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Let's Talk About Sex: A Discussion of Sexual Orientation Discrimination Under Title VII

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LET’S TALK ABOUT SEX: A DISCUSSION OF SEXUAL ORIENTATION DISCRIMINATION UNDER TITLE VII

Abstract: On July 18, 2018, the Eleventh Circuit Court of Appeals held, in *Bostock v. Clayton County Board of Commissioners*, that Title VII does not protect against discrimination on the basis of sexual orientation in the workplace. To the Eleventh Circuit, sexual orientation discrimination is distinct from sex discrimination, which the statute explicitly prohibits. Many courts continue to follow this traditional rule and agree with the Eleventh Circuit’s decision. The Second and Seventh Circuits, however, have instead followed the guidance of the Equal Opportunity Employment Commission (EEOC), the federal agency that enforces Title VII, and held the opposite. The Supreme Court has not directly addressed the question of whether Title VII’s ban on discrimination “because of . . . sex” also protects against sexual orientation discrimination in particular, but that may not be the case for long. This Comment argues, ahead of the Supreme Court’s anticipated decision in the *Bostock* appeal, that the Supreme Court should follow the guidance of the EEOC and definitively hold that sexual orientation discrimination in the workplace is prohibited by Title VII. By doing so, the Supreme Court will remain faithful to the purpose of Title VII—equality in the workplace—and will follow its own precedent that has laid the groundwork for a more expansive reading of “because of . . . sex.”

INTRODUCTION

If somebody told you that, in 2020, it is legal to fire an employee because that person is gay, would you believe it?¹ Or would you think that in a country where it is now legal to marry whomever you wish, this type of employment discrimination has been eliminated?² Although many may be surprised to learn that Title VII of the Civil Rights Act does not prohibit all forms of sexual ori-

¹ See Jack B. Harrison, *Because of Sex*, 51 LOY. L.A. L. REV. 91, 98–99 (2018) (providing an overview of the inconsistencies across jurisdictions regarding protections against sexual orientation discrimination in the workplace). “Sexual orientation” refers to a person’s sexual or romantic preferences for others. *Glossary of Terms*, HUMAN RIGHTS CAMPAIGN, <https://www.hrc.org/resources/glossary-of-terms> [<https://perma.cc/DFL4-LJEC>]. Currently, it is legal to fire someone on the basis of sexual orientation in the majority of states. Harrison, *supra*, at 98–99.

² Harrison, *supra* note 1, at 95–96. There has been significant progress towards inclusion and equality for the LGBTQ community, especially following the legalization of same-sex marriage, but there are still significant shortcomings under current law, including the fact that no federal employment protection exists. *Id.*

entation discrimination in the workplace, this is an issue that courts across the country continue to address.³

Much of the present-day discussion centers around the meaning of “sex” under Title VII, a federal statute aimed at eliminating workplace discrimination.⁴ Some courts find that Congress intended for Title VII’s prohibition against discriminating “because of . . . sex” to forbid only gender-based discrimination, whereas others interpret the meaning of sex more broadly and believe it extends to discrimination on the basis of sexual orientation as well.⁵ Despite the existing inconsistencies regarding what constitutes sex discrimination under Title VII, a definitive answer may be on the horizon.⁶ On July 1,

³ See *Bostock v. Clayton Cty. Bd. of Comm’rs*, 723 F. App’x 964, 964 (11th Cir. 2018) (holding that Title VII does not protect against discrimination based on sexual orientation in accordance with the Eleventh Circuit’s precedent), *cert. granted*, 139 S. Ct. 1599 (2019); *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 351–52 (7th Cir. 2017) (holding that sexual orientation discrimination is a cognizable claim under Title VII); see also *Harrison*, *supra* note 1, at 121 (articulating the increasing willingness of courts to address questions regarding the reach of Title VII and the inconsistencies across jurisdictions). A cognizable claim is one that can be heard and decided by a court after establishing standing. *Cognizable*, BLACK’S LAW DICTIONARY (11th ed. 2019). The current “patchwork of laws and policies” often does not reflect the belief of many Americans who assume that Title VII does already prohibit discrimination on the basis of sexual orientation. *Harrison*, *supra* note 1, at 99–100.

⁴ 42 U.S.C. § 2000e-2(a)(1) (2018) (“It shall be an unlawful employment practice for an employer . . . to fail to refuse or to hire 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”); see *Harrison*, *supra* note 1, at 103 (noting that the definitions for “sex” and “discrimination” are ambiguous because Title VII’s text does not clearly define either term); Vicki Schultz, *Taking Sex Discrimination Seriously*, 91 DENV. U. L. REV. 995, 999 (2015) (noting the literature and movements that have worked over the past three decades to give meaning to anti-discrimination laws and equality, including the women’s rights, civil rights, and gay rights movements). “Sex” refers to a person’s anatomical composition assigned at birth whereas “gender” relates to one’s understanding of self as male, female, both, or neither. See *Glossary of Terms*, *supra* note 1. One’s gender and biological sex do not always align and sexual orientation can depend on how one identifies and expresses sexual preferences, regardless of biological sex. See *id.*

⁵ 42 U.S.C. § 2000e-2(a)(1). Compare *Hively*, 853 F.3d at 340 (holding that sexual orientation discrimination is a form of sex discrimination within the meaning of Title VII), with *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979) (holding that Title VII does not prohibit an employer from making employment decisions based on a person’s sexual orientation).

⁶ See *Bostock*, 723 F. App’x at 964 (affirming dismissal of a sexual orientation discrimination claim because it is not a cognizable Title VII claim in the Eleventh Circuit); Monthly Argument Calendar October 2019, Supreme Court of the U. S., https://www.supremecourt.gov/oral_arguments/argument_calendars/MonthlyArgumentCalOctober2019.pdf [<https://perma.cc/TNW5-HN8A>] (indicating that the Supreme Court heard oral arguments in *Bostock* on October 8, 2019); see also Amy Howe, Court Releases October Calendar, SCOTUSBLOG (July 1, 2019, 2:58 PM), <https://www.scotusblog.com/2019/07/court-releases-october-calendar-2> [<https://perma.cc/ABK7-8Q7A>] (stating that the Supreme Court was asked to determine the scope of Title VII as it related to sexual orientation discrimination in the cases *Bostock* and *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 108 (2d Cir. 2018)). The Eleventh Circuit will not overturn precedent without a contrary decision from the Supreme Court or an en banc decision, where all judges participate. See *Bostock*, 723 F. App’x at 964–65 (remaining consistent with the Eleventh Circuit’s precedent that sexual orientation discrimination is not prohibited by Title VII); *En Banc*, BLACK’S LAW DICTIONARY (11th ed. 2019) (referring to when all the judges of a court participate).

