in the face of Congressional inaction regarding Title VII and sexual orientation, courts, in a multitude of cases, have interpreted Title VII to include a prohibition on discrimination based on sexual orientation.

Second, even though Congress back in 1964 could not likely predict that Title VII would be used in sexual orientation discrimination cases, this does not invalidate its application to such instances.<sup>478</sup> The Supreme Court has indicated that “[s]tatutory prohibitions often go beyond the principal evil . . . to cover reasonably comparable evils.”<sup>479</sup> This is the ultimate purpose of laws like Title VII: to protect those who suffer from wrongdoing that is equitably similar to the wrongdoing initially protected in the law. Accordingly, if a situation meets statutory requirements and is related to what the law intends to protect, then the law can arguably cover that situation, regardless of what the law originally might have been *anticipated* to cover.<sup>480</sup>

#### iv. Lambda Legal brief filed on behalf of Appellants

Lambda Legal, a prominent legal organization supporting civil rights for LGBT persons, based its brief on three main premises: (1) under basic sex discrimination, discrimination necessarily involves sex-based considerations as well (sex-plus theory); (2) associational discrimination under Title VII is applicable to individuals who are discriminated against because of the sexual orientation of their partners; and (3) sexual orientation discrimination unavoidably involves sex stereotypes about how men and women should act.<sup>481</sup>

Under a “sex-plus” theory, Lambda Legal argued, “sexual orientation discrimination is sex discrimination for the simple reason that such discrimination treats otherwise similarly-situated people

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476. *Id.* at 24 (quoting *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990)).

477. *Id.*

478. *Id.* at 23.

479. *Id.* at 22 (quoting *Oncale v. Sundowner Offshore Oil Servs., Inc.*, 523 U.S. 75, 79 (1998)).

480. *Id.* at 23.

481. Brief of the Lambda Legal Def. and Educ. Fund, Inc. as Amicus Curiae in Support of Plaintiffs-Appellants and Reversal at 3–4, *Zarda v. Altitude Express, Inc.*, 855 F.3d 76 (2d Cir. 2017) (No. 15-3775) [hereinafter Brief of Lambda Legal].

differently solely because of their sex.”<sup>482</sup> The reasoning for this, Lambda Legal purports, is because “sexual orientation is inseparable from and inescapably linked to sex.”<sup>483</sup> Following this logic, when an employer fires someone because of their sexual orientation, they must first take into consideration the employee’s sex, which is *prima facie* discrimination “because of . . . sex.”<sup>484</sup>

Like the EEOC, Lambda Legal argued that prior case law prohibiting associational discrimination towards individuals in interracial relationships applies to individuals in LGBT relationships as well.<sup>485</sup> As Lambda Legal asserted, the court of appeals in *Holcomb v. Iona College*<sup>486</sup> held that “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.”<sup>487</sup> Lambda Legal claimed that the *Holcomb* holding should apply equally where the discrimination is rooted in an employer’s beliefs about an employee’s sexual orientation.<sup>488</sup> In this case specifically, Zarda was fired, in part, because he had disclosed his breakup with his boyfriend to a customer. If the court of appeals were not to overturn *Simonton*, it would result in an application of Title VII in conflict with *Holcomb*.<sup>489</sup> Lastly, Lambda Legal argued that discrimination against a gay person is fundamentally based on sex stereotypes; something that is strictly prohibited by *Price Waterhouse*.<sup>490</sup>

Lambda Legal also offered responsive arguments to those anticipated from the opposing side. First, it responded to the argument made by the dissent in *Hively*, namely that any reimagining of the reach of Title VII to include sexual orientation improperly interprets the statutory term “sex” in Title VII.<sup>491</sup> Based on an appeal to a

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482. *Id.* at 4 (quoting *Christiansen v. Omnicom Grp., Inc.*, 852 F.3d 195, 202 (2d Cir. 2017)).

483. *Id.* (quoting *Baldwin v. Foxx*, No. 0120133080, 2015 WL 4397641, at \*5 (EEOC July 16, 2015)).

484. *Id.* at 5–6.

485. *Id.* at 13.

486. 521 F.3d 130 (2d Cir. 2008).

487. Brief of Lambda Legal, *supra* note 481, at 7 (quoting *Holcomb*, 521 F.3d at 139).

488. *Id.* (“*Holcomb*’s holding that discrimination based on an employee’s interracial associations constitute race discrimination cannot ‘be legitimately reconciled’ with an argument that discrimination based on a worker’s same-sex intimate relationships is *not* sex discrimination.”) (quoting *Boutillier v. Hartford Pub. Sch.*, 221 F. Supp. 3d 225, 268 (D. Conn. 2016)).

489. *Id.* at 7–8.

490. 490 U.S. 228 (1989); Brief of Lambda Legal, *supra* note 481, at 8.

491. Brief of Lambda Legal, *supra* note 481, at 8.

common sense historical meaning, those reinterpreting Title VII to include sexual orientation do not believe that “sexual orientation” is at all synonymous with the term “sex” within Title VII. Lambda Legal stated that the question of “whether antigay discrimination is discrimination because of a person’s sex” does not require “Plaintiffs-Appellants to demonstrate that ‘sexual orientation’ and ‘sex’ are synonyms or that they are interchangeable concepts or terms.”<sup>492</sup> According to Lambda Legal, no reason exists to narrowly interpret the statutory meaning of “sex” in Title VII, when it is a statutory scheme aimed at being broadly defined and operated.<sup>493</sup> Finally, Lambda Legal cited several instances, post-*Simonton*, where the law regarding sexual orientation discrimination has become well-settled, implying that if the court were to rule contrary to these decisions, it could upset these related precedents.<sup>494</sup>

#### v. Christiansen and Kreis brief filed on behalf of Appellants

In their brief, Christiansen and Kreis raised arguments that had been made in Christiansen’s case before the court of appeals.<sup>495</sup> Christiansen and Kreis argued that sexual orientation discrimination is a cognizable claim under Title VII’s existing framework.<sup>496</sup> They relied on the idea that sex stereotypes and sexual orientation discrimination are almost indistinguishable and should be treated as such, echoing Judge Katzmann’s concurrence in *Christiansen*, that “homosexuality is the ultimate gender non-conformity, the prototypical sex stereotyping animus.”<sup>497</sup> According to Christiansen

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492. *Id.*

493. *Id.* at 13–16.

494. *Id.* at 22–28.

495. Brief of Amici Curiae Matthew Christiansen & Professor Anthony Michael Kreis in Support of Plaintiffs-Appellants at 3, *Zarda v. Altitude Express, Inc.*, 855 F.3d 76 (2d Cir. 2017) (No. 15-3775) [hereinafter Brief of Amici Curiae Christiansen & Kreis]; see *Christiansen v. Omnicom Grp., Inc.*, 852 F.3d 195, 202 (2d Cir. 2017). In their brief, Christiansen and Kreis initially urged that:

This Court should overturn Circuit precedent and hold in line with the Circuit Court of Appeals for the Seventh Circuit, multiple federal district courts and the [EEOC] that there is no principled reason to distinguish sexual orientation discrimination and sex stereotyping because both are forms of impermissible discrimination “because of sex” under Title VII.

Brief of Amici Curiae Christiansen & Kreis, *supra* at 3.

496. *Id.*

497. *Id.* at 3–4. Katzmann elegantly articulated this concept in *Christiansen* as follows:

The binary distinction that *Simonton* and *Dawson* establish between permissible gender stereotype discrimination claims and impermissible sexual orientation discrimination



and Kreis, the court was presented with an opportunity to overturn the “antiquated and cramped approach distinguishing sex stereotyping unrelated to sexual orientation” that was handed down by *Simonton*.<sup>498</sup>

*b. Briefs arguing that Title VII of the Civil Rights Act of 1964 does not prohibit discrimination on the basis of sexual orientation*

*i. Brief of Appellees (Altitude Express)*

In their brief, Appellees primarily relied upon the arguments made in their prior briefs in this proceeding, seeking to focus the court on a narrow legal question: Does Title VII prohibit sexual orientation discrimination under its prohibition of discrimination “because of . . . sex?” Appellees asserted that the answer to this question is a clear “no,” in that no proper interpretation of “sex” under Title VII includes sexual orientation.<sup>499</sup> Further, Appellees argued that this case is an inappropriate vehicle to decide this question, given the procedural history of the case.<sup>500</sup>

Appellees contended that the decision of the lower court dismissing Zarda’s “gender stereotype discrimination, hostile work environment, and overtime claims” was correct.<sup>501</sup> They asserted that the question raised on appeal regarding the efficacy of a Title VII sexual orientation discrimination claim was never raised in the lower court. As a result, Zarda’s estate “lack[ed] the legal standing to raise a

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claims requires the factfinder, when evaluating adverse employment action taken against an effeminate gay man, to decide whether his perceived effeminacy or his sexual orientation was the true cause of his disparate treatment. *See Fabian v. Hosp. of Cent. Connecticut*, 172 F.Supp.3d 509, 524 n.8 (D. Conn. 2016). This is likely to be an exceptionally difficult task in light of the degree to which sexual orientation is commingled in the minds of many with particular traits associated with gender. More fundamentally, carving out gender stereotypes related to sexual orientation ignores the fact that negative views of sexual orientation are often, if not always, rooted in the idea that men should be exclusively attracted to women and women should be exclusively attracted to men—as clear a gender stereotype as any.

*Christiansen*, 852 F.3d at 205–206 (Katzmann, J., concurring). As Kreis previously wrote:

[T]he question of whether sexual orientation discrimination claims are colorable under *Price Waterhouse* must turn on whether the root of the animus harbored against sexual minorities stems from sex-stereotypes—not whether all sexual minorities uniformly manifest a set of gender non-conforming characteristics.

Anthony Michael Kreis, *Against Gay Potemkin Villages: Title VII and Sexual Orientation Discrimination*, 96 TEX. L. REV. ONLINE 1, 6 (2017).

498. Brief of Amici Curiae Christiansen & Kreis, *supra* note 495, at 4.

499. *See* Appellee’s Brief at 1, *Zarda v. Altitude Express*, 855 F.3d 76 (2d Cir. 2017) (No. 15-3775).

500. *Id.* at 17–18.

