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MARRIED ON SUNDAY, EVICTED ON MONDAY: INTERPRETING THE FAIR HOUSING ACT'S PROHIBITION OF DISCRIMINATION "BECAUSE OF SEX" TO INCLUDE SEXUAL ORIENTATION AND GENDER IDENTITY

JOSEPH J. RAILEY*

INTRODUCTION

An openly gay male and his partner decide to rent an apartment together. After finding a unit they like, the couple contacts the landlord; the landlord declines to rent to the couple because of their "alternative lifestyle." At the same time, a transgender female and her wife are looking for a home together; they are unable to find a realtor willing to work with them.

Presently there are no nationwide protections against housing discrimination based on an individual's sexual orientation¹ or gender identity.² Further, twenty-eight states do not include sexual orientation and gender identity in their state housing discrimination laws.³ Thus, depending on the state where these couples live, the landlords and realtors' actions described above could be legal. As it

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¹ *Definitions Related to Sexual Orientation and Gender Diversity in APA Documents*, THE AMERICAN PSYCHOLOGICAL ASSOCIATION, <https://www.apa.org/pi/lgbt/resources/sexuality-definitions.pdf> (last visited Apr. 21, 2017) (discussing "Sexual Orientation" defined by the American Psychological Association as "one's enduring sexual attraction to male partners, female partners, or both. Sexual orientation may be heterosexual, same sex . . . or bisexual." and "Gender Identity" is defined as one's self identification as male or female).

² See discussion *infra* Part II(A).

³ See discussion *infra* Part II(A)(2).

stands today, in over half the country, it is possible for a gay couple to be married on Sunday only to be evicted from their home on Monday simply for being with the person they love.

When the Supreme Court legalized same-sex marriage in 2015, in the landmark case *Obergefell v. Hodges*,⁴ the Lesbian, Gay, Bisexual, Transgender, and Queer (LGBTQ or gay) legal community was faced with a simple question: “now what?” Having secured marriage equality, advocates settled on comprehensive protections for the LGBTQ community as the next fight.⁵ To that end, less than a month after the Supreme Court’s ruling in *Obergefell*, both Houses of Congress had introduced legislation (The Equality Act)⁶ to provide Federal protections against discrimination to gay individuals in many areas, including housing.⁷ However, the Equality Act died at the end of the 114th Congress, and Federal protections for LGBTQ individuals in housing have not been incorporated into Title VIII of the Civil Rights Act of 1968 (The Fair Housing Act).⁸

This Article shows the importance and need for protection for gay individuals against housing discrimination. Further, this Article argues the Federal courts can—and should—interpret the existing language in the Fair Housing Act to provide protections based on sexual orientation and gender identity under the Act’s prohibition on discrimination on the basis of sex. Part I lays out a brief history of LGBTQ rights and discrimination as they relate to housing. Part II examines the current federal and state housing discrimination laws, argues that statutory interpretation is sufficient to provide protections, and addresses the level of scrutiny that the Court has traditionally applied in constitutional analysis to sexual orientation and gender identity. Part III analyzes why the judiciary is presently better suited to provide protections against housing

⁴ *Obergefell v. Hodges*, 576 U.S. ___, 135 S. Ct. 2584 (2015).

⁵ See Timothy M. Phelps, *Next Frontier for Gays Is Employment & Housing Discrimination*, L.A. TIMES (June 26, 2015, 7:23 AM), <http://www.latimes.com/nation/la-na-gays-employment-20150626-story.html>.

⁶ H.R. 3185, 114th Cong. (2015); S.1858, 114th Cong. (2015) (as reintroduced into the 115th Cong. As H.R. 2282 & S. 1006). See *infra* Part III(A).

⁷ H.R. 3185, 114th Cong. § 10 (2015); S. 1858, 114th Cong. § 10 (2015).

⁸ 42 U.S.C. §§ 3601–19 (2012).

discrimination than Congress. Part IV shows the connection between “sex,” “sexual orientation,” and “gender identity” by examining scholarly writing and recent legal decisions. Finally, Part V calls on the Court to interpret “discrimination because of sex” to include sexual orientation and gender identity and concurrently to apply intermediate scrutiny to LGBTQ constitutional equal protection claims in the future.

I. HISTORY OF LGBTQ RIGHTS & HOUSING DISCRIMINATION

Since the advent of the modern LGBTQ rights movement with the Stonewall Riot in June 1969, the rights gay Americans enjoy have increased dramatically.⁹ Today, LGBTQ individuals nationwide are no longer considered to be criminals because of their identity¹⁰ or to have a mental disease.¹¹ Additionally, LGBTQ individuals enjoy the right to marry,¹² and can serve in the military,¹³ among other advancements. Further, the public has become more accepting of LGBTQ individuals¹⁴ with a number now even holding

⁹ *The Stonewall Riot*, HISTORY.COM, <http://www.history.com/this-day-in-history/the-stonewall-riot> (last visited Jan. 14, 2017); *see generally* DAVID CARTER, *STONEWALL: THE RIOTS THAT SPARKED THE GAY REVOLUTION* (2004). The Riot began on July 28 following a police raid at the Stonewall Inn in Manhattan and marks the beginning of the modern LGBTQ rights movement. *Id.* The riot was among the most visible early incidents of LGBTQ people defending themselves and is commemorated annually across the world with Pride events in June. *Id.*

¹⁰ *Lawrence v. Texas*, 539 U.S. 558, 584 (2003).

¹¹ *See* Neel Burton, *When Homosexuality Stopped Being a Mental Disorder*, PSYCHOL. TODAY (Sep. 18 2015), <https://www.psychologytoday.com/blog/hidden-and-seeking/201509/when-homosexuality-stopped-being-mental-disorder> (explaining that the American Psychiatric Association stopped classifying homosexuality as a mental disorder in 1987 and the World Health Organization stopped in 1992).