2019, the Supreme Court released its October oral argument calendar and included *Bostock v. Clayton County Board of Commissioners*, an Eleventh Circuit appeal, as one of the cases.⁷ The central question in *Bostock* is whether Title VII's prohibition against discrimination "because of . . . sex" includes sexual orientation discrimination.⁸ On May 10, 2018, the Eleventh Circuit Court of Appeals in *Bostock* affirmed that discrimination on the basis of sexual orientation is *not* prohibited by Title VII, but will the Supreme Court use this as an opportunity to decide otherwise?⁹

Ahead of the Supreme Court's upcoming decision in *Bostock*, this Comment argues that, based on the Supreme Court's precedent and the judicial trend towards expanding the traditional understanding of "because of . . . sex," the Supreme Court should use this as an opportunity to explicitly prohibit sexual orientation discrimination under Title VII.¹⁰ Part I provides background information about Title VII, including its legislative intent and history, and introduces the *Bostock* case.¹¹ Part II provides a closer look at the Supreme Court's prior decisions addressing the scope of Title VII and examines how various circuit courts and the U.S. Equal Employment Opportunity Commission (EEOC) have used those cases to inform their interpretations of "because of . . . sex" in the context of workplace discrimination.¹² Part III then discusses the concept of "associational discrimination" in the context of sex discrimination, an idea previously reserved for racial discrimination but advanced by the

⁷ *Monthly Argument Calendar October 2019*, *supra* note 6. The Court consolidated oral arguments for *Bostock* with *Zarda*, where the Second Circuit held that sexual orientation discrimination is a cognizable claim under Title VII. *Zarda*, 883 F.3d at 108; Howe, *supra* note 6. In *Zarda*, a skydiving instructor was fired after a client claimed she had been inappropriately touched by Zarda after he disclosed he was gay. 883 F.3d at 108–09. Zarda denied this allegation and filed a Title VII claim for being discriminated against on the basis of his sexual orientation and gender. *Id.* at 109. By deciding on these two cases, the Supreme Court will be answering the question of whether Title VII protects against discrimination on the basis of sexual orientation. Howe, *supra* note 6.

⁸ Petition for Writ of Certiorari at i, *Bostock v. Clayton Cty.*, No. 17-1618 (U.S. May 25, 2018).

⁹ See *Bostock*, 723 F. App'x at 964–65 (emphasizing the Eleventh Circuit's prevailing rule that sexual orientation discrimination is not a cognizable claim under Title VII). The Eleventh Circuit proceeded to vote against a rehearing en banc. *Bostock v. Clayton Cty. Bd. of Comm'rs*, 894 F.3d 1335, 1335 (11th Cir. 2018); see Petition for Writ of Certiorari, *supra* note 8, at i (stating the question for the Supreme Court to answer).

¹⁰ See *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 82 (1998) (establishing that same-sex sexual harassment is a cognizable claim under Title VII, a further expansion of the definition of "because of . . . sex"); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250–51 (1989) (holding that claims where the plaintiff shows that discrimination is on the basis of sex stereotyping—where an employer acts on the basis that an employee must adhere to traditional gender norms and behaviors—are cognizable under Title VII); *Hively*, 853 F.3d at 351–52 (holding that sexual orientation discrimination is a cognizable claim under Title VII because sex discrimination encompasses discrimination on the basis of sexual orientation).

¹¹ See *infra* notes 15–40 and accompanying text.

¹² 42 U.S.C. § 2000e-2(a)(1); see *infra* notes 41–80 and accompanying text.

EEOC.¹³ This Comment ultimately argues that the Supreme Court should follow the EEOC’s precedent and definitively hold that sexual orientation discrimination is prohibited under Title VII of the Civil Rights Act of 1964.¹⁴

I. HISTORY OF TITLE VII, SEX DISCRIMINATION, AND *BOSTOCK*

Title VII of the Civil Rights Act of 1964 eliminates discrimination on the basis of race, color, religion, sex, or national origin in the workplace.¹⁵ The legislative history of Title VII, discussed in Section A, provides a helpful backdrop for understanding the circuit split illustrated by the *Bostock* case described in Section B.¹⁶

A. Legislative History of Title VII and Sexual Orientation Discrimination in the Workplace

The scant legislative history of Title VII’s prohibition on sex discrimination leaves significant room for interpretation by the courts.¹⁷ At its core, Title VII makes it unlawful for an employer to make employment-related decisions because of a person’s race, color, religion, sex, or national origin.¹⁸ Despite being defined in the statute, courts have continued to differ in interpreting the statute’s reference to discrimination “because of . . . sex.”¹⁹

Oftentimes, the varying interpretations have been attributed to the limited legislative history surrounding the inclusion of “sex” among the statute’s protected classes.²⁰ The legislative record only shows one afternoon of debate re-

¹³ See *infra* notes 81–97 and accompanying text.

¹⁴ See *infra* notes 81–97 and accompanying text.

¹⁵ 42 U.S.C. § 2000e-2(a)(1) (2018).

¹⁶ See *infra* notes 17–40 and accompanying text.

¹⁷ See Harrison, *supra* note 1, at 103 (noting that the limited legislative history has contributed to debates about the meaning of sex discrimination among scholars and courts alike).

¹⁸ 42 U.S.C. § 2000e-2(a)(1) (“It shall be an unlawful employment practice for an employer . . . to fail to refuse or to hire 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”); see also Marc Chase McAllister, *Extending the Sex-Plus Discrimination Doctrine to Age Discrimination Claims Involving Multiple Discriminatory Motives*, 60 B.C.L. REV. 469, 470–71 (2019) (explaining that discrimination claims ordinarily stem from instances when an employer treats employees of one protected class differently from other employees). A protected class is one that receives explicit protection from a statute. *Protected Class*, BLACK’S LAW DICTIONARY, *supra* note 3. When an employer discriminates on the basis of a combination of protected traits, such as race and sex together, this is referred to as a “multiple-motive” claim. McAllister, *supra*, at 471.

¹⁹ 42 U.S.C. § 2000e(k) (focusing on conditions relating to pregnancy and childbirth). Compare *Bostock*, 723 F. App’x at 964–65 (affirming that claims of sexual orientation discrimination are not cognizable under Title VII in the Eleventh Circuit) with *Hively*, 853 F.3d at 351–52 (holding that Title VII prohibits discrimination on the basis of sexual orientation in the Seventh Circuit).

²⁰ See Harrison, *supra* note 1, at 103 (detailing the seemingly last-minute addition of “sex” to the statute and arguments that are put forward to infer intent from these circumstances, including questionable motives).

lating to the inclusion of “sex” in the Act.²¹ Furthermore, there has been speculation that House Rules Committee Chairman Howard Smith added the term as a sabotage attempt, which only contributes to the ambiguity regarding legislative intent.²² Coupled with the lack of guidance from the Supreme Court, the precise meaning and scope of discrimination on the basis of sex is still largely undefined.²³

The present Title VII-related debate focuses on the LGBTQ community²⁴ and whether discrimination based on sexual orientation is captured by Title VII.²⁵ One in four LGBTQ employees reported discrimination because of their sexual orientation in the past five years, and one in three LGBTQ employees are not “out” at work.²⁶ Without consistent laws banning discrimination on the basis of sexual orientation, this type of workplace discrimination is likely to persist.²⁷

²¹ *Id.*

²² *See id.* at 104–05 (discussing scholarly views on Representative Smith’s motive in introducing his addition). Some believe Representative Smith made this change as a sabotage attempt to ensure Title VII did not become law. *Id.* at 105. Other scholars highlight the fact that Smith did want to protect women, specifically white women, especially when race was being protected. *Id.* *But see* Rachel Osterman, *Origins of a Myth: Why Courts, Scholars, and the Public Think Title VII’s Ban on Sex Discrimination Was an Accident*, 20 YALE J.L. & FEMINISM 409, 410 (2009) (arguing that this popular narrative about Smith’s motives paints an incomplete picture of the Act’s history because it ignores the fact that many women’s groups, with support of female House members, lobbied fiercely to receive this protection).