501. *Id.* at 7–9.

new Title VII allegation” on appeal.<sup>502</sup>

In fact, Zarda had specifically stated: “I am not making this charge on my sexual orientation.”<sup>503</sup> In his testimony, Zarda summarily described his experiences while working at Altitude Express.<sup>504</sup> Zarda indicated that he had never had any negative interactions with his supervisor or coworkers regarding his sexual orientation.<sup>505</sup> Regarding his termination, Zarda testified that when he was fired, he did not know the motivation of his employer for the termination.<sup>506</sup> Appellees argued that, given all these facts, no record existed on which the court could possibly conclude that a Title VII sexual orientation claim had ever been raised by Zarda before appeal.<sup>507</sup>

Further, Appellees asserted that Zarda failed to follow the required steps in order to even assert a valid Title VII claim of discrimination based on sexual orientation, specifically failing to file a charge for this claim in a timely manner with the EEOC.<sup>508</sup> As with any claim, appellees noted, EEOC claims are subject to “statute of limitations, waiver, estoppel, and equitable tolling.”<sup>509</sup> Here, however, Zarda never raised a specific claim under Title VII for discrimination based on sexual orientation with the EEOC or with the district court.<sup>510</sup> Given this, appellees asserted, his estate must surely be barred by the doctrines of statute of limitations or estoppel from bringing such a claim now.<sup>511</sup> Appellees argued that Zarda’s failure to timely file an EEOC charge alleging discrimination based on sexual orientation completely distinguishes his case from *Hively*, the primary case used as a basis for appellants’ arguments.<sup>512</sup> As a result, appellees asserted that any decision by the court recognizing a cause of action for discrimination based on sexual orientation under Title VII would provide no relief to the specific party before the court.<sup>513</sup>

502. *Id.* at 8.

503. *Id.* at 9.

504. *Id.*

505. *Id.* at 10.

506. *Id.* at 11.

507. *Id.* at 18–20.

508. *Id.* at 20–21.

509. *Id.* at 21.

510. *Id.* at 24. As appellees point out, Zarda “failed to allege sexual orientation discrimination under Title VII in his amended complaint or second complaint.” *Id.*

511. *Id.* at 21–22.

512. *Id.* at 23.

513. *Id.* at 22.

Therefore, given these procedural infirmities, appellees argued that what was actually being sought in the case was an advisory opinion on the reach of Title VII.<sup>514</sup> Relying on *Preiser v. Newkirk*, appellees asserted that “[i]t is well-settled that ‘a federal court has neither the power to render an advisory opinion nor to decide questions that cannot affect the rights of litigants in the case before them.’”<sup>515</sup> Thus, “this en banc panel has no effect on the ‘rights of the litigants in the case before them’” and, because of this, “no relief flows from their finding of the question of law presented.”<sup>516</sup>

ii. Department of Justice brief filed on behalf of Appellees

While not requested by the court of appeals, the United States Department of Justice (DOJ) filed a brief in this case that contradicted the position taken by the EEOC.<sup>517</sup> The DOJ asserted that it had an interest in this case because it enforces and regulates Title VII against both state and local government employers and because it was an employer itself.<sup>518</sup> While the EEOC and DOJ are assumed to work in conjunction to exclude sex discrimination from the workplace under Title VII, in this case, their positions were in conflict.<sup>519</sup> In asserting the position of the United States government in this proceeding, the DOJ demanded that the court maintain an interpretation of Title VII that is consistent with the specific language of the text and the precedent of *Simonton*.<sup>520</sup> According to the DOJ, courts have long held that the plain meaning of Title VII does not encompass sexual orientation discrimination.<sup>521</sup> The DOJ argued in its brief that the

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514. *See id.* at 3.

515. *Id.* at 17 (citing *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975)).

516. *Id.* at 18 (noting that “if the panel reaches a conclusion, the panel must dismiss the appeal for lack of subject matter jurisdiction.”).

517. By way of background to this unusual filing by the DOJ, it is important to note that when the EEOC decided in 2015 that Title VII’s ban on sex discrimination *does* protect gay employees, the DOJ, under President Obama, took no position. However, in July 2017, the Trump DOJ, led by Attorney General Jeff Sessions, switched positions and filed an amicus brief in this case arguing that Title VII does *not* prohibit discrimination based on sexual orientation. Brief for the United States as Amicus Curiae at 1, *Zarda v. Altitude Express, Inc.*, 855 F.3d 76 (2d Cir. 2017) (No. 15-3775). At oral argument in *Zarda*, the Second Circuit indicated some frustration with the DOJ’s intrusion in the case. U.S. CT. OF APPEALS FOR THE SECOND CIR., <http://www.ca2.uscourts.gov/decisions/isysquery/49f87e29-3d5f-4e01-bfb9-4c4db493c953/221-230/list/>.

518. Brief for the United States as Amicus Curiae, *supra* note 517, at 1.

519. *See id.*

520. *Id.* at 1–2.

521. *Id.*

question before the court was a strict matter of law based upon statutory language and not a policy question that should be decided by the courts.<sup>522</sup>

The DOJ pointed to instances in the legislative history of Title VII where unsuccessful attempts were made to expressly expand the definition of “sex” to include sexual orientation.<sup>523</sup> Further, with regard to the language of Title VII, “Congress [has] neither added sexual orientation as a protected trait nor defined discrimination on the basis of sex to include sexual orientation discrimination.”<sup>524</sup> Thus far, there have been no successful attempts to change the plain meaning or wording of the statute to include sexual orientation.<sup>525</sup>

Like a scriptural fundamentalist, the DOJ argued that reliance on a plain reading of the statute demands a strict interpretation of the specific language included in the statute.<sup>526</sup> The DOJ attempted to offer such an interpretation in its brief by simplistically looking at the words “sex” and “discrimination.”<sup>527</sup> According to the reading offered by the DOJ, the meaning of “sex” in Title VII is meant to correspond to biological “maleness” or “femaleness,” thereby only prohibiting sex discrimination when men and women are treated differently.<sup>528</sup> The DOJ asserted that while the term “sex” is defined nowhere within Title VII nor discussed by Congress in debates on the statute, the Congressional authors of the statute intended “sex” to correspond with biological “maleness” or “femaleness.”<sup>529</sup>

The DOJ noted that the Supreme Court has held that “discrimination” under Title VII requires a “showing that an employer has ‘treated similarly situated employees’ of different sexes unequally.”<sup>530</sup> Under this type of “disparate treatment” claim, according to the DOJ, “[t]he central focus of the inquiry is whether the employer has treated ‘some people less favorably than others because of their . . . sex.’”<sup>531</sup>

522. *Id.* at 2.

523. *Id.* at 3.

524. *Id.*

525. *Id.* (noting that “every Congress from 1974 to the present has declined to enact proposed legislation that would prohibit discrimination in employment based on sexual orientation”).

526. *Id.*

527. *Id.*

528. *Id.* at 4.

529. *Id.* at 6.

530. *Id.* at 4 (quoting *Texas Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 258–59 (1981)).

531. *Id.* (quoting *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 569, 577 (1978)).

Under Title VII, a sexual harassment claim can be brought against an employer if the harassment constituted discrimination “because of . . . sex.”<sup>532</sup> However, as the DOJ asserts, sexual harassment is not “automatically discrimination because of sex merely because the words used have sexual content or connotations.”<sup>533</sup> Rather, “[t]he critical issue . . . is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.”<sup>534</sup> Further, under Title VII, an employer is not allowed to evaluate any of its employees predicated on an understanding that the employee should match any stereotypes associated with their sex.<sup>535</sup> According to the DOJ, under this analysis, “[t]he plaintiff must show that the employer actually relied on her [or his] gender in making its decision.”<sup>536</sup> Prior to the Seventh Circuit decision in *Hively*, according to the DOJ, courts had consistently applied this analysis, limiting the reach of Title VII to cases focused on the gender of the plaintiff, not the sexual orientation.<sup>537</sup> In its brief, the DOJ argued that this narrow interpretation is correct and it should not be expanded or modified to include sexual orientation unless the Congress so acts.

The DOJ argued that both the EEOC and the Seventh Circuit in *Hively* incorrectly applied Title VII and are wrong about three basic arguments.<sup>538</sup> First, in relying upon the comparator theory to support the conclusion that Title VII includes sexual orientation, the EEOC and the *Hively* court wrongly applied the “but for the employee’s sex” comparator test.<sup>539</sup> The DOJ, agreeing with the dissent in *Hively*, argued that a court using the “but-for” comparator test cannot “do its job of ruling in sex discrimination as the actual reason for the employer’s decision . . . if we’re not scrupulous about holding everything constant except the plaintiff’s sex.”<sup>540</sup> The DOJ argued that the manner in which the EEOC and the Seventh Circuit applied the *Manhart* test was improper, in that where sexual orientation is kept

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532. *Id.* (citing *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998)).

533. *Id.* at 4–5.

534. *Id.* at 5 (alteration in original).

535. *Id.* (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (plurality opinion)).

536. *Id.*

537. *Id.* at 6.

538. *Id.* at 15.

539. *Id.* at 15–16.

540. *Id.* at 16 (citing *Hively v. Ivy Tech Cmty. Coll. Of Indiana*, 853 F.3d 339, 366 (7th Cir. 2017) (Sykes, J., dissenting)).

constant and gender is a variable, the resulting discrimination is based not on the sex of the individual, but on the sexual orientation of that individual.<sup>541</sup> This, according to the DOJ, is not actionable under Title VII.<sup>542</sup>

Second, the DOJ pointed to the contention made by the EEOC and the *Hively* court that where an employer discriminates against an employee based on sexual orientation, the employer is necessarily discriminating based on sexual stereotypes, because such discrimination “allegedly targets an employee’s failure to conform to the gender norm of opposite-sex attraction.”<sup>543</sup> The DOJ categorically rejected any argument that “presumes that sexual orientation discrimination always reflects a gender-based stereotype.”<sup>544</sup> The DOJ asserted that it is simply a wrongheaded analysis to believe that discrimination based on sexual orientation must happen on the basis of gender, but rather could be based on “moral beliefs about sexual, marital, and familial relationships.”<sup>545</sup>

The DOJ further argued that even if some sexual orientation discrimination cases are based on sex stereotypes, the opposite-sex sexual attraction stereotype is not one of them, in that discrimination that results from a sexual attraction based stereotype is equivalent across both genders.<sup>546</sup> For example, the DOJ pointed out, if a man is discriminated against because he does not conform to the stereotype of being attracted to women, but would be treated no better or worse than a woman who is discriminated against for not being attracted to men, then no unfair discrimination based on sex occurs, thereby resulting in no Title VII claim.<sup>547</sup>

Lastly, the DOJ rejected the associational discrimination argument set forth by both the EEOC and the Seventh Circuit in *Hively*. The DOJ asserted that the logical analogy between associational race discrimination and associational sex discrimination is “fundamentally inapposite.”<sup>548</sup> Discrimination based on the race of

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541. *Id.* at 16.

542. *Id.*

543. *Id.* at 18.

544. *Id.*

545. *Id.* at 19.

546. *Id.*

547. *Id.* Apparently, the DOJ recognizes that this situation is somehow different from when men are discriminated against for being too feminine or women are discriminated against for being too masculine.