¹² *Obergefell v. Hodges*, 135 S. Ct. 2584, 2599 (2015).

¹³ *Don't Ask, Don't Tell Repeal Act of 2010*, Pub. L. No. 111-321, 124 Stat. 3516; *see also* Elisabeth Bumiller, *Obama Ends 'Don't Ask, Don't Tell' Policy*, N.Y. TIMES (Jul. 22, 2011), <http://www.nytimes.com/2011/07/23/us/23military.html>.

¹⁴ *See* Gary J. Gates, *In US More Adults Identifying as LGBT*, GALLUP (Jan. 11, 2017), http://www.gallup.com/poll/201731/lgbt-identification-rises.aspx?g_source

public office.¹⁵ However, despite these advances, gay individuals still are not protected from harmful discrimination in one of life's basic necessities: housing.

Housing discrimination against LGBTQ individuals has been highly publicized and studied.¹⁶ From these studies, it is now well established that housing discrimination is a significant issue for the gay community.¹⁷ For example, in a recent study, 73% of gay

=Social%20Issues&g_medium=newsfeed&g_campaign=tiles (noting that a likely cause of increased LGBT identification is the broad degree of social acceptance that has developed over the past decades).

¹⁵ See Cristina Marcos, *115th Congress Will Be Most Racially Diverse in History*, THE HILL (Nov. 17, 2016, 6:00 AM), <http://thehill.com/homenews/house/306480-115th-congress-will-be-most-racially-diverse-in-history> (reporting that in the current Congress there is one gay senator and six gay members of congress); see also *Our Candidates*, The Gay and Lesbian Victory Fund, https://www.victoryfund.org/our-work/our-candidates?title=&field_region_value=All&field_level_value=All (last visited Jan. 14, 2016) (listing LGBTQ candidates for public office at any level in the 2016 election cycle).

¹⁶ See, e.g., Phelps, *supra* note 5; Richard Eisenberg, *Housing Discrimination: The Next Hurdle for LGBT Couples*, FORBES (July 2, 2015, 10:06 AM), <http://www.forbes.com/sites/nextavenue/2015/07/02/housing-discrimination-the-next-hurdle-for-lgbt-couples/#5dfa08283cac>; Trudy Ring, *Housing Discrimination a Shared Experience for LGBT Folks and Muslims*, THE ADVOCATE (July 5, 2016, 8:28 PM), <http://www.advocate.com/religion/2016/7/05/housing-discrimination-shared-experience-lgbt-folks-and-muslims>; Press Release, *LGBT People File Housing Discrimination Complaints as often as People of Color, Women, New Study Shows*, THE WILLIAMS INSTITUTE (Feb. 9, 2016), <http://williamsinstitute.law.ucla.edu/press/press-releases/lgbt-people-file-housing-discrimination-complaints-as-often-as-people-of-color-women-new-study-shows/>; NAT'L ASSOC. OF GAY & LESBIAN REAL ESTATE PROF'L, *2015 LGBT Home Buyer & Seller Survey* (2015), <https://naglrep.com/wp-content/uploads/2017/06/naglrep-lgbt-survey-2015.pdf> (last visited Aug. 15, 2018) (hereinafter NAGLREP).

¹⁷ Christy Mallory & Brad Sears, *Evidence of Discrimination Based on Sexual Orientation & Gender Identity: An Analysis of Complaints Filed with State Enforcement Agencies, 2008–2014*, THE WILLIAMS INSTITUTE (Feb. 2016), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Housing-Discrimination-Complaints-2008-2014.pdf>. A recent study from the Williams Institute noted that in states with state level protections for LGBTQ peoples there were on average three reports of discrimination per 100,000 people. As points of comparison, the same study found an average of 5 complaints per 100,000 people of color, and 1 complaint per 100,000 people for women. *Id.*

individuals reported fearing some form of housing discrimination.¹⁸ Additionally, many respondents cited a state with protections against housing discrimination as a high priority in choosing a place to live.¹⁹ In another study, emails were sent to housing providers from “straight” and “gay” couples.²⁰ Predictably, in that study, the LGBTQ couples received considerably fewer responses than straight counterparts.²¹ Finally, among young and old LGBTQ individuals, access to housing is a significant issue.

One study reports that 48% of gay seniors faced discrimination of some form when applying for senior housing.²² At the other end of the age spectrum, LGBTQ youth suffer from lack of access to housing with nearly 40% of homeless youth in the country identifying as LGBTQ.²³ Acknowledging this history of discrimination, Congress noted in the Equality Act, “LGBT[Q] people often face discrimination when seeking to rent or purchase housing . . .” and “[n]ational surveys . . . show that housing discrimination against LGBT[Q] people is very prevalent.”²⁴ Despite the well-documented history of discrimination, the current federal law provides no protections for LGBTQ individuals with regard to housing.

II. LEGAL LANDSCAPE

Presently housing discrimination is governed by federal laws, regulations from the Department of Housing and Urban Development (HUD), and state and local law.²⁵

¹⁸ NAGLREP, *supra* note 16, at 3, 17.

¹⁹ *Id.* at 3, 13.

²⁰ Samantha Friedman et al., *An Estimate of Housing Discrimination Against Same-Sex Couples*, U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, 5-6 (June 2013), http://www.huduser.org/portal/Publications/pdf/Hsg_Disc_against_SameSexCpls_v3.pdf

²¹ *Id.* at 14–15.

²² Eisenberg, *supra* note 16.

²³ *LGBTQ Youth Homelessness*, THE HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/resources/lgbt-youth-homelessness> (last visited Jan. 16, 2017).

²⁴ Equality Act, H.R. 3185, 114th Cong. §§ 2(10)–(11) (2015).