²³ *See* Jack B. Harrison, “*To Sit or Stand*”: *Transgender Persons, Gendered Restrooms, and the Law*, 40 HAW. L. REV. 49, 73 (2017) (discussing how lower courts have differed in applying the *Oncale* and *Price Waterhouse* decisions to Title VII sex discrimination claims). The Supreme Court has provided some guidance on what “sex” means beyond the more straightforward case where gender plays a role in employment decisions. *See Oncale*, 523 U.S. at 82 (holding that Title VII protects against same-sex sexual harassment that is hostile and abusive); *Price Waterhouse*, 490 U.S. at 250–51 (holding that claims where the plaintiff shows that discrimination is on the basis of sex stereotyping, such as punishing a woman for aggressiveness, are cognizable under Title VII).

²⁴ *Glossary of Terms*, *supra* note 1. The acronym “LGBTQ” refers to people who identify as “lesbian, gay, bisexual, transgender, and queer.” *Id.*

²⁵ *See* Harrison, *supra* note 1, at 121 (noting that federal courts across the country have addressed the explicit question of whether Title VII extends to protecting against sexual orientation discrimination).

²⁶ BRAD SEARS & CHRISTY MALLORY, THE WILLIAMS INST., DOCUMENTED EVIDENCE OF EMPLOYMENT DISCRIMINATION & ITS EFFECTS ON LGBT PEOPLE 2, 4 (2011), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Sears-Mallory-Discrimination-July-20111.pdf> [<https://perma.cc/EYH9-CJ6S>]. Examples of being discriminated against because of one’s sexual orientation include being harassed or fired. *Id.*

²⁷ *See* Harrison, *supra* note 1, at 95, 99–100, 101 (discussing sexual orientation discrimination in the workplace). Inconsistencies exist across state and federal laws. *Id.* Thirty-two states and the District of Columbia have taken some steps to limit and/or prohibit sexual orientation discrimination through legislation or executive action. *Id.* An employee is “out” at work when that person’s sexual orientation is shared publicly. *See Glossary of Terms*, *supra* note 1. Furthermore, approximately 455 of 500 of *Fortune 500* companies independently prohibit discrimination on the basis of sexual orientation. HUMAN RIGHTS CAMPAIGN FOUND., A RESOURCE GUIDE TO COMING OUT 15, https://assets2.hrc.org/files/assets/resources/resource_guide_april_2014.pdf [hereinafter A RESOURCE GUIDE TO

B. The Bostock Case

On May 10, 2018, the Eleventh Circuit confronted the issue of whether Title VII protects against discrimination on the basis of sexual orientation in *Bostock v. Clayton County Board of Commissioners*.²⁸ Plaintiff Gerald Lynn Bostock, a gay man, worked for Clayton County, Georgia as the Child Welfare Services Coordinator for over a decade from 2003 to 2013.²⁹ In January 2013, Bostock joined a gay recreational softball league.³⁰ In June 2013, he was fired from his position with the county.³¹ Although the county stated Bostock was fired because of “conduct unbecoming of a County employee,” Bostock alleged it was because he was gay.³²

A magistrate judge for the United States District Court for the Northern District of Georgia sided with Clayton County and recommended to the district judge that Bostock’s sexual orientation discrimination claim be dismissed.³³ In

COMING OUT]. Still, twenty-nine states do not have laws in place that explicitly prohibit terminating an employee on the basis of sexual orientation. Harrison, *supra* note 1, at 95–96. Sexual orientation discrimination includes, but is not limited to, being fired, overlooked for job opportunities, or harassed because of one’s sexual orientation. See HUMAN RIGHTS CAMPAIGN FOUND., A WORK DIVIDED: UNDERSTANDING THE CLIMATE FOR LGBTQ WORKERS WORLDWIDE 16–17, <https://assets2.hrc.org/files/assets/resources/AWorkplaceDivided-2018.pdf> [hereinafter A WORK DIVIDED].

²⁸ *Bostock*, 723 F. App’x at 964–65.

²⁹ *Bostock v. Clayton Cty.*, No. 1:16-CV-001460-ODE-WEJ, 2016 U.S. Dist. LEXIS 192898, at *2–3 (N.D. Ga. Nov. 3, 2016). Bostock worked for Clayton County from January 2003 to 2013 where he served as the Child Welfare Services Coordinator for the Juvenile Court and managed the Court Appointed Special Advocate program. *Id.*

³⁰ *Id.* at *3. Bostock alleged that he was openly criticized for being gay by a supervisor after he joined the “Hotlanta Softball League.” *Id.*

³¹ *Id.* at *4.

³² *Id.* Bostock first filed a Charge of Discrimination with the Equal Employment Opportunity Commission (EEOC) where he alleged sex discrimination and stated: “I believe that I have been discriminated against because of my sex (male/sexual orientation).” *Id.* Bostock’s initial complaint and First Amended Complaint alleged only discrimination on the basis of sexual orientation. Pro Se Employment Discrimination Complaint Form at 1–2, *Bostock v. Clayton Cty.*, 2016 U.S. Dist. LEXIS 192898 (N.D. Ga. Nov. 3, 2016) (No. 1:16-CV-001460-ODE-WEJ); First Amended Complaint at 6, *Bostock*, 2016 U.S. Dist. LEXIS 192898 (No. 1:16-CV-001460-ODE-WEJ). Bostock’s Second Amended Complaint, however, alleged that the defendant initiated an internal audit on program funds managed by Bostock as a “pretext for discrimination based on his sexual orientation and failure to conform to a gender stereotype.” Second Amended Complaint at 5–6, *Bostock*, 2016 U.S. Dist. LEXIS 192898 (No. 1:16-CV-001460-ODE-WEJ).