548. *Id.* at 21.

an employee's spouse is treating an employee differently because of their race. The DOJ agreed that this constitutes *prima facie* race discrimination prohibited under Title VII.<sup>549</sup> Having agreed that discrimination based on the race of an employee's spouse is race discrimination, the DOJ then made the wholly illogical argument that "an employer who discriminates against an employee in a same-sex relationship is not engaged in sex-based discrimination" of that person, even though the discrimination occurs because of the gender or sex of the spouse.<sup>550</sup> Rather, the DOJ argued, the employer is discriminating based on sexual orientation; a claim that is not cognizable under Title VII's plain reading.<sup>551</sup>

In conclusion, the DOJ asserted that the facts in Zarda do not present actionable discrimination within this strict reading of Title VII.<sup>552</sup>

### iii. Brief of Court appointed amicus curiae

Adam Mortara, as court-appointed amicus curiae, submitted a brief favoring the appellees. Similar to the DOJ, Mortara asserted that "it is a fundamental canon of statutory construction that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, and common meaning."<sup>553</sup> Accordingly, he argued, discrimination "because of . . . sex" does not encompass sexual orientation.<sup>554</sup>

Mortara contended that the only proper way to apply a "but-for" test for sex discrimination is to be consistent in its application.<sup>555</sup> No substitutions or extraneous methods of using the comparator test should be used.<sup>556</sup> Mortara argued that if the court were to use the comparator test laid out in *Manhart*, it should look to the axiomatic questions of whether the employer in the case fired Zarda because he was gay or because he was a man.<sup>557</sup> Men and women can have any kind of sexual orientation and be discriminated against based on their

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549. *Id.*

550. *Id.* at 22.

551. *Id.*

552. *Id.*

553. Brief of Adam Mortara as Amicus Curiae at 1, *Zarda v. Altitude Express, Inc.*, 855 F.3d 76 (2d Cir. 2017) (No. 15-3775).

554. *Id.*

555. *Id.* at 2–3.

556. *Id.*

557. *Id.* at 3.

gender. This is prohibited under Title VII.

Men and women can also be discriminated against solely because of their sexual orientation; regardless of gender. According to Mortara, there is a distinction between these two scenarios.<sup>558</sup> When an employer discriminates based on sexual orientation, they are not saying that they do not believe that a man or a woman specifically can be homosexual, they are acting on the basis that human beings should not be homosexual.<sup>559</sup> This is not an example of discrimination based on gender. *Zarda* attempted to broaden this distinction, ultimately making it more difficult for courts to rule on Title VII sex discrimination cases.<sup>560</sup> Furthermore, “the court ha[d] never once endorsed using a comparative or ‘but-for’ test to interpret the text of Title VII and, in effect, to supply an alternative motive to the actual and true reasons that the evidence shows motivated the employment decision.”<sup>561</sup>

Like others who filed in support of the position of the defendants-appellees, Mortara looked to the specific wording of Title VII’s sex discrimination prohibition. According to Mortara, the term “sex” under Title VII is intended to mean biological men and women and does not include sexual orientation.<sup>562</sup> Mortara argued that a strong inference supports the truth of this assertion, because the word sex is within the words “homosexual,” “bisexual,” and the phrase “sexual orientation.”<sup>563</sup> In other words, the word “sex” is necessary to define “sexual orientation,” but not the other way around.<sup>564</sup>

Consistent with the arguments offered by the DOJ, Mortara also rejected the associational discrimination argument. He notes that associational discrimination claims were intended to combat racism; a prime component of Title VII prohibition.<sup>565</sup> Mainly, he asserted that the recognition of associational discrimination claims was to protect people from being punished for interracial relationships.<sup>566</sup>

He further argued that racial associational discrimination and sex

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558. *Id.* at 2–3.

559. *Id.* at 3.

560. *Id.* at 5.

561. *Id.* at 11.

562. *Id.* at 6–7.

563. *Id.*

564. *Id.*

565. *Id.* at 14.

566. *Id.*



associational discrimination are clearly dissimilar. In support of this contention, Mortara asserted that the cases relied upon by appellants in support of the associational discrimination theory were not relevant in this context, in that none of the cases cited involved a plaintiff (regardless of sexual orientation) being fired or treated disparagingly different for being married to or associating with other homosexual individuals.<sup>567</sup> According to Mortara, being homosexual was an independent status, one not defined by associating with or being in a relationship with other homosexuals. For example, he argued, a person can associate with homosexuals regardless of her own sexual orientation. Thus, discrimination occurs because of an individual's innate sexual orientation (status) as a homosexual, not as a result of the individual's intimate association with persons of the same gender.<sup>568</sup>

Lastly, Mortara addressed the issue of sex stereotyping as a basis for a sexual orientation claim under Title VII. Mortara disagreed with Zarda and those supporting the position that where discrimination based on sexual orientation exists, discrimination based on sexual stereotyping or gender nonconformity also necessarily exists, giving rise to an actionable sexual orientation claim.<sup>569</sup> While he did agree that sex stereotyping could "be evidence of sex discrimination" under *Price Waterhouse*,<sup>570</sup> he asserted that, to the degree any sex stereotyping occurred in the case of Zarda, it was not specifically rooted in unlawful discrimination towards Zarda as a man.<sup>571</sup>

### c. *En banc oral argument*

On September 26, 2017, oral arguments were held in the case before the en banc court of appeals. While scheduled for only one hour, the arguments actually lasted for almost two hours.<sup>572</sup>

Gregory Antollino, representing appellants, first addressed the procedural questions associated with whether arguments regarding sex

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567. *Id.* at 16–17.

568. *Id.* at 16 (citing *Evans v. Ga. Reg'l Hosp.*, 850 F.3d 1248, 1259–60 (Pryor, J., concurring), *cert. denied*, No. 17-370, 138 S. Ct. 557 (Dec. 11, 2017)).

569. *Id.* at 17–18.

570. *Id.* at 19.

571. *Id.* at 21.

572. Oral Argument, *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018) (No. 15-3775) [hereinafter Oral Argument, *Zarda*], <http://www.ca2.uscourts.gov/decisions/isysquery/bb77d7d7-614b-4223-9d6d-8e38ca9c5260/228/doc/15-3775%20En%20Banc.mp3>.

stereotyping were even before the court, given that they were not directly raised on appeal. Antollino asserted that discrimination based on sexual orientation was the ultimate case of sex stereotyping, in that it went to the heart of sexual expectations for men and women in a heteronormative society.<sup>573</sup> Antollino's arguments basically tracked the arguments that had been made in appellants' briefs.<sup>574</sup>

Following Antollino was Jeremy D. Horowitz, arguing on behalf of the EEOC.<sup>575</sup> It fell to Horowitz to make the substantive argument regarding the question of whether the prohibition against discrimination because of sex found in Title VII could be interpreted broadly enough to include a prohibition against discrimination based on sexual orientation.<sup>576</sup> Horowitz effectively explained the three main arguments offered by the EEOC, namely that discrimination based on sexual orientation (1) involves impermissible sex-based considerations, (2) constitutes gender-based associational discrimination, and (3) relies on sex stereotyping.<sup>577</sup> Horowitz rooted these arguments in the foundational idea that "sexual orientation cannot be separated from sex."<sup>578</sup>

After Horowitz made the affirmative argument in support of the positions asserted by the appellants and the EEOC, it fell to Greg Nevins of Lambda Legal to directly counter the arguments that had been set forth by the DOJ in its brief filed on behalf of the appellees.<sup>579</sup> Nevins painstakingly sought to show in the brief period of time that he was allotted that the DOJ position was a "radical reinterpretation of Title VII" rooted in a "parlor trick."<sup>580</sup>

Deputy Assistant Attorney General Hashim M. Mooppan made the primary argument in support of the appellants.<sup>581</sup> Before Mooppan was even able to begin his substantive argument, the judges interrupted him with a series of questions regarding the unusual scenario of one executive agency arguing against another executive agency.<sup>582</sup> Several of the judges seemed quite disturbed by the

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573. *Id.* at 01:40–12:15.

574. *See supra* Part V(C)(1)(a)(i)–(ii).

575. Oral Argument, Zarda, *supra* note 572, at 13:00.

576. Oral Argument, Zarda, *supra* note 572.

577. *Id.* at 19:19.

578. *Id.* at 19:19.

579. *Id.* at 36:26.

580. *Id.* at 43:42, 38:52.

581. *Id.* at 1:02:29.

582. *Id.* at 1:02:43.

situation, with Judge Katzmman asking “[w]hat is the process with regard to the EEOC and the DOJ in terms of filing a brief?”<sup>583</sup> Rather than directly answering the question, Mooppan responded “[t]hat’s a fairly complicated question.”<sup>584</sup> However, Judge Katzmman was not satisfied and continued to press Mooppan for a direct answer.<sup>585</sup> Mooppan ultimately told the court in regard to questions about the DOJ procedures that “[t]hat’s not appropriate for me to disclose.”<sup>586</sup> Undeterred, Judge Pooler followed up on Judge Katzmman’s questions, asking “[d]oes the Justice Department sign off on a brief that EEOC intends to file?”<sup>587</sup> Again, Mooppan responded “[t]hat’s not appropriate for me to speak to,” causing Judge Pooler to point out that she was asking for procedural information, “not internal deliberations.”<sup>588</sup> Mooppan refused to discuss why two executive branch agencies were taking diametrically opposing positions in a significant matter.<sup>589</sup>

After this procedural discussion, Mooppan moved to the major argument of the DOJ. Basically, the DOJ’s argument was that for sex discrimination in violation of Title VII to occur, the discrimination had to be predicated on a belief that one gender is inferior to the other gender.<sup>590</sup> Mooppan argued that because discrimination based on sexual orientation did not rest on such a predicate, discrimination based on sexual orientation could not be included in the protection offered by Title VII’s prohibition against discrimination “because of sex.”<sup>591</sup>

Judge Jacobs pushed Mooppan to address the associational discrimination theory that was argued by the EEOC and which had been accepted by the Seventh Circuit in *Hively*.<sup>592</sup> In response, Mooppan asserted that “[w]hen you discriminate against interracial marriage, you are promoting ‘racial superiority.’”<sup>593</sup> Mooppan pursued this argument further by claiming, for example, that

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583. *Id.* at 1:03:53.

584. *Id.* at 1:04:32.

585. *Id.* at 1:04:34.

586. *Id.* at 1:04:50.

587. *Id.* at 1:05:13.

588. *Id.* at 1:05:18.

589. *See id.* at 1:05:26.

590. *Id.* at 1:08:05.

591. *Id.* at 1:18:53.

592. *Id.* at 1:06:20.