²⁵ *See, e.g.*, N.Y.C. Admin. Code § 8-107(5)(a) (2016) (In some instances, municipal ordinances protect LGBTQ individuals, however, such ordinances are

A. Statutory Law & Administrative Regulations

Nationwide there is a wealth of statutory law preventing discrimination in housing against various communities.²⁶ In addition to the federal Fair Housing Act, all fifty states and the District of Columbia have fair housing statutes.²⁷ Federal Agencies, like HUD, have administrative regulations that protect LGBTQ people as well.²⁸ While administrative actions have certainly played a role in advancing LGBTQ equality, their current usefulness is questionable.²⁹ As such, like municipal ordinances, administrative actions are largely not addressed in this Article.³⁰

not addressed in this Article); see also, *Housing for LGBTQ People: What You Need to Know about Prop. Ownership & Discrimination*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/resources/housing-for-lgbt-people-what-you-need-to-know-about-property-ownership-and> (last visited Jan. 17, 2017) (stating that more than 240 municipalities have laws preventing discrimination based on sexual orientation).

²⁶ Fair Housing Act, 42 U.S.C. § 3604(a) (2012) (prevents discrimination on the basis of “race, color religion, sex, familial status, or national origin”).

²⁷ See discussion *infra* Part II(A)(2).

²⁸ *Ending Housing Discrimination Against Lesbian, Gay, Bisexual and Transgender Individuals and Their Families*, HUD, https://portal.hud.gov/hudportal/HUD?src=/program_offices/fair_housing_equal_opp/LGBT_Housing_Discrimination (last visited Mar. 4, 2017).

²⁹ See Aaron Rugar, *Jeff Sessions’ DOJ Is Already Working to Roll Back Protections for Transgender Kids*, THINKPROGRESS, Feb. 11, 2017, <https://thinkprogress.org/jeff-sessions-doj-transgender-rights-schools-fb105c1db30f#.lcwuvdofs>.

³⁰ See *infra* note 137 and related text. Administrative acts (e.g., departmental guidance, executive orders) are not as rigid as statutes and precedent, as they can be withdrawn or changed by subsequent orders. However, LGBTQ progress has been made via administrative acts. *But see* Jeremy W. Peters, Jo Becker & Julie H. Davis, *Trump Rescinds Rules on Bathrooms for Transgender Students*, N.Y. TIMES (Feb 22, 2017), <https://www.nytimes.com/2017/02/22/us/politics/devos-sessions-transgender-students-rights.html> (some of those rights have also been taken away).

1. Federal Laws

The Fair Housing Act makes it unlawful to discriminate against an individual on the basis of “race, color, religion, sex, familial status, or national origin” when selling or renting a home.³¹ The law also makes it unlawful to discriminate in the terms and conditions of the sale, advertise or represent property as being for sale to certain groups, and to discriminate based on a handicap in any way.³² Notably, the Fair Housing Act’s definitions section does not provide a definition for what is protected as “sex.”³³ The absence of a stated definition in the Act leaves courts open to interpret what the term “sex” precisely means, and therefore what “discrimination based on sex” means.³⁴

Under the Obama administration, HUD has interpreted the Fair Housing Act favorably toward gay individuals. On the Department’s website for LGBTQ individuals, they note that discrimination against LGBTQ people could be classified as discrimination based on sex.³⁵ Accordingly, HUD’s policies allowed for an individual to sue for sex discrimination based on the individual’s nonconformity to gender stereotypes (i.e. dating a person of the same gender, wearing clothing commonly attributed to another gender, or being transgender).³⁶ Additionally, during the Obama administration, HUD prevented discrimination against an individual because they have HIV or AIDS (this would be discrimination based on a handicap) and explicitly prevented discrimination based on actual or perceived sexual orientation and gender identity by providers funded by HUD or with loans from the Federal Housing Administration.³⁷

While President Obama and Secretary Castro had interpreted HUD policies favorably toward LGBTQ individuals, it remains to be seen how the department will operate under President Trump and

³¹ 42 U.S.C. § 3604(a) (2012).

³² *Id.* at §§ (b)–(f) (2012).

³³ *See id.* § 3602 (2012).

³⁴ *See discussion infra* Part IV.

³⁵ *See Ending Housing Discrimination, supra* note 28.

³⁶ *Id.*

³⁷ *Id.*

his nominee, Dr. Ben Carson.³⁸ During his confirmation hearing in January 2017, Dr. Carson noted he did not believe that LGBTQ individuals should get “extra rights.”³⁹ It appears, therefore, likely that under the current administration, HUD will be less protective toward LGBTQ individuals and their rights.⁴⁰

2. State Laws

In general, the fifty states and the District of Columbia can be divided into three categories in relation to their housing discrimination laws: states that have protections against discrimination for individuals based on sexual orientation and gender identity, those with protections based on sexual orientation only, and finally, those with no protections. According to current projections, approximately 48% of the LGBTQ population lives in states with protections based on sexual orientation and gender identity.⁴¹ While this is significant, the majority of gay individuals are still subject to harmful housing practices simply because of who they are.⁴² Moreover, many gay people choose to move to states with housing protections in order to have a sense of security.⁴³ In doing so, many LGBTQ individuals may be in a sense forced to either move away from friends and family or live in states with inadequate housing protections.

³⁸ *HUD History*, HUD, https://portal.hud.gov/hudportal/HUD?src=/about/hud_history (last visited Mar. 5, 2017) (Julián Castro served as the sixteenth HUD Secretary from July 28, 2014 until January 20, 2017).

³⁹ See Tim Devaney, *Carson: No ‘Extra Rights’ for Gay Americans*, THE HILL (Jan. 12, 2017, 11:31 AM), <http://thehill.com/homenews/administration/313968-carson-no-extra-rights-for-gay-americans>.

⁴⁰ As of this note’s writing in late May 2017, Secretary Carson has not rolled back HUD’s public housing protections for LGBTQ individuals.