³³ *Bostock*, 2016 U.S. Dist. LEXIS 192898, at *13. Under federal and Georgia law, a magistrate judge, when assigned to hear a pre-trial dispositive motion, must enter a recommended disposition which can be accepted, rejected, or modified by a district judge if a party objects, as was the case in *Bostock*. See FED. R. CIV. P. 72(b) (governing dispositive motions assigned to magistrate judges in federal court); N.D. GA. LR 72.1(B) (providing the local Georgia rule regarding dispositive pre-trial motions assigned by the district judge). A dispositive motion is one in which a party asks the trial court to decide on a claim or case without further proceedings. *Dispositive Motion*, BLACK’S LAW DICTIONARY, *supra* note 3. In addition to rejecting Bostock’s sexual orientation discrimination claim, the magistrate judge also determined that Bostock failed to state a gender stereotyping claim with the EEOC, and thus did not exhaust the administrative remedies. *Bostock*, 2016 U.S. Dist. LEXIS 192898,

reaching this conclusion, the magistrate judge relied heavily on a 1979 precedential decision by the Fifth Circuit Court of Appeals in *Blum v. Gulf Oil Corporation*, which held that Title VII does not prohibit sexual orientation discrimination.³⁴ The district court adopted the magistrate judge's recommendation in full, and the Eleventh Circuit affirmed the decision, reiterating the binding precedent of *Blum*.³⁵ On July 18, 2018, the Eleventh Circuit voted against granting a rehearing en banc on behalf of Bostock, thus effectively upholding the *Blum* precedent.³⁶

The Eleventh Circuit's decision in *Bostock* follows the prevailing rule regarding the inapplicability of Title VII to claims of sexual orientation discrimination.³⁷ To support this view, courts continue to rely upon a number of rationales.³⁸ For example, some courts turn to the plain meaning of the statute, defining sex as one's gender.³⁹ Courts have also referenced the repeated failure to

at *20–21. The district judge affirmed the magistrate judge's determination that Bostock failed to state a claim and failed to exhaust administrative remedies on July 21, 2017. *Bostock v. Clayton Cty.*, No. 1:16-CV-1460-ODE, 2017 U.S. Dist. LEXIS 217815, at *8 (N.D. Ga. July 21, 2017).

³⁴ 597 F.2d at 938; *Bostock*, 2016 LEXIS 192898, at *9. The plaintiff in *Blum* claimed that he was terminated because he was Jewish, male, white, and gay. 597 F.2d at 937. The trial court disagreed with Blum's discrimination claims after holding that he was fired because of using the company phone for personal business, and the appeals court affirmed. *Id.* at 937–38. The Eleventh Circuit was established in 1981 after the old Fifth Circuit was divided into two. *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981). *Bonner* established that the old Fifth Circuit's precedent is binding on the Eleventh Circuit. *Id.*

³⁵ *Bostock*, 723 F. App'x at 964 (refusing to overrule the lower court's dismissal of the plaintiff's sexual orientation discrimination claim in accordance with the *Blum* precedent).

³⁶ See *Bostock*, 894 F.3d 1335 (denying the request for a rehearing en banc after the plaintiff's claim regarding sexual orientation discrimination was dismissed for failing to state a redressable claim, meaning that no remedy was available); *Redressable*, BLACK'S LAW DICTIONARY, *supra* note 3.

³⁷ See Eric C. Surette, Annotation, *Discrimination on Basis of Sexual Orientation as Form of Sex Discrimination Proscribed by Title VII of Civil Rights Act of 1964*, 28 A.L.R. Fed. 3d Art. 4 (2018) (providing an overview of the historical understanding of "because of . . . sex" as well as a list of cases that address the related issues across jurisdictions). The prevailing rule is that Title VII does not protect against sexual orientation discrimination. *Id.*; see *Bostock*, 723 F. App'x at 964–65 (holding that Title VII does not prohibit discrimination on the basis of sexual orientation in the Eleventh Circuit).

³⁸ See Surette, *supra* note 37 (providing a more comprehensive list of various arguments utilized by courts in support of the notion that sexual orientation discrimination is not protected by Title VII). For example, courts that derive the "plain meaning" from the language of the statute point to the fact that Congress has never modified the statute. *Id.* Lower courts say they are powerless to change precedent. *Id.*

³⁹ *Id.*; see also *Simonton v. Runyon*, 232 F.3d 33, 36 (2d Cir. 2000) (stating that sex under Title VII refers only to membership in a gender group); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 258 (1st Cir. 1999) (implicating the "plain meaning" of sex by stating that matters relating to sexual activity are not within the scope of Title VII). Both cases involved harassment in the workplace, such as name-calling stemming from plaintiffs' sexual orientation. *Simonton*, 232 F.3d at 35; *Higgins*, 194 F.3d at 257.

pass federal legislation prohibiting sexual orientation discrimination in particular.⁴⁰

II. THE REACH OF TITLE VII

Two of the strongest arguments for excluding sexual orientation discrimination under Title VII are precedent and congressional intent (or lack thereof).⁴¹ Nevertheless, the meaning of “because of . . . sex” has evolved and broadened over time.⁴² In 1964, there was an initial push to remove the barrier between women and the workforce, but sex discrimination grew into a significantly more expansive concept, as illustrated by the forthcoming cases.⁴³ Section A of this Part discusses how the Supreme Court has expanded the meaning of “sex” within Title VII, and Section B examines the larger impact the expanded definition has had over time.⁴⁴

A. Early Supreme Court Groundwork

The Supreme Court has been instrumental in expanding the understanding of “sex” under Title VII.⁴⁵ An early, and noteworthy, example of the Court’s broadening its reach occurred in 1989 when the Supreme Court held in *Price Waterhouse v. Hopkins* that sex discrimination was not limited to discrimina-

⁴⁰ Surette, *supra* note 37; *see also* Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 261 (3d Cir. 2001) (stating that Congress rejected legislation prohibiting sexual orientation discrimination on multiple occasions); *Simonton*, 232 F.3d at 35 (emphasizing congressional inaction which prevented sexual orientation discrimination from being explicitly prohibited by Title VII).

⁴¹ Victoria Schwartz, *Title VII: A Shift from Sex to Relationships*, 35 HARV. J.L. & GENDER 209, 235–36 (2012). Because the congressional intent is unclear, courts have used the limited legislative history to support an understanding that “sex” under Title VII is synonymous with gender. *See id.* at 239 (providing that Title VII’s inclusion of sex was to make women equal with men in the workplace).

⁴² *See* 42 U.S.C. § 2000e(k) (2018) (stating that “because of sex” or “on the basis of sex” includes discrimination related to pregnancy and childbirth). The definition of sex has expanded in scope to universally prohibit discrimination related to sex stereotyping and same-sex sexual harassment. *See* *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 82 (1998) (establishing that same-sex sexual harassment is a cognizable claim under Title VII, a further expansion of the definition of “because of . . . sex”); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250–51 (1989) (holding that discrimination on the basis of sex stereotyping is prohibited by Title VII).

⁴³ *See* Harrison, *supra* note 1, at 109, 112 (explaining how *Price Waterhouse* and *Oncale* set the stage for expanding the scope of “because of . . . sex” under Title VII by establishing that sex stereotyping and same-sex sexual harassment are both prohibited by Title VII’s ban on sex discrimination); Schultz, *supra* note 4, at 998–99 (noting the critical role the civil rights, women’s rights, and gay rights movements of the twentieth century have had on shaping what Title VII means today); Schwartz, *supra* note 41, at 242 (questioning reliance on legislative history because Congress could not have foreseen every way Title VII may be invoked).

⁴⁴ *See infra* notes 45–80 and accompanying text.