593. *Id.* at 1:07:32.

discrimination against interfaith marriages was rooted in some idea of “religious superiority.”<sup>594</sup>

This argument is just wrong, in that it is inconsistent with all prior interpretations of Title VII. Federal courts have always held that a violation of Title VII may be proven by showing that the employer took sex, religion, race, or age into account in making an adverse employment decision.<sup>595</sup> Nowhere has the Supreme Court ever held that the language of Title VII requires that a plaintiff alleging a violation of Title VII must prove that the discrimination that she suffered was because the employer believed that one gender or one race or one religion or one age group was superior to another. This fictional requirement, asserted by the DOJ, that a showing of animus by a Title VII plaintiff is necessary, has no support in the law. Imposing such a requirement would reject decades of court decisions and turn the protections provided by Title VII on their head.

The questions asked by the court during oral argument and the tone of the oral argument would suggest that the Second Circuit is likely to follow the lead of the Seventh Circuit in *Hively*, concluding that the prohibition against discrimination “because of sex” found in Title VII includes a prohibition against discrimination based on sexual orientation.<sup>596</sup>

#### *d. En banc decision*

On February 26, 2018, the court of appeals issued its en banc decision in *Zarda*.<sup>597</sup> Unsurprisingly, given the oral argument, the court held, 10-3, that the prohibition against discrimination “because of sex” in Title VII includes discrimination based on sexual orientation.<sup>598</sup> In addition to the opinion of the court, written by Chief Judge Katzmann, four members of the court wrote separate concurring opinions and three members of the court wrote separate dissenting

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594. *Id.* at 1:14:10.

595. *See, e.g., Ricci v. DeStefano*, 557 U.S. 557, 557 (2009); *Watson v. Fort Worth Bank & Tr.*, 487 U.S. 977, 977 (1988); *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971); *see also Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 753–54 (1998) (“When a plaintiff proves that a tangible employment action resulted from a refusal to submit to a supervisor’s sexual demands, he or she establishes . . . [an] actionable [claim] under Title VII.”); *Faragher v. City of Boca Raton*, 524 U.S. 775, 778 (1998); *Llampallas v. Mini-Circuits, Inc.*, 163 F.3d 1236, 1243 (11th Cir. 1998).

596. *Hively v. Ivy Tech Cmty. Coll. Of Indiana*, 853 F.3d 339, 351–352 (7th Cir. 2017).

597. *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 100 (2d Cir. 2018).

598. *Id.* at 106–08.

opinions.<sup>599</sup>

Writing for the majority, Judge Katzmann began his analysis with a discussion of the text of Title VII, writing:

In deciding whether Title VII prohibits sexual orientation discrimination, we are guided, as always, by the text and, in particular, by the phrase “because of . . . sex.” However, in interpreting this language, we do not write on a blank slate. Instead, we must construe the text in light of the entirety of the statute as well as relevant precedent. As defined by Title VII, an employer has engaged in “impermissible consideration of . . . sex . . . in employment practices” when “sex . . . was a motivating factor for any employment practice,” irrespective of whether the employer was also motivated by “other factors.” 42 U.S.C. § 2000e-2(m). Accordingly, the critical inquiry for a court assessing whether an employment practice is “because of . . . sex” is whether sex was “a motivating factor.” *Rivera v. Rochester Genesee Reg’l Transp. Auth.*, 743 F.3d 11, 23 (2d Cir. 2014).<sup>600</sup>

Judge Katzmann then offered three primary arguments in support of the court’s holding that the prohibition against discrimination “because of sex” in Title VII did include a prohibition against discrimination based on sexual orientation.<sup>601</sup>

First, sexual orientation discrimination constitutes sex discrimination because “sexual orientation is a function of sex.”<sup>602</sup> Firing a man because he is attracted to men “is motivated, at least in part, by sex and is thus a subset of sex discrimination.”<sup>603</sup> In this situation, the fired male employee would not have been fired “but for” his sex.<sup>604</sup> According to Judge Katzmann, in order to “identify the sexual orientation of a particular person,” an employer must “know the sex of the person and that of the people to whom he or she is attracted.”<sup>605</sup> As Judge Katzmann further explained:

Because one cannot fully define a person’s sexual orientation

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599. *See id.* at 132–69.

600. *Id.* at 111–12.

601. *See id.* at 113, 119, 124.

602. *Id.* at 113.

603. *Id.* at 112.

604. *See id.* at 119.

605. *Id.* at 113.

without identifying his or her sex, sexual orientation is a function of sex. Indeed sexual orientation is doubly delineated by sex because it is a function of both a person's sex and the sex of those to whom he or she is attracted. Logically, because sexual orientation is a function of sex and sex is a protected characteristic under Title VII, it follows that sexual orientation is also protected.<sup>606</sup>

To reach this conclusion, Judge Katzmann employed the “comparative test” that had been used by the majority in *Hively*.<sup>607</sup> According to Judge Katzmann (and the majority in *Hively*), this test “determines whether the trait that is the basis for discrimination is a function of sex by asking whether an employee’s treatment would have been different ‘but for that person’s sex.’”<sup>608</sup> In strongly rejecting the approach to the “comparative test” that had been argued by the dissent in *Hively* and by the defendant and the DOJ in *Zarda*, Judge Katzmann wrote:

But the real issue raised by the government’s critique is the proper application of the comparative test. In the government’s view, the appropriate comparison is not between a woman attracted to women and a man attracted to women; it’s between a woman and a man, both of whom are attracted to people of the same sex. Determining which of these framings is correct requires understanding the purpose and operation of the comparative test. Although the Supreme Court has not elaborated on the role that the test plays in Title VII jurisprudence, based on how the Supreme Court has employed the test, we understand that its purpose is to determine when a trait other than sex is, in fact, a proxy for (or a function of) sex. To determine whether a trait is such a proxy, the test compares a female and a male employee who both exhibit the trait at issue. In the comparison, the trait is the control, sex is the independent variable, and employee treatment is the dependent variable.<sup>609</sup>

Applying this test to the facts of *Zarda* led Judge Katzmann to the

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606. *Id.*

607. *Id.* at 116–18.

608. *Id.* at 116 (quoting *City of L.A. Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978)).

609. *Id.* at 116–17.

following analytical conclusion:

Zarda was allegedly fired after he revealed his sexual attraction to men—his sexual orientation. Had Zarda been a woman who revealed her attraction to men—her sexual orientation—presumably Zarda would not have been fired.<sup>610</sup>

Thus, the control factor in this analysis is “attraction to men,” sex (male or female) is the independent variable, and the employment action (termination or not) is the dependent variable.<sup>611</sup> Therefore, “but for” his sex, Zarda would not have been terminated and, concomitantly, suffered discrimination.<sup>612</sup> As Judge Katzmann stated:

Having addressed the proper application of the comparative test, we conclude that the law is clear: To determine whether a trait operates as a proxy for sex, we ask whether the employee would have been treated differently “but for” his or her sex. In the context of sexual orientation, a woman who is subject to an adverse employment action because she is attracted to women would have been treated differently if she had been a man who was attracted to women. We can therefore conclude that sexual orientation is a function of sex and, by extension, sexual orientation discrimination is a subset of sex discrimination.<sup>613</sup>

Second, Judge Katzmann, relying on the analysis of *Price Waterhouse*, concluded that discrimination based on sexual orientation constituted discrimination “because of sex” because “sexual orientation discrimination is almost invariably rooted in stereotypes about men and women.”<sup>614</sup> As Judge Katzmann explains:

Applying *Price Waterhouse*’s reasoning to sexual orientation, we conclude that when, for example, “an employer . . . acts on the basis of a belief that [men] cannot be [attracted to men], or that [they] must not be,” but takes no such action against women who are attracted to men, the employer “has acted on the basis of gender.” *Cf.* 490 U.S. at 250, 109 S.Ct. 1775.<sup>615</sup>

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610. *See id.* at 113–14, 117–19.

611. *Id.* at 117.

612. *See id.* at 119.

613. *Id.*

614. *Id.*

615. *Id.* at 120–21 (footnote omitted).

Discrimination based on sexual orientation is violative of Title VII when it is rooted in gender stereotypes and expectations “that ‘real’ men should date women, and not other men.”<sup>616</sup> Relying on *Hively*, Judge Katzmann concluded that “same-sex orientation ‘represents the ultimate case of failure to conform’ to gender stereotypes (majority), and aligns with numerous district courts’ observation that ‘stereotypes about homosexuality are directly related to our stereotypes about the proper roles of men and women.’”<sup>617</sup>

Third, relying on *Loving*, Judge Katzmann asserted that discrimination based on sexual orientation violates Title VII’s prohibition against discrimination “because of sex” under an “associational” theory of discrimination.<sup>618</sup> Following *Loving*, courts have incorporated its “associational” analysis into the employment context, holding that “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” in violation of Title VII.<sup>619</sup>

Since courts have consistently held that discrimination on the basis of race and sex are equally forbidden under Title VII, Judge Katzmann concluded that this “associational” theory applied equally to cases that raised claims of sex discrimination.<sup>620</sup> Under this theory, Judge Katzmann asserts that where an employee suffers discrimination because of her associations with a partner of the same-sex, she has experienced illegal sex discrimination.<sup>621</sup> As Judge Katzmann explained:

If an employer disapproves of close friendships among persons of opposite sexes and fires a female employee because she has male friends, the employee has been discriminated against because of her own sex. “Once we accept this premise, it makes little sense to carve out same-sex [romantic] relationships as an association to which these

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616. *Id.* at 121–23.

617. *Id.* (quoting *Centola v. Potter*, 183 F. Supp. 2d 403, 410 (D. Mass. 2002)); *see also, e.g.*, *Boutillier v. Hartford Pub. Schs.*, 221 F. Supp. 3d 255, 269 (D. Conn. 2016); *Videckis v. Pepperdine Univ.*, 150 F. Supp. 3d 1151, 1160 (C.D. Cal. 2015); *Terveer v. Billington*, 34 F. Supp. 3d 100, 116 (D.D.C. 2014); *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212, 1224 (D. Or. 2002).

618. *Zarda*, 833 F.3d at 124–28 (relying on *Loving v. Virginia*, 388 U.S. 1 (1967)).

619. *Id.* at 124 (quoting *Holcomb v. Iona Coll.*, 521 F.3d 130, 139 (2d Cir. 2008)).

620. *Id.* at 125.