⁴¹ *Non-Discrimination Laws*, LGBT MOVEMENT ADVANCEMENT PROJECT, http://www.lgbtmap.org/equality-maps/non_discrimination_laws (last visited Jan. 19, 2017).

⁴² *Id.*

⁴³ See generally NAGLREP, *supra* note 16.

Twenty states and the District of Columbia provide protections based on both sexual orientation and gender identity.⁴⁴ Another two states protect only against discrimination based on sexual orientation.⁴⁵ The remaining twenty-eight states provide no protections for discrimination against LGBTQ people.⁴⁶ As a result of the incongruent nature of state laws, the only viable way for LGBTQ individuals to have adequate protection against harmful discrimina-

⁴⁴ See CAL. GOV'T CODE § 12955 (West 2016); NEV. REV. STAT. ANN. § 118.100 (West 2016); OR. REV. STAT. ANN. §§ 174.100, 659A.421 (West 2016); WASH. REV. CODE ANN. §§ 39.60.040(26), 49.60.222 (West 2016) (referring to sexual orientation); UTAH CODE ANN. § 57-21-5 (West 2016); HAW. REV. STAT. ANN. §513-3 (West 2016); N.M. STAT. ANN. §28-1-7(G) (West 2016); COLO. REV. STAT. ANN. §§ 24-34-301(7), 24-34-502 (West 2016); IOWA CODE ANN. § 216.8 (West 2016); MINN. STAT. ANN. §§ 363A.03(44), 363A.09 (West 2016); 775 ILL. COMP. STAT. ANN. 5/1-103(O-1) (West 2016); 775 ILL. COMP. STAT. ANN. 5/3-102 (West 2016); DEL. CODE ANN. tit. 25, § 5116 (West 2016); D.C. Mun. Regs. tit. 4 §§ 801(b), 1001 (2016); MD. CODE ANN. STATE GOV'T § 20-705 (West 2016); N.J. STAT. ANN. §10:5-12(g)-(h) (West 2016); N.Y. EXEC. LAW §§ 296(5), 466.13 (West 2016); CONN. GEN. STAT. ANN. §§ 46a-81e, 46a-64c (West 2016); 34 R.I. GEN. LAWS ANN. §§ 34-37-2, 34-37-2.2, 34-37-2.3 (West 2016); MASS. GEN. LAWS ANN. CH. 151B § 4(6)-(7B) (West 2016); VT. STAT. ANN. tit. 9 § 4503 (West 2016); ME. REV. STAT. ANN. tit. 5 §§ 4553(9-C), 4581-A (West 2016).

⁴⁵ See N.H. REV. STAT. ANN. §354-A:8 (West 2016); WIS. STAT. ANN. § 106.50 (West 2016).

⁴⁶ See ALASKA STAT. ANN. § 18.80.240 (West 2016); ARIZ. REV. STAT. ANN. § 41-1491.14 (West 2016); IDAHO CODE ANN. §67-5909 (West 2016); WYO. STAT. ANN. § 40-26-103 (West 2016); MONT. CODE ANN. §49-2-305 (West 2016); TEX. PROP. CODE ANN. § 301.021 (West 2016); OKLA. STAT. tit. 25 § 1452 (West 2016); KAN. STAT. ANN. § 44-106 (West 2016); NEV. REV. STAT. ANN. § 20-318 (West 2016); S.D. CODIFIED LAWS § 20-13-20 (2016); N.D. CENT. CODE ANN. § 14-02.5-02 (West 2016); LA. STAT. ANN. § 51:2606 (2016); ARK. CODE ANN. § 16-123-204 (West 2016); MO. ANN. STAT. § 213.040 (West 2016); MICH. COMP. LAWS ANN. § 37.2502 (West 2016); OHIO REV. CODE ANN. § 4112.02 (West 2016); IND. ANN. CODE § 22-9.5-5-1 (West 2016); KY. REV. STAT. ANN. § 344.360 (West 2016); TENN. CODE ANN. § 4-21-601 (West 2016); MISS. CODE ANN. § 43-33-723 (West 2016); ALA. CODE § 24-8-4 (2016); FLA. STAT. ANN. § 760.23 (West 2016); GA. CODE ANN. § 8-3-202 (West 2016); S.C. CODE ANN. §31-21-40 (2016); N.C. GEN. STAT. ANN. § 41A-4 (West 2016); VA. CODE ANN. § 36-96.3 (West 2016); W. VA. CODE ANN. § 5-11A-5 (West 2016); 43 PA. STAT. AND CONS. STAT. § 953 (West 2016).

tion, and enjoy the right to live openly in all fifty states, is through Federal law.

Among the twenty-one states (including the District of Columbia) that protect against discrimination on the basis of both sexual orientation and gender identity, there is a broad degree of variance in how exactly the laws achieve this result. Most states have amended their respective state Fair Housing Acts to provide sexual orientation and gender identity protections.⁴⁷ One state (Connecticut) protects discrimination on the basis of sexual orientation with its own title,⁴⁸ while others also provide protection against housing discrimination on the basis of HIV status.⁴⁹ Another state (Rhode Island) amended its laws by creating new statutes that universally insert “sexual orientation” and “gender identity” after the word “sex” in the housing title.⁵⁰ While really two separate things, some states also include gender identity or expression in the definition of sexual orientation thereby providing protection for the full range of the LGBTQ community.⁵¹

While the protections are significant, the absence of federal protections under the Fair Housing Act’s prohibition on discrimination “because of sex” still leaves LGBTQ Americans in over half the country subject to the potential harm of discrimination because of their sexual orientation or gender identity.⁵²

⁴⁷ See, e.g., CAL. GOV. CODE § 12955 (West 2016); NEV. REV. STAT. ANN. § 118.100 (West 2016); OR. REV. STAT. ANN. § 659A.421(2) (West 2016); WASH. REV. CODE ANN. § 49.60.222 (West 2016); UTAH CODE ANN. § 57-21-5 (West 2016); HAW. REV. STAT. ANN. § 513-3 (West 2016); N.M. STAT. ANN. § 28-1-7(G) (West 2016).