⁴⁵ *See* Harrison, *supra* note 1, at 114 (arguing that the Supreme Court has expanded the understanding of “because of . . . sex” through *Price Waterhouse* and *Oncale* in particular).

tion based on biological sex alone.⁴⁶ The plaintiff in *Price Waterhouse* was Ann Hopkins, a senior manager at Price Waterhouse who was recommended for partnership.⁴⁷ When she did not make partner, Hopkins sued Price Waterhouse, alleging the company discriminated against her on the basis of sex.⁴⁸

In 1985, the District Court for the District of Columbia, and ultimately the Supreme Court in 1989, emphasized the role that sex stereotyping played in Price Waterhouse's decision not to promote Hopkins, and found for Hopkins under Title VII.⁴⁹ The district court highlighted the advice Hopkins received to walk, talk, and dress in a more feminine manner to increase her chances of making partner.⁵⁰ To both the lower courts and the Supreme Court, an employer's insistence that an employee match the stereotype associated with the employee's gender was a violation of Title VII.⁵¹ In expressing this view, the Su-

⁴⁶ See *Price Waterhouse*, 490 U.S. at 250 (holding that claims where the plaintiff proves discrimination on the basis of sex stereotyping are cognizable under Title VII by showing that gender played a role in an employment decision). Sex stereotyping is defined by the Supreme Court as evaluating employees by their gender stereotype, either male or female. *Id.* at 251. Punishing a woman for being aggressive when the role requires that trait is an example of sex stereotyping. *Id.* Under *Price Waterhouse*, if gender is proven to be a factor considered by an employer making an employment decision, Title VII is relevant. *Id.* at 250. Gender stereotyping claims arise when an individual is discriminated against because the individual does not embody the stereotype associated with being male or female. *Id.* at 251. It is distinct from sexual orientation discrimination, which arises when an individual is discriminated against because of the individual's sexual attractions. See A RESOURCE GUIDE TO COMING OUT, *supra* note 27, at 15 (providing examples of sexual orientation discrimination, including being harassed or fired because of one's sexual preferences).

⁴⁷ *Price Waterhouse*, 490 U.S. at 231–32. In 1982, Hopkins was not made a partner. *Id.* When the time came the following year to re-propose Hopkins for partner, the partners refused, prompting her to file a Title VII claim. *Id.* When an employee is being considered for partner, Price Waterhouse's Admissions Committee makes a recommendation to the Policy Board. *Id.* at 232. This recommendation is based on evaluations and comments from other partners. *Id.* In their comments, many partners praised Hopkins for her performance and accomplishments, but some pointed to Hopkins's worrisome interpersonal skills, including her aggressiveness. *Id.* at 233–34. Ultimately, the district court determined that negative reactions to Hopkins's personality could often be attributed to the fact she was a woman, not acting femininely enough for her employer's standards. *Id.* at 237. This was further evidenced by Hopkins's being called "macho" and advised to attend charm school. *Id.* at 235.

⁴⁸ *Id.* at 232.

⁴⁹ *Id.* at 236–37. The trial court found for Hopkins and determined that Price Waterhouse discriminated against her on the basis of sex by relying upon comments stemming from sex stereotyping in making its employment decision. *Id.* Although the appeals court affirmed, it differed in its analysis by articulating that an employer will not be liable under Title VII "if it proves by *clear and convincing evidence* that it would have made the same employment decision" in the absence of discriminatory motives. *Id.* at 237 (emphasis added).

⁵⁰ See *id.* at 235 (citing to the district court's analysis of Price Waterhouse's reliance on interpersonal skills, including those related to the view of proper female behavior); Hopkins v. Price Waterhouse, 618 F. Supp. 1109, 1117 (D.D.C. 1985), *aff'd*, 490 U.S. 228 (1989) (noting that Price Waterhouse's head partner advised Hopkins to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry").

⁵¹ See *Price Waterhouse*, 490 U.S. at 250 (stating that gender is an unlawful motive when making employment decisions, and by considering sex stereotypes, Price Waterhouse violated Title VII);

preme Court significantly advanced the argument that Title VII covers the entire spectrum of disparate treatment between men and women, moving beyond the traditional understanding of sex, meaning gender.⁵²

The next major Supreme Court decision that further expanded the definition of sex under Title VII was in 1997, in *Oncale v. Sundowner Offshore Services, Inc.*⁵³ Prior to *Oncale*, the Supreme Court had not addressed the issue of same-sex sexual harassment.⁵⁴ In *Oncale*, a male employee of Sundowner was repeatedly threatened and assaulted by his fellow male colleagues.⁵⁵ The Supreme Court rejected the Fifth Circuit's finding that Title VII did not apply to same-sex sexual harassment claims.⁵⁶ Beyond establishing that same-sex sexual harassment is redressable under Title VII, the *Oncale* decision also represented the Supreme Court's willingness, and duty, to settle circuit splits.⁵⁷ Furthermore, the Supreme Court introduced an important parallel between race-based discrimination and sex-based discrimination.⁵⁸ Specifically, the Supreme Court in *Oncale* recognized that members of the same group may still act in a discriminatory way against one another.⁵⁹

Price Waterhouse, 618 F. Supp. at 1120 (determining that because sex stereotyping went into Price Waterhouse's decision-making, Title VII was violated as a sex-based consideration).

⁵² *Price Waterhouse*, 490 U.S. at 250; see Surette, *supra* note 37 (articulating that traditional understandings of sex interpreted "sex" to mean "gender").

⁵³ See *Oncale*, 523 U.S. at 82 (holding same-sex sex discrimination impermissible under Title VII).

⁵⁴ See Harrison, *supra* note 1, at 112 (noting the Supreme Court addressed the issue of same-sex sexual harassment following inconsistent court holdings).

⁵⁵ See *Oncale*, 523 U.S. at 77. The lower court in *Oncale*, in following the Fifth Circuit's precedential decision in *Garcia v. Elf Atochem North America*, 28 F.3d 446, 448 (5th Cir. 1994), held that harassment by a male supervisor against another male employee does not constitute a Title VII violation. In *Garcia*, the plaintiff-employee brought suit against his supervisor, whom he alleged sexually harassed him on multiple occasions, including by grabbing his crotch area. 28 F.3d at 448. A claim that is not redressable is one in which no remedy or relief may be granted by the court. *Redressable*, BLACK'S LAW DICTIONARY (11th ed. 2019).

⁵⁶ *Oncale*, 523 U.S. at 77, 82. The Supreme Court explicitly stated that same-sex sexual harassment is prohibited by Title VII, thus expanding the statute's scope. *Id.* at 82. The Court recognized that discrimination on the basis of sex can occur between members of the same sex and also does not need to be motivated only by sexual desire. *Id.* at 81.

⁵⁷ See *id.* at 79–80 (recognizing that the Supreme Court's decision would impact circuit courts that established categorical rules placing same-sex sexual harassment outside the scope of Title VII). Although, as the Supreme Court noted, Congress likely did not have this type of harassment in mind when passing the statute, not including same-sex sexual harassment would go against principles of law and potentially expose individuals to an unsafe and offensive work environment. *Id.*

⁵⁸ See *id.* at 78 (explaining that same-sex sex discrimination is unlawful just as race discrimination by members of the same race is also impermissible); see also *infra* notes 81–97 and accompanying text (further illustrating the parallel between race and sex discrimination in the context of Title VII).