621. *Id.* at 124–25, 128.



protections do not apply.” *Id.* Applying the reasoning of *Holcomb*, if a male employee married to a man is terminated because his employer disapproves of same-sex marriage, the employee has suffered associational discrimination based on his own sex because “the fact that the employee is a man instead of a woman motivated the employer’s discrimination against him.” *Baldwin v. Foxx*, 2015 WL 4397641, at \*6 (E.E.O.C. July 16, 2015).<sup>622</sup>

Any of these three rationales are adequate for the court to conclude that discrimination based on sexual orientation is prohibited by Title VII as discrimination because of sex, according to Judge Katzmann.<sup>623</sup> Relying upon *Oncale*, Judge Katzmann acknowledges that, while sexual orientation discrimination is “assuredly not the principal evil that Congress was concerned with when it enacted Title VII,” “statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils.”<sup>624</sup> As applied to the specific facts before the court in *Zarda*, Judge Katzmann concludes:

Zarda has alleged that, by “honestly referr[ing] to his sexual orientation,” he failed to “conform to the straight male macho stereotype.” J.A. 72. For this reason, he has alleged a claim of discrimination of the kind we now hold cognizable under Title VII. The district court held that there was sufficient evidence of sexual orientation discrimination to survive summary judgment on Zarda’s state law claims. Even though Zarda lost his state sexual orientation discrimination claim at trial, that result does not preclude him from prevailing on his federal claim because his state law claim was tried under “a higher standard of causation than required by Title VII.” *Zarda*, 855 F.3d at 81. Thus, we hold that Zarda is entitled to bring a Title VII claim for discrimination based on sexual orientation.<sup>625</sup>

In concurring with the judgment of the court, Judge Jacobs joined with the conclusion that under an associational discrimination theory, discrimination based on sexual orientation is encompassed by Title

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622. *Id.* at 125.

623. *Id.* at 131–32.

624. *Id.* at 132.

625. *Id.*

VII's prohibition against discrimination because of sex.<sup>626</sup> Judge Jacobs rejected the other two rationales offered by Judge Katzmann as nothing more than “woke dicta.”<sup>627</sup> Judge Sack also concurred in the decision based on the theory of associational discrimination.<sup>628</sup>

For his part, Judge Cabranes concurred in the judgment, but did so because he thought the decision was an easy, straightforward case of statutory interpretation.<sup>629</sup> As Judge Cabranes wrote:

This is a straightforward case of statutory construction. Title VII of the Civil Rights Act of 1964 prohibits discrimination “because of . . . sex.” *Id.* Zarda’s sexual orientation is a function of his sex. Discrimination against Zarda because of his sexual orientation therefore *is* discrimination because of his sex, and is prohibited by Title VII.

That should be the end of the analysis.<sup>630</sup>

In his concurrence, Judge Lohier joined in the portion of Judge Katzmann’s opinion that he believed to be most firmly rooted in the

626. *Id.* at 132–33 (Jacobs, J., concurring). As Judge Jacobs writes:

Supreme Court law and our own precedents on race discrimination militate in favor of the conclusion that sex discrimination based on one’s choice of partner is an impermissible basis for discrimination under Title VII. This view is an extension of existing law, perhaps a cantilever, but not a leap.

First: this Circuit has already recognized associational discrimination as a Title VII violation. In *Holcomb v. Iona Coll.*, we considered a claim of discrimination under Title VII by a white man who alleged that he was fired because of his marriage to a black woman. We held that “an employer may violate Title VII if it takes action against an employee because of the employee’s association with a person of another race . . . . 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.”

Second: the analogy to same-sex relationships is valid because Title VII “on its face treats each of the enumerated categories exactly the same”; thus principles announced in regard to sex discrimination “apply with equal force to discrimination based on race, religion, or national origin.” And, presumably, vice versa.

Third: There is no reason I can see why associational discrimination based on sex would not encompass association between persons of the same sex. In *Oncale v. Sundowner Offshore Servs., Inc.*, a case in which a man alleged same-sex harassment, the Supreme Court stated that Title VII prohibits “discriminat[ion] . . . because of . . . sex” and that Title VII “protects men as well as women.”

This line of cases, taken together, demonstrates that discrimination based on same-sex relationships is discrimination cognizable under Title VII notwithstanding that the sexual relationship is homosexual.

*Id.* at 132–33 (Jacobs, J., concurring) (emphasis in original).

627. *Id.* at 134.

628. *Id.* at 135 (Sack, J., concurring).

629. *Id.* (Cabranes, J., concurring).

630. *Id.*

text of Title VII.<sup>631</sup> He does, however, directly challenge the textual analysis offered by those writing in dissent, stating:

Time and time again, the Supreme Court has told us that the cart of legislative history is pulled by the plain text, not the other way around. The text here pulls in one direction, namely, that sex includes sexual orientation.<sup>632</sup>

In a powerful and eloquent dissent reminiscent of that offered by Judge Sykes in *Hively*, Judge Lynch rejected the three rationales offered by Judge Katzmann in support of the decision. Judge Lynch begins his opinion by noting that, while he certainly favored the result reached by the majority, he firmly believed that the result was not supported by the text and history of Title VII.<sup>633</sup>

In his dissent, Judge Lynch discusses the lengthy legislative history and statutory meaning behind Title VII and its application.<sup>634</sup> This discussion forms the basis for the analysis that follows. Judge Lynch stresses the importance of the legislative history recounted in his introduction.<sup>635</sup> For Judge Lynch, this history:

tells us something important about what the language of Title VII must have meant to any reasonable member of Congress, and indeed to any literate American, when it was passed—what Judge Sykes called the “original *public* meaning” of the statute. That history tells us a great deal about why the legislators who constructed and voted for the Act used the specific language that they did.<sup>636</sup>

As Judge Lynch wrote:

I do not cite this sorry history of opposition to equality for African-Americans, women, and gay women and men, and of the biases prevailing a half-century ago, to argue that

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631. *Id.* at 136 (Lohier, J., concurring).

632. *Id.* at 137.

633. *Id.* (Lynch, J., dissenting). Judge Lynch described his position as follows:

I would be delighted to awake one morning and learn the Congress had just passed legislation adding sexual orientation to the list of grounds of employment discrimination prohibited under Title VII . . . . I would equally be pleased to awake to learn that Congress had secretly passed such legislation more than half a century ago—until I actually woke up and realized that I must have been still asleep and dreaming. Because we all know that Congress did no such thing.

*Id.*

634. *Id.* at 138–43.

635. *Id.* at 143.

636. *Id.* at 143 (emphasis added) (citations omitted).

the private intentions and motivations of the members of Congress can trump the plain language or clear implications of a legislative enactment. (Still less, of course, do I endorse the views of those who opposed racial equality, ridiculed women's rights, and persecuted people for their sexual orientation.) Although Chief Judge Katzmann has observed elsewhere that judicial warnings about relying on legislative history as an interpretive aid have been overstated, *see* Robert A. Katzmann, *Judging Statutes* 35–39 (2014), I agree with him, and with my other colleagues in the majority, that the implications of legislation flatly prohibiting sex discrimination in employment, duly enacted by Congress and signed by the President, cannot be cabined by citing the private prejudices or blind spots of those members of Congress who voted for it. The above history makes it obvious to me, however, that the majority misconceives the fundamental *public* meaning of the language of the Civil Rights Act. The problem sought to be remedied by adding “sex” to the prohibited bases of employment discrimination was the pervasive discrimination against women in the employment market, and the chosen remedy was to prohibit discrimination that adversely affected members of one sex or the other. By prohibiting discrimination against people based on their sex, it did not, and does not, prohibit discrimination against people because of their sexual orientation.<sup>637</sup>

Indeed, Judge Lynch argued that Title VII's “because of . . . sex” clause meant exactly what the drafters of the document meant at the

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637. *Id.* Judge Lynch continued:

The words used in legislation are used for a reason. Legislation is adopted in response to perceived social problems, and legislators adopt the language that they do to address a social evil or accomplish a desirable goal. The words of the statute take meaning from that purpose, and the principles it adopts must be read in light of the problem it was enacted to address. The words may indeed cut deeper than the legislators who voted for the statute fully understood or intended: as relevant here, a law aimed at producing gender equality in the workplace may require or prohibit employment practices that the legislators who voted for it did not yet understand as obstacles to gender equality. Nevertheless, it remains a law aimed at *gender* inequality, and not at other forms of discrimination that were understood at the time, and continue to be understood, as a different kind of prejudice, shared not only by some of those who opposed the rights of women and African-Americans, but also by some who believed in equal rights for women and people of color.

*Id.* at 143–44 (emphasis in original).

time it was created.<sup>638</sup> The meaning of “sex” within “the language of the Act itself” was understood by members of Congress and the general public to create a “prohibition of discrimination . . . to secure the rights of women to equal protection in employment . . . [and] to prohibit employers from . . . [creating] workplace inequalities that held women back from advancing in the economy.”<sup>639</sup> This was constructed the same way in Title VII as it was to “protect African-Americans and other racial, national, and religious minorities from similar discrimination.”<sup>640</sup> Judge Lynch agreed with Judge Sykes in her 7th Circuit dissent of *Hively*, that in 1964, “sex” in the context of Title VII meant “biological sex” rather than “sexual orientation.”<sup>641</sup>

Judge Lynch disagrees with the majority’s view that employing Title VII to prohibit sexual orientation discrimination in the workplace is supported by the fact that the word “sex” is in the text of the statute and the word “sex” has new connotative meaning.<sup>642</sup> He states that:

[T]he fact that a prohibition on discrimination against members of one sex may have unanticipated consequences when courts are asked to consider carefully whether a given practice does, in fact, discriminate against members of one sex in the workplace does not support extending Title VII by judicial construction to protect an entirely different category of people.<sup>643</sup>

An interpretation of the words in a statute that was previously unanticipated may occur without changing the overall meaning of the statute. As Judge Lynch writes:

But such interpretations of employment “discrimination against any individual . . . based on sex” do not say anything about whether discrimination based on *other* social categories is covered by the statute. Just as Congress adopted broader language than discrimination “against women,” it adopted narrower language than “discrimination based on personal characteristics or classifications unrelated to job performance.” Title VII does not adopt a broad principle of

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638. *Id.* at 145.

639. *Id.*

640. *Id.*

641. *Id.*

642. *Id.*

643. *Id.*

equal protection in the workplace; rather, its language singles out for prohibition discrimination based on particular categories and classifications that have been used to perpetuate injustice—but not all such categories and classifications. That is not a matter of abstract justice, but of political reality. Those groups that had succeeded by 1964 in persuading a majority of the members of Congress that unfair treatment of them ought to be prohibited were included; those who had not yet achieved that political objective were not.<sup>644</sup>

To illustrate this, Judge Lynch used an example of the original prohibition on discrimination against women from equal pay and opportunity in the workplace.<sup>645</sup> He compared this original meaning to a prohibition that was adopted later, which forbade using sexual favors for advancement or bonuses, basically *quid pro quo* exchanges.<sup>646</sup> While this “Mad Men” culture was still discrimination based on sex that was not originally anticipated by the drafters of Title VII, it did not change the class of persons that it was aimed at.<sup>647</sup> Judge Lynch argued that incorporating sexual orientation within the meaning of “sex” in Title VII changed the fundamental meaning that would constitute an entirely different class of persons, rather than accounting for a previously unanticipated “matter of abstract justice.”<sup>648</sup> He also noted that there are many things that are “offensive or immoral or economically inefficient” but are not yet illegal.<sup>649</sup> Yet, “if the view that a practice is offensive or immoral or economically inefficient does not command sufficiently broad and deep political support to produce legislation prohibiting it, that practice will remain legal.”<sup>650</sup> Essentially, Judge Lynch argued that, unless Congress makes the explicit decision to protect LGBT individuals in the workplace, the courts should not use Title VII as an anchor to do so, because “simply put, discrimination based on sexual orientation is not the same thing as discrimination based on sex.”<sup>651</sup>

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644. *Id.* at 147.