⁴⁸ CONN. GEN. STAT. ANN. § 46a-81e (West 2016).

⁴⁹ CAL. GOV. CODE § 12955 (West 2016); HAW. REV. STAT. ANN. § 513-3 (West 2016).

⁵⁰ 34 R.I. GEN. LAWS ANN. §§ 34-37-2.2, 34-37-2.3 (West 2016).

⁵¹ OR. REV. STAT. ANN. § 174.100 (West 2016); WASH. REV. CODE ANN. § 49.60.040 (West 2016); ME. REV. STAT. ANN. Tit. 5 §4581-A (2016).

⁵² See *Non-Discrimination Laws*, *supra* note 41.

B. Level of Scrutiny for Constitutional Equal Protection Analysis

Under both the Fifth and Fourteenth Amendments' Equal Protection Clause, the Court has developed levels of scrutiny in order to protect suspect and quasi-suspect groups.⁵³ When subjected to that analysis, sexual orientation and gender identity are reviewed under the default, rational basis review, rather than intermediate or strict scrutiny.⁵⁴ This level of analysis is used as the Court has not determined which level of analysis properly applies, leading to review under the default standard.⁵⁵ The Court last remotely approached this question in 1996 in *Romer v. Evans*.⁵⁶ In that case, the trial court applied rational basis review and that decision was not appealed.⁵⁷ However, since that time, lower courts have applied higher levels of review.⁵⁸

While the Courts have failed to apply heightened scrutiny,⁵⁹ in a sense constitutional equal protection analysis for the gay community has improved since the infancy of the LGBTQ rights movement. With the Court's decision in *Romer*, the gay community

⁵³ See *United States v. Carolene Prod. Co.*, 304 U.S. 144, 152 n.4 (1938).

⁵⁴ See Andrea L. Claus, *Outstanding Student Article, The Sex Less Scrutinized: The Case for Suspect Classification for Sexual Orientation*, 5 PHOENIX L. REV. 151, 152–53 (2011).

⁵⁵ In the Supreme Court's most recent decision that explicitly dealt with sexual orientation, the Court made little mention of levels of scrutiny in holding that there is a constitutional right for same sex couples to marry. See generally *Obergefell*, *supra* note 4.

⁵⁶ 517 U.S. 620 (1996).

⁵⁷ *Id.* at 640, n.1.

⁵⁸ See, e.g., *Windsor v. United States*, 699 F.3d 169, 185 (2d Cir. 2012) (using intermediate scrutiny to strike down the Defense of Marriage Act); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 997 (N.D. Cal. 2010) (“Although Proposition 8 fails to possess even a rational basis, the evidence presented at trial shows that gays and lesbians are the type of minority *strict scrutiny* was designed to protect”) (emphasis added); see also *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 484 (9th Cir. 2014).

⁵⁹ See generally *Obergefell v. Hodges*, 135 S. Ct. 2584, 2599 (2015) (holding that marriage is a fundamental right without addressing what level of scrutiny, if any, should apply to the LGBTQ community).

has advanced from a legal paradigm that explicitly prevented anti-discrimination laws targeting sexual orientation to the present system where such conduct is unconstitutional.⁶⁰ To be fair, this shift from a prohibition against anti-discrimination laws to protection under rational basis is progress, however, more progress is needed to adequately protect LGBTQ individuals. As such, the judiciary should now hold that laws targeting sexual orientation and gender identity are subject to the same analysis as laws targeting sex and apply intermediate scrutiny in constitutional analysis to protect the LGBTQ community against discrimination.⁶¹

C. Statutory Interpretation Versus Constitutional Analysis to Provide for LGBTQ Housing Protections

While much of the legal protections for LGBTQ individuals that have been created via the courts have been through constitutional analysis, statutory interpretation is the best approach for housing discrimination.⁶² As noted above, protections in the housing context that already exist at the state level and through HUD for LGBTQ people are statutory rather than constitutional.⁶³ Admittedly, constitutional arguments for equal protection for LGBTQ individuals have been effective.⁶⁴ However, with the current ambiguity as to what level of scrutiny applies to LGBTQ individuals, statutory interpretation presents the more conservative option.⁶⁵ After all, it is far easier for the judiciary to interpret “because of sex” in federal statutes like the Fair Housing Act to include discrimination based on sexual orientation and gender identity than to reach

⁶⁰ See generally *Romer v. Evans*, 517 U.S. 620, 636 (1996) (holding Colorado’s constitutional amendment preventing anti-discrimination ordinances protecting the LGBTQ community to be unconstitutional).

⁶¹ See discussion *infra*, Part V.

⁶² See discussion *infra*, Part III(B).

⁶³ See discussion *supra*, Part II(A)(1).

⁶⁴ See, e.g., *Obergefell*, 135 S. Ct. at 2604 (Amendment XIV); *Lawrence v. Texas*, 539 U.S. 558, 574–78 (2003) (Amendment XIV); *Christian Legal Soc’y v. Martinez*, 561 U.S. 661, 702–03 (2011) (Amendment I).

⁶⁵ See *supra* Part II(B).

the same conclusion under a constitutional analysis. Further, these statutory based arguments are already being raised.⁶⁶ Unless these arguments prove unconvincing to the judiciary, there is no reason to attempt to mount an attack under the Fourteenth Amendment. Finally, and perhaps most compelling, an act of Congress or statutory interpretation by the courts would provide protections against actions taken by private parties in addition to acts of the state or federal government. It is well settled that the Constitution does not govern the actions of private actors; statutes, however, do.⁶⁷ This simple principle means that statutory protections, even via judicial interpretation, are the best avenue to universally protect LGBTQ people.