⁵⁹ 523 U.S. at 78.

B. Sexual Orientation Discrimination Claims Under Title VII Post-Price Waterhouse and Oncale

The *Price Waterhouse* and *Oncale* decisions undoubtedly paved the way for a broader reading of Title VII sex discrimination.⁶⁰ Nevertheless, the mechanisms available to LGBTQ individuals under Title VII remain limited and vary greatly across jurisdictions.⁶¹

A majority of courts, such as the Fifth and Eleventh Circuits, still follow the view that sexual orientation discrimination is not prohibited by Title VII.⁶² To these courts, the *Price Waterhouse* and *Oncale* decisions only apply to a specific set of circumstances, and sexual orientation discrimination remains outside the scope of Title VII, as determined by precedent.⁶³

The strong reliance on judicial precedence is the route the Eleventh Circuit took in *Bostock*.⁶⁴ Although the district court provided additional details

⁶⁰ *Id.* at 82; *Price Waterhouse*, 490 U.S. at 250; see Harrison, *supra* note 1, at 114–16 (pointing out the understanding of “because of . . . sex” was broadened as a result of *Price Waterhouse* and *Oncale* but also introduces the limitations). For example, plaintiffs who have attempted to bring sexual orientation discrimination claims under Title VII by arguing that the discrimination stemmed from sex stereotyping have often been unsuccessful. Harrison, *supra* note 1, at 114–16. Because sexual orientation discrimination claims have not been upheld, utilizing the logic of the Supreme Court is still unsuccessful in most jurisdictions. *Id.*

⁶¹ See *Wittmer v. Phillips 66 Co.*, 915 F.3d 328, 330, 339 (5th Cir. 2019) (holding that sexual orientation discrimination is not a cognizable claim even post-*Price Waterhouse* and *Oncale* in following the Fifth Circuit’s precedent); *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 342, 351 (7th Cir. 2017) (relying at least in part on the Supreme Court’s decisions in *Price Waterhouse* and *Oncale* to rule that, in the Seventh Circuit, sexual orientation is a cognizable claim under Title VII because of the “common-sense reality” that cannot separate sexual orientation discrimination from sex discrimination). An example of a limited mechanism available to LGBTQ individuals is bringing a discrimination claim based on sex stereotyping, rather than sexual orientation. Surette, *supra* note 37.

⁶² *Wittmer*, 915 F.3d at 330–31; *Bostock v. Clayton Cty. Bd. of Comm’rs*, 723 F. App’x 964, 964–65 (11th Cir. 2018), *cert. granted*, 139 S. Ct. 1599 (2019). *Wittmer* involved a case where a transgender woman’s employment offer was rescinded after a background check discrepancy came to light. 915 F.3d at 331. After learning that her offer was no longer valid, Wittmer sent an email accusing Phillips 66 employees of discriminating against her because she was transgender. *Id.* The Phillips 66 employees denied having any knowledge of Wittmer’s sexual identity and further asserted her being transgender would have no bearing on the company’s decision to rescind the employment offer. *Id.* Wittmer ultimately filed a Title VII claim, which was dismissed when the court granted summary judgment on behalf of the defendants. *Id.* In reaching its conclusion regarding claims of sexual orientation discrimination under Title VII, the majority in *Wittmer* relied on precedent, without providing additional support for the holding in *Blum v. Gulf Oil Corp.*, 597 F.2d 936 (5th Cir. 1979). *Wittmer*, 915 F.3d at 330.

⁶³ See *Wittmer*, 915 F.3d at 330 (stating the court already addressed the issue and *Blum* remains binding precedent in the Fifth Circuit); *Blum*, 597 F.2d at 938 (holding that Title VII does not prohibit an employer from discriminating on the basis of one’s sexual orientation); Surette, *supra* note 37 (indicating a distinction between sex stereotyping and sexual orientation claims).

⁶⁴ See *Bostock*, 723 F. App’x at 964–65 (citing *Blum*, which foreclosed the notion that sexual orientation discrimination was a cognizable claim in the Eleventh Circuit, as binding precedent); see also *Evans v. Ga. Reg’l Hosp.*, 850 F.3d 1248, 1256 (11th Cir. 2017) (stating that *Price Waterhouse*

about the history of Title VII and acknowledged the circuit split, the district court's ultimate finding was that *Blum* was binding and not to be reconsidered.⁶⁵ The appeals court affirmed the decision of the lower court and voted against granting a rehearing en banc.⁶⁶

The *Bostock* decision runs contrary⁶⁷ to the stance taken by the Equal Employment Opportunity Commission (EEOC), the federal agency tasked with enforcing Title VII.⁶⁸ The EEOC has instead asserted a more expansive view of sex discrimination, relying heavily on the groundwork laid by the *Price Waterhouse* and *Oncale* decisions.⁶⁹ In 2015, the EEOC issued its land-

and *Oncale* do not change the Eleventh Circuit's reliance on *Blum* as precedent because the Supreme Court did not directly address the issue of sexual orientation discrimination in those cases).

⁶⁵ *Bostock v. Clayton Cty.*, No. 1:16-CV-001460-ODE-WEJ, 2016 U.S. Dist. LEXIS 192898, at *7–10 (N.D. Ga. Nov. 3, 2016). The magistrate judge did provide some details on the legislative intent and history of Title VII, including the intention to even the playing field for women and men in the workplace. *Id.* at *7. The magistrate judge also cited to cases in various circuits that agree with *Blum*, including *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252 (1st Cir. 1999). *Bostock*, 2016 U.S. Dist. LEXIS 192898, at *6–7, *9. Ultimately, the district court declined to decide the issue and invited Congress to amend the statute if it wished to do so. *Bostock*, 2016 U.S. Dist. LEXIS 192898, at *13. Furthermore, the district judge, in reviewing the magistrate judge's order, provided minimal details regarding the reasoning behind the *Blum* precedent and concluded that the Eleventh Circuit rejects the possibility of bringing a Title VII claim regarding sexual orientation discrimination. *See Bostock v. Clayton Cty.*, No. 1:16-CV-001460-ODE-WEJ, 2017 U.S. Dist. LEXIS 217815 (N.D. Ga. July 21, 2017), at *6–7 (reaffirming the court's reliance on precedent).

⁶⁶ *See Bostock v. Clayton Cty. Bd. of Comm'rs.*, 894 F.3d 1335, 1335 (11th Cir. 2018) (affirming the district court's decision to dismiss the case); *Bostock*, 723 Fed. App'x at 964–65 (voting against granting a rehearing en banc).

⁶⁷ *See Bostock*, 2016 U.S. LEXIS 192898, at *12–13 (recognizing the EEOC's stance but refusing to follow the agency's earlier decision without an amendment from Congress).