645. *See id.* at 146.

646. *Id.* at 146.

647. *Id.*

648. *Id.* at 147.

649. *Id.* at 148.

650. *Id.*

651. *Id.*

Judge Lynch analyzed the majority's linguistic argument of "sex" within the context of Title VII. He acknowledged that the majority did not actually dispute the "common-sense proposition" that "sex discrimination" in the ordinary meaning of the term is not the same thing as "sexual orientation discrimination."<sup>652</sup> Rather, as Judge Lynch articulated it, "the majority argues that discrimination based on sex encompasses discrimination against gay people because discrimination based on sex encompasses any distinction between the sexes that an employer might make for any reason."<sup>653</sup> In making this argument, the majority "[read] 'discriminate' to mean pretty much the same thing as 'distinguish.'"<sup>654</sup> Judge Lynch agreed with the majority that, in the common English understanding, the definitions and usages of both words are incredibly similar.<sup>655</sup> However, in the context of statutory construction, they have two completely different meanings.<sup>656</sup> He argued that "it is an oversimplification to treat the statute as prohibiting any distinction *between* men and women in the workplace . . . [because] the law prohibits discriminating *against* members of one sex or the other in the workplace."<sup>657</sup>

Judge Lynch compared situations distinguishing between genders, which is legal in some instances, with situations discriminating against genders, which is illegal in all instances.<sup>658</sup> He stated that Title VII does not prevent creation of "separate men's and women's toilet facilities . . . separate dress codes . . ." and "some different fitness requirements."<sup>659</sup> From this premise, he raised two points:

First, it is not the case that any employment practice that can only be applied by identifying an employee's sex is prohibited. Second, neither can it be the case that any discrimination that would be prohibited if race were the criterion is equally prohibited when gender is used.<sup>660</sup>

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652. *Id.* at 149.

653. *Id.*

654. *Id.*

655. *Id.*

656. *Id.*

657. *Id.*

658. *Id.* at 149–150.

659. *Id.* at 150.

660. *Id.* at 151. Judge Lynch concludes this argument by saying:

Obviously, Title VII does not permit an employer to maintain racially segregated bathrooms, nor would it allow different-colored or different-designed bathing costumes

The next argument presented by Judge Lynch countered the “legislative inaction” argument used by the majority. He stated that the legislative inaction argument “is further supported by the movement, in both Congress and state legislatures, to enact legislation protecting gay men and women against employment discrimination.”<sup>661</sup> Of the twenty-two states that have passed such legislation, “[i]n none of those states did the prohibition of sexual orientation discrimination come by judicial interpretation of a pre-existing prohibition on gender-based discrimination to encompass discrimination on the basis of sexual orientation.”<sup>662</sup> Furthermore, as pointed out by the DOJ in its brief in this case, Congress arguably ratified certain prior judicial interpretations of “sex” in Title VII as excluding sexual orientation in amending the Civil Rights Act in 1991 and failing to address prior judicial decisions concluding that Title VII did not cover sexual orientation discrimination.<sup>663</sup> Even though Judge Lynch stated that he did not want to “rely heavily” on the “congressional actions and omissions” to define “sex,” he did find it compelling that “over twenty-five amendments ha[ve] been proposed to add sexual orientation to Title VII between 1964 and 1991,” and “[a]ll ha[ve] been rejected.”<sup>664</sup>

He summarized the above arguments by saying that merely distinguishing between genders and calling it discrimination is “the

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for white and black lifeguards. Such distinctions would smack of racial subordination and would impose degrading differences of treatment on the basis of race. Precisely the same distinctions between men and women would not . . . . A refusal to hire gay people cannot serve as a covert means of limiting employment opportunities for men or for women as such; a minority of both men and women are gay, and discriminating against them discriminates against *them*, as gay people, and does not differentially disadvantage employees or applicants of either sex. *Id.* at 151–52 (emphasis in original).

661. *Id.* at 152.

662. *Id.*

663. *Id.* at 153–154.

664. *Id.* at 154. He further states:

Although the Supreme Court has rightly cautioned against relying on legislative inaction as evidence of congressional intent, because “several equally tenable inferences must be drawn from such inaction, including the inference that the existing legislation already incorporated a change,” surely the proposal and rejection of over fifty amendments to add sexual orientation to Title VII means something. And it is pretty clear what it does *not* mean. It is hardly reasonable, in light of the EEOC and judicial consensus that sex discrimination did not encompass sexual orientation discrimination, to conclude that Congress rejected the proposed amendments because senators and representatives believed that Title VII “already incorporated the offered change.”

*Id.* at 154–55 (citations omitted) (emphasis in original).



simplistic argument.”<sup>665</sup> Noticing the gender of an individual is surely required in order to target someone for being sexually attracted to the same sex.<sup>666</sup> However, simply noticing gender “is not a fair reading of the text of the statute, and has nothing to do with the type of unfairness in employment that Congress legislated against in adding “sex” to the list of prohibited categories of discrimination in Title VII.”<sup>667</sup> By not explicitly adding sexual orientation to the list of protected classes under Title VII, Congress has yet to attack the unfairness in employment that LGBT individuals currently suffer.

Judge Lynch next addressed the other two arguments presented by the majority: the arguments for gender stereotyping and associational discrimination.<sup>668</sup> He stated that, though “[they] have the merit of attempting to link discrimination based on sexual orientation to the social problem of gender discrimination at which Title VII is aimed . . . ,” these arguments unsuccessfully try to “shoehorn sexual orientation discrimination into the statute’s verbal template of discrimination based on sex.”<sup>669</sup>

To start, Judge Lynch defined “sex stereotyping” in terms of its meaning and application in Title VII.<sup>670</sup> Judge Lynch stated that “[i]nvidious stereotyping of members of racial, gender, national, or religious groups is at the heart of much employment discrimination.”<sup>671</sup> For example, the “perception that women . . . are not suited to executive positions, or are less adept . . . can be a significant hindrance to women seeking such positions . . . even when a particular woman is demonstrably qualified . . . .”<sup>672</sup> This type of “sex stereotyping” “treats applicants or employees . . . as members of a class that is disfavored for purposes of the employment decision by reason of a trait stereotypically assigned to members of that group.”<sup>673</sup> Judge Lynch then asserted that this traditional type of sex stereotyping is discernible from stereotyping based on gender roles and norms:

Clearly, sexual orientation discrimination is not an example

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665. *Id.* at 156.

666. *Id.*

667. *Id.*

668. *Id.*

669. *Id.*

670. *Id.*

671. *Id.*

672. *Id.* at 156–57.

673. *Id.* at 157.

of that kind of sex stereotyping; an employer who disfavors a male job applicant whom he believes to be gay does not do so because the employer believes that most men are gay and therefore unsuitable. Rather, he does so because he believes that most *gay* people (whether male or female) have some quality that makes them undesirable for the position, and that because this applicant is gay, he must also possess that trait. Although that is certainly stereotyping, and invidiously so, it does not stereotype a group protected by Title VII, and is therefore not (yet) illegal.<sup>674</sup>

Judge Lynch acknowledged that this “is not the only way in which stereotyping can be an obstacle to protected classes of people in the workplace.”<sup>675</sup> For example, stereotyping can also include beliefs about how people within a certain group *should* behave.<sup>676</sup> This was exactly the type of discrimination based on gender stereotypes that the Supreme Court sought to prohibit in its decision in *Price Waterhouse*. Judge Lynch stated that “[n]ot only does such discrimination require women to behave differently in the workplace than men, but it also actively deters women from engaging in kinds of behavior that are required for advancement in certain positions.”<sup>677</sup> The “systematic disadvantage” that this type of stereotyping creates is the crux of the argument for its inclusion under Title VII’s protection, because it disadvantages one sex over another.<sup>678</sup>

However, Judge Lynch, agreeing with Judge Syke’s dissent in *Hively*, argued that employers discriminating based on sexual orientation are not “deploying” the sort of stereotyping recognized in

674. *Id.*

675. *Id.*

676. *Id.* As Judge Lynch writes:

The stereotyping discussed above involves beliefs about how members of a particular protected category *are*, but there are also stereotypes (or more simply, beliefs) about how members of that group *should be*. In the case of sex discrimination in particular, stereotypes about how women ought to look or behave can create a double bind. For example, a woman who is perceived through the lens of a certain “feminine” stereotype may be assumed to be insufficiently assertive for certain positions by contrast to men who, viewed through the lens of a “masculine” stereotype, are presumed more likely to excel in situations that demand assertiveness. At the same time, the employer may fault a woman who behaves as assertively as a male comparator for being *too* aggressive, thereby failing to comply with societal expectations of femininity.

*Id.* (emphasis in original).

677. *Id.* at 158.

678. *Id.*

*Price Waterhouse*.<sup>679</sup> Judge Lynch summed up this argument as follows:

But as Judge Sykes points out in her *Hively* dissent, the homophobic employer is not deploying a stereotype about men or about women to the disadvantage of either sex. Such an employer is expressing disapproval of the behavior or identity of a class of people that includes both men and women. 853 F.3d at 370. That disapproval does not stem from a desire to discriminate against either sex, nor does it result from any sex-specific stereotype, nor does it differentially harm either men or women vis-à-vis the other sex. Rather, it results from a distinct type of objection to anyone, of whatever gender, who is identified as homosexual. The belief on which it rests is not a belief about what men or women ought to be or do; it is a belief about what *all* people ought to be or do—to be heterosexual, and to have sexual attraction to or relations with only members of the opposite sex. That does not make workplace discrimination based on this belief better or worse than other kinds of discrimination, but it does make it something different from sex discrimination, and therefore something that is not prohibited by Title VII.<sup>680</sup>

According to Judge Lynch, if conduct is truly discriminatory because of gender, then the discriminatory conduct by the employer must single out one specific gender to be advantaged to the disadvantage of the other gender. Based on Judge Lynch's analysis, in order to be prohibited by Title VII, the discrimination cannot be applied equally to both genders.

Judge Lynch then turned to the "associational discrimination" argument offered by the majority, which he found unpersuasive.<sup>681</sup> He says that the kind of discrimination against Zarda is "not discrimination of the sort at issue in either *Holcomb* [or] *Barrett*."<sup>682</sup> Those cases involved employers who discriminated against employees because they associated with someone of a different ethnicity or race;

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679. *Id.* at 157–58.