III. WHAT BRANCH IS BEST SUITED TO PROVIDE PROTECTIONS

Compelling arguments can be made for either the legislature or the judiciary to be the agent of expanding civil rights. In the past, LGBTQ rights advocates have been divided over this issue. Some favored action via the judiciary while others, including sometimes even the courts themselves, have argued that the political process is the ideal avenue.⁶⁸ By amending the Fair Housing Act, Congress can provide protections to LGBTQ individuals uniformly across the country. Significantly, Congressional action would not require gay rights advocates to argue that discrimination based on sexual orientation and gender identity are themselves discrimination because of sex.⁶⁹ The ability to provide protections, however, is not limited to

⁶⁶ See discussion *infra* Part IV.

⁶⁷ See, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254, 264–65 (1964).

⁶⁸ See *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), *rev'd sub nom Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); Janet E. Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity*, 36 UCLA L. REV. 915, 915–16 (1989); see also *When We Rise: Night IV Part 1* (ABC Television Broadcast Mar. 3, 2017).

⁶⁹ See generally Elyssa Cherney, *Courts Question Distinction between Sex, Sexuality in Discrimination Cases*, CHI. TRIB. (Feb. 13, 2017, 5:38 AM), <http://www.chicagotribune.com/news/ct-federal-lgbt-discrimination-cases-met-20170211-story.html>.

the political branches. The nation's courts can prevent discrimination on the basis of sexual orientation and gender identity through statutory interpretation. This can be accomplished by expanding the definition of sex in the Fair Housing Act to include sexual orientation and gender identity.⁷⁰ Courts have begun to do just that⁷¹ and with the current polarized nature of Congress, continuing to litigate the expansion of the Fair Housing Act's definition of sex is the best strategy for nationwide protections against discrimination on the basis of sexual orientation and gender identity in housing.

A. Congress

Under our Constitution, Congress makes law.⁷² The judiciary subsequently is tasked with reviewing the law and determining the meaning of the words in the statute; they should not make the law themselves.⁷³ Accordingly, laws protecting the rights of minorities should be passed in Congress via the democratic process. This, however, does not always happen. For this reason, the system was designed to prevent a "tyranny of the majority."⁷⁴ Moreover, there are some instances where Congress is either unable or unwilling to act. In those instances, the Judiciary should intercede. LGBTQ protections in housing are one such area where Congress has proven itself unwilling to act.

Congress has had the chance to protect LGBTQ individuals seeking access to housing. In 2015, the Equality Act was introduced before dying in committee.⁷⁵ Even prior to, and during, the judicial

⁷⁰ See discussion *infra* Part IV.

⁷¹ *Id.*

⁷² See U.S. Const. art. I.

⁷³ See U.S. Const. art. I.

⁷⁴ Dane S. Claussen, *Preventing the Tyranny of the Majority is in the Original Plan*, ACLU NEV. (Feb. 21, 2012), <https://www.aclunv.org/en/news/preventing-tyranny-majority-original-plan>.

⁷⁵ See H.R. 3185, *supra* note 6. The Equality Act has been reintroduced with bipartisan support. See O'Hara, *infra* note 82; see also H.R. 2282, 115th Cong. (2017). Additionally, Congress has introduced the Fair and Equal Housing Act of 2017, which would provide statutory protections against discrimination on the

campaign for marriage equality there was a consistent push from the LGBTQ community for legislative protections against discrimination on the basis of an individual's sexual orientation.⁷⁶ Outside of housing, Congress' recent record in LGBTQ rights is not much better. In 2009, Congress passed the Matthew Shepard & James Byrd Jr. Hate Crimes Prevention Act,⁷⁷ which expanded the Federal Hate Crimes Law to cover sexual orientation and gender identity. That Act, however, had to be slipped in as a rider to a defense-spending bill in order to make it through Congress.⁷⁸ Further, the legislative record is filled with examples of congressional animus toward gay individuals.⁷⁹ Given Congress's inaction with LGBTQ rights in the past, it is unlikely that any substantial changes will presently come via the legislature.

Another reason why Congress is unwilling to act in this area is the makeup of the chambers. Congress itself is a political organization with members who are popularly elected. Representatives and Senators from the twenty-eight states without state-level housing protections⁸⁰ would likely not feel compelled to provide protections that their counterparts in state capitals (who were elected by the same electorate) have not themselves provided. This is exacerbated by the fact that LGBTQ rights are still largely seen as a political issue.⁸¹ Because of the makeup of the chambers and the divisive

basis of sexual orientation and gender identity. H.R. 1447, 115th Cong. (2017). The act was introduced by a Republican and has bipartisan support. *Id.*

⁷⁶ See *When We Rise*, *supra* note 68.

⁷⁷ 18 U.S.C. § 249 (2012).

⁷⁸ Jeff Zeleny, *Obama Signs Hate Crimes Bill*, N.Y. TIMES (Oct. 28, 2009, 7:43 PM), https://thecaucus.blogs.nytimes.com/2009/10/28/obama-signs-hate-crimes-bill/?_r=0.

⁷⁹ The Federal Defense of Marriage Act, Don't Ask, Don't Tell, and the historic status of homosexuality being an inadmissible ground for immigration are a few examples of explicitly anti-LGBTQ laws that Congress has passed over its history.

⁸⁰ See *supra* Part II(A)(2).