⁶⁸ *See Baldwin v. Fox*, EEOC Decision No. 01 20133080, at 6 (Jul. 15, 2015) <https://www.eeoc.gov/decisions/0120133080.pdf> (holding that sexual orientation discrimination is prohibited by Title VII). Congress provided the EEOC with the authority to ensure employers' compliance with Title VII. *See infra* note 69 and accompanying text. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* establishes that when a court is reviewing an agency interpretation, the question for the court is whether the agency's interpretation is based on a permissible construction of the statute, if Congress has remained silent. 467 U.S. 837, 843–44 (1984). A court may not substitute its own interpretation if the agency's is also reasonable. *Id.* at 844; *see, e.g., Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 107 (2d Cir. 2018) (holding the plaintiff is entitled to bring a claim of sexual orientation discrimination under Title VII because sexual orientation is a form of sex discrimination).

⁶⁹ *See Baldwin*, EEOC Decision No. 01 20133080, at 8, 13 (citing the *Price Waterhouse* decision to support the notion that each protected category must be treated equally under Title VII and the *Oncale* decision to support the notion that Congress does not have to foresee every application of the statute to have it apply). An individual who wishes to bring an employment discrimination claim in federal court must first file it with the EEOC. *Filing a Charge of Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <https://www.eeoc.gov/employees/charge.cfm/>, [<https://perma.cc/DHA4-DKCV>]. The EEOC has the authority to investigate discrimination charges and determine whether discrimination has occurred. *Overview*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <https://www.eeoc.gov/eeoc/> [<https://perma.cc/72MK-BS9H>]. If the EEOC finds that a discrimination claim exists, it will try to settle the charge. *Administrative Enforcement and Litigation*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, https://www.eeoc.gov/eeoc/enforcement_litigation.cfm [<https://perma.cc/6JAJ-DCK7>]. If unsuccessful, the EEOC may file a lawsuit. *Id.* Even if the EEOC does not find a cogniza-

mark decision in *Baldwin v. Foxx*, which explicitly recognized that discrimination based on sexual orientation is a Title VII violation.⁷⁰ In *Baldwin*, the plaintiff filed a formal Equal Employment Opportunity (EEO) complaint, alleging he had not been chosen for a permanent position with the Miami Tower TRACON facility because he was gay.⁷¹ For the first time, the EEOC explicitly held that sexual orientation is, in fact, a sex-based consideration and therefore discrimination based on sexual orientation is a violation of Title VII.⁷²

To reach its conclusion, the EEOC relied on the concept introduced by *Price Waterhouse* illustrating that Title VII protections apply equally to all classes of people covered by the statute.⁷³ The EEOC, consequently, put forth the notion of associational discrimination—a concept previously reserved for racial discrimination—and applied it to sex discrimination.⁷⁴ The EEOC stated that an individual cannot be discriminated against for associating with a member of a certain gender, just as an individual cannot be discriminated against for associating with a member of a certain race.⁷⁵

Some courts have opted to follow the EEOC's decision.⁷⁶ These courts similarly turn to *Price Waterhouse* and *Oncale*, as well as the changing societal landscape, for support.⁷⁷ For example, in 2017 in *Hively v. Ivy Tech Community College of Indiana*, the Seventh Circuit Court of Appeals, recognizing that it was

ble claim, the individual may file a claim in federal court once the administrative remedy is exhausted. 42 U.S.C. § 2000e-5 (2018).

⁷⁰ *Baldwin*, EEOC Decision No. 01 20133080, at 6; see Surette, *supra* note 37 (denoting *Baldwin* as a “landmark decision”). The EEOC’s website lists “sex” among the categories against which an employer may not discriminate. *Overview*, *supra* note 69. Furthermore, the EEOC explicitly includes “sexual orientation.” *Id.*

⁷¹ *Baldwin*, EEOC Decision No. 01 20133080, at 2. Defendant-employer, claimed that because the full-time position was never filled, there was no cognizable discrimination claim. *Id.* Plaintiff, on the other hand, attributed it to the fact that he was gay, as evidenced by his supervisor’s negative comments about his sexual orientation. *Id.* These comments included being told, “[w]e don’t need to hear about that gay stuff.” *Id.*

⁷² *Id.* at 6. The EEOC articulated why sexual orientation cannot be removed from a sex-based consideration by emphasizing that sexual orientation discrimination is premised on sex-based preferences (i.e. a man being attracted to a man or a woman being attracted to a woman). *Id.*

⁷³ *Id.* at 8–9.

⁷⁴ *Id.* at 8. Associational discrimination exists when a person is discriminated against for associating with a person of a certain group. *Id.* This notion first existed in the context of racial discrimination. See *Holcomb v. Iona Coll.*, 521 F.3d 130, 139 (2d Cir. 2008) (holding an employer cannot base an employment action on an employee’s association with someone of a particular race). The rationale in the context of race was that this type of discrimination inherently implicates the employee’s race, which is a violation of Title VII. *Baldwin*, EEOC Decision No. 01 20133080, at 8. The EEOC extended protections to sex discrimination because *Price Waterhouse* established that all categories of Title VII deserve equal treatment. *Id.* at 8–9.

⁷⁵ *Baldwin*, EEOC Decision No. 01 20133080 at 8–9.

⁷⁶ See *Zarda*, 883 F.3d at 107 (highlighting that the EEOC now explicitly holds that sexual orientation is a sex-based consideration)

⁷⁷ *Id.*; *Hively*, 853 F.3d at 349 (emphasizing the societal changes even beyond employment law that have moved to protect same-sex couples, including gay marriage).

straying away from precedent, ultimately concluded that it is “impossible to discriminate on the basis of sexual orientation without discriminating on the basis sex.”⁷⁸ The court supported its holding by drawing on precedence from the Supreme Court and the EEOC.⁷⁹ Beyond that, the *Hively* court also emphasized the responsibility of the courts to correct the rule of law to ensure decisions align with present-day realities—in this case, the evolution of LGBTQ rights.⁸⁰

III. EEOC PRECEDENT: EQUALITY FOR ALL TITLE VII PROTECTED CLASSES AND THE LINK BETWEEN RACE AND SEX DISCRIMINATION

Equal opportunity in the workplace is at the heart of the EEOC’s mission.⁸¹ In 2015, the EEOC’s decision in *Baldwin v. Foxx* emphasized the notion of equality for all classes of people protected under Title VII.⁸² First, it emphasized that the protections regarding hiring, firing, compensation, and privileges equally apply to members of the LGBTQ community.⁸³ Simply put, an employer is not allowed to consider sexual orientation when making an employment decision.⁸⁴

Second, the EEOC, like the Supreme Court in *Oncale*, notably looked to the parallel between race and sex discrimination by applying the concept of associational discrimination.⁸⁵ Similar to the prohibition on discrimination against an employee who associates—through marriage, friendship, or some other relationship—with someone of a particular race, an employer cannot discriminate because of an employee’s decision to associate with a member of a

⁷⁸ *Hively*, 853 F.3d at 351. The plaintiff in this case was openly lesbian and a part-time professor at Ivy Tech Community College. *Id.* at 341. After unsuccessfully applying for full-time employment on multiple occasions, she filed a Title VII claim alleging discrimination based on her sexual orientation. *Id.* The Seventh Circuit held that *Hively* presented a cognizable Title VII claim, breaking with prior precedent. *Id.* at 340–41.

⁷⁹ *Id.* at 342, 350.