680. *Id.* at 158.

681. *Id.*

682. *Id.* at 160.

clearly protected groups under Title VII.<sup>683</sup> In the case of Zarda, however, no facts or explanations exist in the record that would reasonably lead someone to believe that the employer discriminated against Zarda because he associated with another male.<sup>684</sup> Rather, the employer discriminated against Zarda because he associated with a gay man.<sup>685</sup> Judge Lynch argues that “[a]n employer who practices such discrimination is hostile towards gay men, not to men in general; the animus runs not, as in the race and religion cases . . . against a ‘protected group’ to which the employee’s associates belong, but against an (alas) *unprotected* group . . . gay men.”<sup>686</sup> Since LGBT persons are not expressly a protected group under Title VII, the associational discrimination argument falls short.<sup>687</sup>

Judge Lynch acknowledged that the arguments presented on both sides of this issue ultimately depend on how one characterizes discrimination based on sex.<sup>688</sup> However, because sexual orientation is not an enumerated protected class in the language of Title VII, the majority is required to “reconceptualize discrimination on the basis of sexual orientation as discrimination on the basis of sex.”<sup>689</sup> For “if the law expressly prohibited sexual orientation discrimination,” no reason would exist for this “recharacterization” and no reasonable opponent could argue that Title VII did not protect individuals from being discriminated on such grounds.<sup>690</sup> The majority argues that “discrimination against gay people is nothing more than a subspecies of discrimination against one or the other gender.”<sup>691</sup> Judge Lynch agrees that the majority is correct in attempting to halt this discrimination because “it denies the dignity and equality of gay men and lesbians.”<sup>692</sup> However, according to Judge Lynch, this type of discrimination cannot be said “to [fundamentally] treat men differently from women” within the “evident meaning of the language of Title VII.”<sup>693</sup> To conclude that Title VII prohibits discrimination

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683. *Id.*

684. *Id.*

685. *Id.*

686. *Id.*

687. *Id.* at 161–62.

688. *Id.* at 161.

689. *Id.*

690. *Id.* at 162.

691. *Id.*

692. *Id.*

693. *Id.*

based on sexual orientation is to ignore the language of the statute, “the social realities that distinguish [] the kinds of biases that the statute sought to exclude . . . and the distinctive nature of anti-gay prejudice.”<sup>694</sup> For all these reasons, Judge Lynch concludes that the arguments of the majority fail.<sup>695</sup>

Finally, Judge Lynch examined how the laws have evolved since 1964 following the passage of the Civil Rights Act. While, during that time, both the Supreme Court and State governments have taken significant steps to help protect LGBT individuals, none of those decisions supports the argument that Title VII protects Zarda from sexual orientation discrimination.<sup>696</sup> Judge Lynch asserts that “none of the Supreme Court” cases supporting gay rights “depend on the argument that laws disadvantaging” gays violate equal protection based on gender.<sup>697</sup> Instead, these cases were decided “based on the guarantee of ‘liberty’ embodied in the Fourteenth Amendment.”<sup>698</sup> Additionally, Judge Lynch notes that “[t]he Supreme Court’s decisions in this area are based on the Constitution . . . rather than a specific statute, and the role of the courts in interpreting the Constitution is distinctively different from their role in interpreting acts of Congress.”<sup>699</sup>

Essentially, Judge Lynch argues that while the Constitution is broad, moldable, and able to accommodate societal changes, statutes are enacted to more minutely define rules that encompass those changes.<sup>700</sup> In this case, the court is not presented with a Constitutional question, which might allow some flexibility in interpreting meaning and application.<sup>701</sup> Rather, in this case, the court is tasked with interpreting the language of Title VII; which has been narrowly tailored and custom-fit for the problems it was intended to tackle, which does not encompass sexual orientation discrimination.<sup>702</sup> Therefore, Judge Lynch argues that the court is compelled to “respect the choices made by Congress about which social problems to address,

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694. *Id.*

695. *Id.*

696. *Id.* at 162–63.

697. *Id.* at 163.

698. *Id.*

699. *Id.*

700. *Id.* at 165.

701. *Id.* at 166.

702. *See id.* at 164–66.

and how to address them.”<sup>703</sup> For these textualist reasons, Judge Lynch disagreed with the interpretation of the reach of Title VII adopted by the majority.<sup>704</sup>

In separate dissents, Judge Livingston<sup>705</sup> and Judge Raggi<sup>706</sup> agreed with the textual analysis offered by Judge Lynch and joined in those parts of his dissent. For her part, Judge Livingston expressly did not sign on to the constitutional discussion contained in the dissent of Judge Lynch, but did agree with his textual analysis.<sup>707</sup>

On May 29, 2018, following the en banc decision by the court of appeals, Altitude Express filed a Petition for a Writ of Certiorari, asking the Supreme Court to review the decision of the court of appeals.<sup>708</sup> In the petition, the Supreme Court was asked to answer the following question:

Whether the prohibition in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1), against employment discrimination “because of . . . sex” encompasses discrimination based on an individual’s sexual orientation.<sup>709</sup>

As of January 1, 2019, the Supreme Court had yet to consider the Petition for a Writ of Certiorari.

## VI. CONCLUSION

As seen in both the decision by the en banc Seventh Circuit in *Hively* and by the en banc Second Circuit in *Zarda*, arguments against including a prohibition against sexual orientation discrimination within Title VII’s prohibition against discrimination “because of sex” are rooted in a rigid and false dichotomy between one’s status as a gendered sexual being and one’s conduct as that same gendered sexual being. Lived gender is seen as disconnected from the status of gender.

703. *Id.* at 166.

704. *Id.* at 167.

705. *Id.* at 167 (Livingston, J., dissenting).

706. *Id.* at 169 (Raggi, J., dissenting).

707. *Id.* at 168. As Judge Livingston wrote:

I agree with Judge Lynch . . . that constitutional and statutory interpretation should not be confused: that while courts sometimes may be called upon to play a special role in defending constitutional liberties against encroachment by *government*, in statutory interpretation, courts “are not in the business of imposing on private actors new rules that have not been embodied in legislative decision.”

*Id.* (Livingston, J., dissenting) (emphasis in original) (citations omitted).

708. Petition for Writ of Certiorari, *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018) (No. 17-623).

709. *Id.* at i.

Courts have historically allowed workplace discrimination cases brought by gay or lesbian persons to advance under the rubric of Title VII only when it could be shown that the discrimination was based on the failure of the effeminate gay man or the butch lesbian woman to conform to accepted lived gender expectations.<sup>710</sup>

Historically, society and courts have been locked in a biological binary understanding of gender, attempting to place individuals in the narrow-gendered boxes that the law seems to require. The narrow-gendered boxes have been treated as if they are void of any constitutive conduct that defines who is understood to fit within the narrow-gendered box. However, the expansion of the protections provided by *Price Waterhouse* and its progeny allow for a much broader view of gender and of the protections provided by the law against discrimination because of sex. The sexual stereotyping theory seen in *Price Waterhouse* and its progeny transgresses traditional binary notions of gender by recognizing that the protections provided by antidiscrimination laws encompass discrimination based on a nonconforming gender expression that flows organically from an individual's gender identity.<sup>711</sup>

Gay and lesbian individuals live lives that are, at the core, significantly distinct from the traditional societal expectations of how men and women are to live out their lives. Sylvia Law describes the importance of this, writing:

Both women and homosexual people appeal to venerable liberal values. A core feminist claim is that women and men should be treated as individuals, not as members of a sexually determined class. This claim rejects notions that gender characteristics are natural, immutable and universal. Similarly, homosexuals' claim to freedom from state suppression relies upon classical liberal ideals of individual liberty and equal personhood, rejecting the notion that heterosexual attraction is natural and universal.

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710. See William N. Eskridge, *Title VII's Statutory History and the Sex Discrimination Argument for LGBT Workplace Protections*, 127 YALE L.J. 322, 353, 373 (2017).

711. Sonia Katyal, *The Numerus Clausus of Sex*, 84 U. CHI. L. REV. 389, 479 (2017); see also *id.* at 492 (“[A] related possibility is to simply interpret gender identity to include gender expression, instead of describing it as a separate category. For example, gender identity, at least in an earlier version of the ENDA federal bill, is defined as ‘the gender-related identity, appearance, or mannerisms or other gender-related characteristics of an individual, with or without regard to the individual’s designated sex at birth.’”).

....

Gay and women's liberation built on these experiences through mutually reinforcing processes. By talking about their own experiences, women came to understand the dynamic that had for so long prevented them from asserting even straightforward claims to equal treatment in the public and economic spheres. Traditional concepts of gender cast man as strong, woman subservient; man as not responsible for family care, woman as nurturant; man as sexually aggressive, and woman as passive victim, whether virgin or whore. These social meanings ascribed to gender shape our ideas about who we are. The social and economic arrangements built upon gender shape the texture of our daily lives. Under the normal prevailing arrangements of market and family, the woman pays a price for the warmth, support and legitimacy of family: she subordinates her capacity to achieve and contribute in the public world to the nurturing needs of children, parents and men. Multiple cultural messages, and the material reality of women's second-class position as wage workers, define the search for a husband as the central goal of women's lives. Even today most people believe that a successful marriage demands that the man be older, stronger, smarter, and better-paid than the woman.<sup>712</sup>

What could possibly be more transgressive of normative gendered stereotypes than a woman sexually attracted to other women or a man sexually attracted to other men? Andrew Koppelman has described this transgression as follows:

[T]he taboo against homosexuality reinforces the inequality of the sexes, and that is, at least in large part, why the taboo exists. From an antidiscrimination perspective, the problem with the prohibitions of both miscegenation and homosexuality is not that they interfere with individual liberty—the incest prohibition also interferes with sexual freedom—but the reasons for the interference. To say it once more: The equal respect that the state owes its citizens, and that the citizens owe one another, is incompatible with the

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712. See Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 207–08 (footnotes omitted).



idea that sexual penetration is a nasty, degrading violation of the self, and that there are some people (black women, or women simpliciter) to whom, because of their inferior social status, it is acceptable to do it, and others (white women, or men) who, because of their superior social status, must be rescued (or, if necessary, forcibly prevented) from having it done to them.<sup>713</sup>

It is utterly impossible to separate what is discrimination based on sexual orientation from discrimination based on a failure to conform to gender stereotypes.<sup>714</sup> Judge Rosenbaum followed this same logic in her dissent in *Evans*, when she concluded that “when a woman

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713. See Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 284 (1994).