⁸¹ By way of example, during her campaign for President, Secretary Clinton had an LGBT rights page on her campaign website. *LGBT Rights and Equality*, HILLARY FOR AMERICA, <https://www.hillaryclinton.com/issues/lgbt-equality/> (last visited May 21, 2017). Additionally, former North Carolina Governor Pat McCrory's lost reelection bid was attributed at least in part to his support of the anti-LGBTQ H.B.2. See, e.g., *North Carolina Gov. McGrory Concedes He Lost*

nature of LGBTQ rights for many voters, it is unlikely that Congress will actually push for protections based on sexual orientation and gender identity in the Fair Housing Act. Further, any potential bill to protect the gay community would also likely face difficulties in the White House.⁸²

Finally, in an article examining the gay rights movement post-*Obergefell*, the authors concluded that the Court is likely the best avenue for continual change.⁸³ Noting the success of the marriage equality campaign and the stalled Equality Act in Congress, the authors argue that the court is the best avenue for progress.⁸⁴ They note that in titles of the Civil Rights Act that protect against “discrimination based on sex,”—such as the Fair Housing Act—LGBTQ advocates have the obvious strategy of construing the language to include sexual orientation and gender identity.⁸⁵

Re-election Bid, FOX NEWS, Dec. 5, 2016, <http://www.foxnews.com/politics/2016/12/05/north-carolina-gov-pat-mccrory-concedes-lost-re-election.html>; Jenny Jarvie, *North Carolina Gov. McCrory Concedes He Lost Reelection Bid*, L.A. TIMES, Dec. 5, 2016, <http://www.latimes.com/politics/la-na-pol-pat-mccrory-lost-20161205-story.html>; Jim Morrill, *Tolls—& HB2—Became Roadblocks for Pat McCrory*, CHARLOTTE OBSERVER (Nov. 9, 2016), <http://www.charlotteobserver.com/news/politics-government/election/article113751839.html>.

⁸² See Mary Emily O’Hara, *Over 200 Members of Congress File Federal LGBTQ-Rights Bill*, NBC NEWS (May 2, 2017), <http://www.nbcnews.com/feature/nbc-out/over-200-members-congress-file-federal-lgbtq-rights-bill-n754006>; see also Chris Johnson, *LGBT Groups Prepare for Fight over Trump “Religious Freedom” EO*, LOS ANGELES BLADE (May 2, 2017), <http://www.losangelesblade.com/2017/05/02/lgbt-groups-prepare-fight-trump-religious-freedom-eo/>; Eugene Scott, *LGBT Groups Condemn Trump’s Religious Liberty Executive Order*, CNN (May 4, 2017), <http://www.cnn.com/2017/05/04/politics/lgbt-religious-liberty-executive-order/>.

⁸³ See Lisa Bornstein & Megan Bench, *Married on Sunday, Fired on Monday: Approaches to Federal LGBT Civil Rights Protections*, 22 WM & MARY J. WOMEN & L. (SPECIAL ISSUE) 31, 68–71 (2015).

⁸⁴ See *id.* at 68–69.

⁸⁵ See *id.* at 69; see also discussion *infra* Part IV.

B. The Courts

Justice Scalia once opined, “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.”⁸⁶ While battles for LGBTQ equality have played out in both the Capital Building and the courthouse, it has been in the courthouse where the gay community has found much of its success. This history of judicial victories coupled with the court’s ability to provide protections via statutory interpretation⁸⁷ makes the court the ideal venue to expand the Fair Housing Act to protect LGBTQ individuals.

Four of the cases from the Court’s lengthy history in advancing LGBTQ are particularly relevant to current arguments to expand the definition of sex in the Fair Housing Act. The Court’s decision in *Romer v. Evans*,⁸⁸ *Lawrence v. Texas*,⁸⁹ *U.S. v. Windsor*,⁹⁰ and *Obergefell v. Hodges*⁹¹ helped to lay the legal framework for current arguments in favor of protections against housing discrimination.

In 1992 voters in Colorado passed a Constitutional amendment in response to comprehensive civil rights ordinances in Boulder, Denver, and Aspen.⁹² The ordinances provided protections against discrimination on a variety of basis, including sexual orientation in housing, public accommodation, welfare, and employment.⁹³ The amendment overturned the protections based on sexual orientation and preventing any state or municipal ordinance protecting LGBTQ people.⁹⁴ Finding the Colorado law to be little more

⁸⁶ *Oncale v. Sundowner Offshore Serv. Inc.*, 523 U.S. 75, 79 (1998) (emphasis added).

⁸⁷ See discussion *infra* Part IV.

⁸⁸ 517 U.S. 620 (1996).

⁸⁹ 539 U.S. 558 (2003).

⁹⁰ 570 U.S. 744 (2013).

⁹¹ 135 S. Ct. 2584 (2015).

⁹² *Romer*, 517 U.S. at 623–24.

⁹³ *Id.* at 624.

⁹⁴ *Id.*

than a “bare . . . desire to harm a politically unpopular group”⁹⁵ the Court overturned the Colorado amendment holding that it violated the Equal Protection Clause of the Fourteenth Amendment.⁹⁶ In so doing, the Court allowed the non-discrimination ordinances to fully protect LGBTQ Coloradans from the harm of discrimination in all facets of their daily life, including housing.

Less than a decade after *Romer*, the Court again handed down a significant LGBTQ decision in *Lawrence v. Texas*.⁹⁷ In *Lawrence*, the Court struck down a Texas law criminalizing same-sex sexual activity.⁹⁸ The Court framed the issue around privacy and the right to associate with people of one’s choosing.⁹⁹ By recognizing the right of LGBTQ people to associate freely,¹⁰⁰ the Court effectively decriminalized being gay and allowed gay Americans access to newfound equality.¹⁰¹ Most significantly, the decision in *Lawrence* set the groundwork for modern fights in LGBTQ rights, including anti-discrimination laws.¹⁰²

A decade after striking down sodomy laws, in *United States v. Windsor* the Court started to address same-sex marriage by striking down the Federal Defense of Marriage Act (DOMA)’s

⁹⁵ *Id.* at 634–35 (quoting *Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)) (internal quotations omitted).

⁹⁶ *Id.* at 635–36.

⁹⁷ 539 U.S. 558 (2003).

⁹⁸ *Id.* at 578–79.