⁸⁰ *See id.* at 350–51 (discussing the need to adapt law to present-day questions). To support its newfound position, the Seventh Circuit turned to the Supreme Court’s decisions in *Price Waterhouse* and *Oncale*, the EEOC’s guidance in *Baldwin*, and the “common-sense reality” that makes it impossible to separate sexual orientation discrimination from sex discrimination. *Id.* at 342, 344, 351. Like the EEOC, the Seventh Circuit also relied on the associational theory of race discrimination (making it a violation to discriminate against someone for associating with another of a certain race) to bolster its position. *Id.* at 347, 349.

⁸¹ *Overview*, *supra* note 69.

⁸² *See Baldwin v. Fox*, EEOC Decision No. 01 20133080, at 8 (July 15, 2015) <https://www.eeoc.gov/decisions/0120133080.pdf> [<https://perma.cc/4XRM-AMGP>] (articulating that *Price Waterhouse* established that all categories protected by Title VII, including race, color, religion, sex, or national origin, must be treated identically).

⁸³ *Id.* at 5–6. The EEOC held that when sexual orientation is taken into account by an employer, the employee’s sex is also consequently considered. *Id.* Therefore, a Title VII violation existed. *Id.*

⁸⁴ *Id.* at 6.

⁸⁵ *Id.* at 8; *see supra* note 74.

certain sex.⁸⁶ When the Supreme Court decided to broaden the understanding of racial discrimination to include this associational dimension, changing the language of the statute was not required.⁸⁷ The EEOC, in drawing this analogy, suggested the same is true for sex-based associational discrimination.⁸⁸ With equality at the center of Title VII, all classes protected by the statute are entitled to the same level of protection.⁸⁹

As previously illustrated, the line of reasoning utilized by the EEOC in *Baldwin* is already influential, and the Supreme Court should ensure its status as binding precedent when it decides *Bostock*.⁹⁰ First, in following the Supreme Court's 1984 decision in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, courts should give a considerable amount of deference to an agency's interpretation of a statute.⁹¹ Congress has delegated the authority to the EEOC to enforce Title VII.⁹² Because its interpretation is reasonable, the Supreme Court should defer to the EEOC's understanding of "sex" and require other courts to do the same.⁹³

Secondly, courts have an obligation to interpret what statutes mean and how they should be applied.⁹⁴ What a statute meant to legislators when it first

⁸⁶ *Baldwin*, EEOC Decision No. 01 20133080, at 8.

⁸⁷ *See id.* (highlighting the Supreme Court's recognition of associational discrimination absent a change in the statute). The EEOC cites to *Floyd v. Amite County School District*, 581 F.3d 244, 249 (5th Cir. 2009), and *Holcomb* as two cases where courts held that discriminating against a person who associates with a member of a particular race is a violation of Title VII. *Baldwin*, EEOC Decision No. 01 20133080 at 8; *see Floyd v. Amite Cty. Sch. Dist.*, 581 F.3d 244, 249 (5th Cir. 2009) (holding that Title VII protects against discrimination resulting from a relationship with someone of a certain race); *Holcomb*, 521 F.3d at 139 (holding that it is illegal for an employer to make an employment decision because of that employee's association with a person of another race).

⁸⁸ *Baldwin*, EEOC Decision No. 01 20133080 at 8–9.

⁸⁹ *See Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 349 (7th Cir. 2017) (emphasizing that because the statute does not make distinctions among classes of people, all who are protected under Title VII are entitled to the same level and breadth of protection).

⁹⁰ *See Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 107–08 (2d Cir. 2018) (noting that the Seventh and Eleventh Circuits addressed the issue of whether sexual orientation discrimination is prohibited by Title VII following the EEOC's *Baldwin* decision); *Hively*, 853 F.3d at 344 (acknowledging the EEOC's decision in *Baldwin* and similarly relying on associational discrimination logic to support a finding that sexual orientation discrimination is prohibited under Title VII).

⁹¹ *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984) (holding that when a court is reviewing an agency interpretation of a statute on which Congress has not spoken, the question for the court is whether the agency's interpretation is based on a "permissible construction of the statute"). The Supreme Court wrote that a court may not reinterpret a statute when an agency has already provided a reasonable interpretation of its meaning. *Id.* at 844.

⁹² 42 U.S.C. § 2000e-5 (2018) (delegating power to the EEOC to ensure employers do not engage in discriminatory practices, including those falling within the scope of Title VII); *see Overview, supra* note 69 (providing an overview of the function of the EEOC in relation to Title VII claims).

⁹³ *See Chevron*, 467 U.S. at 844 (noting that an agency interpretation is unreasonable if it is "arbitrary, capricious, or manifestly contrary to the statute").

⁹⁴ *See Hively*, 853 F.3d at 343 (stating the court's power to overrule prior decisions to reflect the Supreme Court's contemporary position on a subject). The court stressed that its interpretation of

went into effect may be relevant, but it is not the stopping point; it would have been impossible for the 1964 Senate to have contemplated every potential discriminatory situation when enacting Title VII.⁹⁵ Thus, the EEOC's approach provides the most logical interpretation—it remains faithful to Congress' intent to promote equality in the workplace and adapts to present-day questions.⁹⁶ Race discrimination underwent this natural evolution, resulting in a broadened scope with associational discrimination, so it is only logical that sex discrimination receives this same treatment.⁹⁷

CONCLUSION: THE SUPREME COURT'S TASK

Title VII was enacted in 1964 to promote workplace equality for all classes of protected people. It is a statute aimed at eliminating discriminatory practices. Allowing sexual orientation discrimination to exist in the workplace runs counter to this purpose and the position previously paved by the Second and Seventh Circuits, the EEOC, and the Supreme Court itself. The Supreme Court already banned sex stereotyping, decriminalized homosexual behavior, outlawed same-sex sexual harassment, and legalized gay marriage. The next logical step for the Supreme Court to take is holding, once and for all, that sexual orientation is a sex-based consideration and Title VII prohibits any and all discrimination on that basis. Ruling otherwise would permit continued discrimination in the workplace against LGBTQ individuals, who would be left without any meaningful protection, particularly in states that have explicitly declined to enact legislation to protect them.

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“sex” under Title VII must be made against the backdrop of discriminatory employment practices, plus the realities of sexual orientation discrimination more generally. *Id.* at 350–51.

⁹⁵ *Id.* at 345 (“The Court could not have been clearer: the fact that the enacting Congress may not have anticipated a particular application of the law cannot stand in the way of the provisions of the law that are on the books.”).

⁹⁶ See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973) (holding that the purpose of Title VII was to guarantee equal employment opportunities for the statute's protected classes, including race, color, religion, sex, or national origin); see also *Hively*, 853 F.3d at 349 (indicating that all Title VII protected classes should be treated equally in terms of level of protection).

⁹⁷ See *Zarda*, 883 F.3d at 131 (recognizing the evolution of the legal framework for evaluating claims of race and sex discrimination under Title VII). In addition to pointing to *Price Waterhouse*, the Second Circuit in *Zarda* highlighted associational discrimination in the racial context as relevant to the evolution of Title VII as it relates to sex. *Id.*