714. As Judge Katzmann wrote in his concurrence in *Christiansen*:

Relying on common sense and intuition rather than any “special training,” *see Back*, 365 F.3d at 120 (quoting *Price Waterhouse*, 490 U.S. at 256, 109 S.Ct. 1775), courts have explained that sexual orientation discrimination “is often, if not always, motivated by a desire to enforce heterosexually defined gender norms. In fact, stereotypes about homosexuality are directly related to our stereotypes about the proper roles of men and women . . . . The gender stereotype at work here is that ‘real’ men should date women, and not other men,” *Centola v. Potter*, 183 F.Supp.2d 403, 410 (D. Mass. 2002); *see also Boutillier v. Hartford Pub. Sch.*, No. 3:13-CV-01303-WWE, 2016 WL 6818348 (D. Conn. Nov. 17, 2016) (“[H]omosexuality is the ultimate gender non-conformity, the prototypical sex stereotyping animus.”). Indeed, we recognized as much in *Dawson* when we observed that “[s]tereotypical notions about how men and women should behave will often necessarily blur into ideas about heterosexuality and homosexuality.” 398 F.3d at 218 (alteration in original) (internal quotation marks omitted) Having conceded this, it is logically untenable for us to insist that this particular gender stereotype is outside of the gender stereotype discrimination prohibition articulated in *Price Waterhouse*.

Numerous district courts throughout the country have also found this approach to gender stereotype claims unworkable. *See, e.g., Videckis v. Pepperdine Univ.*, 150 F.Supp.3d 1151, 1159 (C.D. Cal. 2015) (collecting cases) (“Simply put, the line between sex discrimination and sexual orientation discrimination is ‘difficult to draw’ because that line does not exist, save as a lingering and faulty judicial construct.”). The binary distinction that *Simonton* and *Dawson* establish between permissible gender stereotype discrimination claims and impermissible sexual orientation discrimination claims requires the factfinder, when evaluating adverse employment action taken against an effeminate gay man, to decide whether his perceived effeminacy or his sexual orientation was the true cause of his disparate treatment. *See Fabian v. Hosp. of Cent. Connecticut*, 172 F.Supp.3d 509, 524 n.8 (D. Conn. 2016). This is likely to be an exceptionally difficult task in light of the degree to which sexual orientation is commingled in the minds of many with particular traits associated with gender. More fundamentally, carving out gender stereotypes related to sexual orientation ignores the fact that negative views of sexual orientation are often, if not always, rooted in the idea that men should be exclusively attracted to women and women should be exclusively attracted to men—as clear a gender stereotype as any.

*Christiansen v. Omnicom Grp., Inc.*, 852 F.3d 195, 205–06 (2d Cir. 2017) (Katzmann, J., concurring) (alterations in original); *see also Kreis, supra* note 497, at 4–9.

alleges . . . that she has been discriminated against because she is a lesbian, she necessarily alleges that she has been discriminated against because she failed to conform to the employer’s image of what women should be—specifically, that women should be sexually attracted to men only.”<sup>715</sup>

In *The Numerus Clausus of Sex*, Sonia Katyal argued for recognition of a much more robust understanding of gender pluralism, centering the power of defining gender in the individual, rather than in the law, the school, or the state in some other fashion.<sup>716</sup> Approaching the prohibition against discrimination based on sex contained in Title VII from a stance of gender pluralism that allows an individual’s claim of gender identity to emerge organically from his or her lived experience would allow the law to provide broader protection against discrimination based on sex. This broad protection would reject a rigid and unequal binary understanding of gender, and would embrace the myriad ways in which gender identity is experienced, defined, and, ultimately, expressed. Tying together the plurality of gender identity and the manner in which that identity is expressed does not result in a wholesale rejection of current Title VII jurisprudence. In fact, tying these ideas together is consistent with the gender stereotyping jurisprudence that the courts have developed in the context of Title VII following *Price Waterhouse*.<sup>717</sup>

715. *Evans v. Ga. Reg’l Hosp.*, 850 F.3d 1248, 1261 (11th Cir. 2017) (Rosenbaum, J., concurring in part and dissenting).

716. See Katyal, *supra* note 711, at 479; see also *id.* at 475 (“Years ago, Professor Mary Dunlap noted, ‘If the individual’s authority to define sex identity were to replace the authority of law to impose sex identity, many of the most difficult problems currently associated with the power of government to probe, penalize, and restrict basic freedoms of sexual minorities would be resolved.’ As Currah has brilliantly noted, Dunlap’s transformative project has become obscured, largely due to the deployment of legal arguments that serve to reify, rather than challenge, the dominance of gender norms. The result of this approach risks what Currah describes as a ‘pyrrhic’ victory, one that disadvantages not just gender nonconforming and transgender individuals, but many others who fall outside those categories as well.” (footnotes omitted)); Paisley Currah, *Defending Genders: Sex and Gender Non-conformity in the Civil Rights Strategies of Sexual Minorities*, 48 HASTINGS L.J. 1363, 1364 (1997); Mary C. Dunlap, *The Constitutional Rights of Sexual Minorities: A Crisis of the Male/Female Dichotomy*, 30 HASTINGS L.J. 1131, 1132–39 (1979); Sonia Katyal, *Exporting Identity*, 14 YALE J.L. & FEMINISM 97, 133–48 (2002); Gayle Rubin, *Of Catamites and Kings: Reflections on Butch, Gender, and Boundaries*, in THE TRANSGENDER STUDIES READER 471, 479 (Susan Stryker & Stephen Whittle eds., 2006); Susan Stryker, *(De)Subjugated Knowledges: An Introduction to Transgender Studies*, 1 THE TRANSGENDER STUD. READER 1, 14 (Susan Stryker & Stephen Whittle eds., 2006).

717. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). See generally Katyal, *supra* note 711, at 491–92 (“[A] focus on expression starts from a wholly different vantage point. Rather than addressing the state as a benign protector, the state might be viewed through a comparably more

The core purpose of Title VII was to “strike at the *entire spectrum* of disparate treatment of men and women resulting from sex stereotypes.”<sup>718</sup> Over time, courts concluded that, likewise, Title VII was also intended “protect . . . male employees” from restrictions that restricted men’s liberty and reinforced the traditional hierarchy of gender roles.<sup>719</sup> In both *Price Waterhouse* and *Oncale*, the Supreme Court concluded that Title VII not only bars formal sex discrimination, but that it also prohibits discrimination based on historical obsolete stereotypes about how each gender should behave.<sup>720</sup> Since the adoption of Title VII, courts have progressively expanded the understanding of the reach of the protections provided under Title VII, but the fundamental goal of striking at the heart of restrictions in the workplace based on gendered stereotypes has remained unchanged.

The drafters of Title VII understood that “the enforcement of traditional sex and family roles” has long been uniquely “detrimental to women and their families.”<sup>721</sup> Yet, allowing employers to discriminate against gay or lesbian persons because they openly live out this transgressive element of their being serves to reinforce these traditional sex and family roles. Allowing discrimination based on sexual orientation confirms this gendered hierarchy by furthering the belief that men and women have constitutively *different* roles and responsibilities in the world, such that it is violative of a traditional and natural norm for men or women to undertake familial, sexual, and expressive activities believed to be reserved for the other sex. According to Catharine MacKinnon, “[w]hen perceived and punished as gay men and lesbian women, [individuals] are discriminated against for flouting gender hierarchy, for failing to conform to male-dominant society’s requirements for women and femininity, men and

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suspicious lens. The concern about state regulation stems from a desire to protect expression and avoid the coercion of conformity, which is closely linked to traditional First Amendment jurisprudence. A more pluralist model would include the term ‘gender identity *and expression*,’ which broadens its protections beyond gender dysphoric individuals alone.” (emphasis added) (footnotes omitted)).

718. *Cty. of Washington v. Gunther*, 452 U.S. 161, 180 (1981) (quoting *Los Angeles Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)).

719. *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 681–82 (1983).

720. *See Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (concluding that an employer may not fire a man because the employer believes that he is too soft-spoken or more effeminate than a man is expected to be); *Price Waterhouse*, 490 U.S. at 256 (holding that an employer may not refuse to promote a woman because the employer believes that she is more “aggressive” than a woman is expected to be).

721. Franklin, *supra* note 35, at 1326.

masculinity.”<sup>722</sup>

Concluding that discrimination based on sexual orientation is not discrimination “because of sex” is to further the misunderstanding that sex discrimination is primarily about women, while sexual orientation discrimination is primarily about gay and lesbian persons. In fact, both of these forms of discrimination are ultimately about the elevation of masculinity over femininity and the traditional demand on normative gender performance in order to preserve this hierarchy. “Reading gender to be essentially about women does not capture the relational nature of gender, the role of power relations, and the way that structures of subordination are reproduced.”<sup>723</sup>

Separating an individual’s sexual orientation from their manner of living that reality out in the world is “an exceptionally difficult task in light of the degree to which sexual orientation is commingled in the minds of many with particular traits associated with gender.”<sup>724</sup> The result of this inseparable intersection between gendered expectations and sexual orientation is that the refusal to see the transgressive nature of sexual orientation as a violation of gender norms results in a diminution of the protection provided by Title VII, rooted in the acceptance of the general hierarchy of male superiority as normative.

In *Price Waterhouse*, Justice Brennan wrote:

[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for “[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

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722. CATHARINE A. MACKINNON, *SEX EQUALITY* 1068–69 (3d ed. 2016); see also Catharine A. MacKinnon, *The Road Not Taken: Sex Equality in Lawrence v. Texas*, 65 OHIO ST. L.J. 1081, 1085 (2004); Cass R. Sunstein, *Homosexuality and the Constitution*, 70 IND. L.J. 1, 18 (1994).

723. Hilary Charlesworth, *Not Waiving but Drowning: Gender Mainstreaming and Human Rights in the United Nations*, 18 HARV. HUM. RTS. J. 1, 15 (2005). As Catharine MacKinnon explains it:

Male inviolability and female violation are cardinal tenets of gender hierarchy. If men can do to men what men do to women sexually, women’s sexual place as man’s inferior is not a given, natural one, because a biological male can occupy it. That male sexual aggression could be directed at a biological male vitiates the biological basis upon which gender inequality ideologically rests.

MACKINNON, *SEX EQUALITY*, *supra* note 722, at 1354.

724. *Christiansen v. Omnicom Grp., Inc.*, 852 F.3d 195, 205–06 (2d Cir. 2017) (Katzmann, J., concurring).

stereotypes.”<sup>725</sup>

The trail leading from *Price Waterhouse*, with Justice Brennan’s insistence that Title VII was intended to cover the “entire spectrum” of gender stereotypes, through the decisions in *Hively*, *Zarda*, and *Evans* inevitably lead one to the conclusion that discrimination against persons based on sexual orientation is discrimination “because of sex.”

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725. *Price Waterhouse*, 490 U.S. at 251 (second alteration in original) (quoting *City of L.A. Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)).