⁹⁹ *Id.* at 567; *see also* *Christiansen v. Omnicom Grp.*, 852 F.3d 195, 204 (2d Cir. 2017) (Katzmann, C.J., concurring) (stating the right to associate is implicated in discrimination issues, as actions taken based on the sex of an associate could be actionable sex discrimination).

¹⁰⁰ *Lawrence*, 539 U.S. at 567 (“When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.”).

¹⁰¹ Lambdalegal, *Overruled! The Case That Brought Down Sodomy Laws (Complete)*, YOUTUBE (Mar. 14, 2012) <https://www.youtube.com/watch?v=PZWjVh7OdFc>.

¹⁰² *Id.* *See also* *Hively v. Ivy Tech Cmty. College*, 853 F.3d 339, 349 (7th Cir. 2017) (citing *Lawrence* as support for their holding that discrimination because of sex also includes sexual orientation).

definition of “spouse” in federal laws.¹⁰³ In striking down DOMA, the Court granted federal recognition to same-sex marriages that were recognized by the individual’s state.¹⁰⁴ In so doing, the Court granted federal recognition to lawfully performed same-sex unions. Two years to the day after the decision in *Windsor*, marriage equality was lawful nationwide with the Court’s decision in *Obergefell v. Hodges*.¹⁰⁵ In *Obergefell* the Court held states must recognize marriages performed in other states and that the Constitution provides a right to marry.¹⁰⁶

Having found LGBTQ individuals to no longer be effectively criminals and provided for their right to marry, the next logical fight is for protection against discrimination in one of life’s basic necessities: finding and maintaining a home. These cases provide one piece of the framework by which the judiciary can protect the LGBTQ community from discrimination in housing. The other two pieces, the connection between “sexual orientation,” “gender identity,” and “sex” as concepts and Title VII sex discrimination precedents allow the court to rely on statutory interpretation to expand the meaning of the word “sex” in Title VII, and eventually the Fair Housing Act.

IV. “SEXUAL ORIENTATION” & “GENDER IDENTITY” ARE INTRICATELY LINKED TO “SEX”

In order for sexual orientation and gender identity discrimination to be protected under the umbrella of sex discrimination, it must be shown that sexual orientation and gender identity are linked to the concept of “sex.” Further, as the Fair Housing Act does not include a definition for “sex” the concept could be expanded to include sexual orientation and gender identity.¹⁰⁷ The term “sex” generally is interpreted to mean purely the “biological and physiological

¹⁰³ *United States v. Windsor*, 570 U.S. 744, 775 (2013).

¹⁰⁴ *Id.* at 773–75.

¹⁰⁵ *Obergefell v. Hodges*, 135 S Ct. 2584, 2607–08 (2015).

¹⁰⁶ *Id.* at 2604–05, 2607–08.

¹⁰⁷ *See* discussion *supra* Part II(A)(1).

characteristics that define men and women.”¹⁰⁸ Gender generally refers to the “widely shared set of expectations and norms linked to how women and men . . . should behave.”¹⁰⁹ The term “sex,” at least under Title VII and the Fair Housing Act, has generally been interpreted to protect against discrimination on the basis of both sex and gender.¹¹⁰

Scholars have argued that discrimination based on failure to conform to a common sexual stereotype is itself discrimination based on sex.¹¹¹ Relying on social science,¹¹² these scholars argue that sexual orientation and sex are really the same thing.¹¹³ One scholar noted, “sex, gender, and sexual orientation are inextricably linked in reality” before concluding that these concepts should be linked in the law as well.¹¹⁴ Another scholar speaking in an employment context argued “[i]f an employee is fired for being gay, the employer necessarily considered the sex of the persons with whom

¹⁰⁸ *What Is the Link between Sexuality and Gender*, INST. OF DEV. STUDIES, <http://spl.ids.ac.uk/sexuality-and-social-justice-toolkit/1-issues-and-debates/what-link-between-sexuality-and-gender> (last visited May 18, 2017).

¹⁰⁹ *Id.*

¹¹⁰ *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989) (holding that failure to promote a female to partner because of her aggressive personality was actionable sex discrimination); Christiansen v. Omnicom Grp., 852 F.3d 195, 205–06 (2d Cir. 2017) (Katzmann, C.J., concurring); *see also* Isaac Saidel-Goley, *The Right Side of History: Prohibiting Sexual Orientation Discrimination in Public Accommodations, Housing, and Employment*, 31 WIS. J.L. GENDER & SOC’Y 117, 140–41 (2016).

¹¹¹ *See, e.g.*, Luke A. Boso, *Acting Gay, Acting Straight: Sexual Orientation Stereotyping*, 83 TENN. L. REV. 575, 589 (2016) (discussing how courts have interpreted sex as both biological status and individual expressions of masculinity or femininity); *see* Bornstein & Bench, *supra* note 83, at 43–46; *see also* Daniella Lichtman Esses, *Afraid to be Myself, Even at Home: A Transgender Cause of Action under the Fair Housing Act*, 42 COLUM. J. L. & SOC. PROB. 465, 494–96 (Summer, 2009).

¹¹² Courtney Weiner, *Sex Education: Recognizing Anti-Gay Harassment as Sex Discrimination Under Title VII & Title IX*, 37 COLUM. HU. RTS. L. REV. 189, 195–203 (2005).

¹¹³ Boso, *supra* note 111, at 596; Esses, *supra* note 111, at 470; Weiner, *supra* note 112, at 195.

¹¹⁴ Weiner, *supra* note 112, at 193.

the plaintiff associated or dated.”¹¹⁵ Finally, and perhaps most compellingly, judges and scholars have both argued that sexual orientation discrimination really is all about asserting traditional gender roles.¹¹⁶ In the housing context, if a landlord refused to rent an apartment to a same-sex couple because the individuals were in a relationship with people of the same sex (i.e. because of their sexual orientation), then the landlord discriminated on the basis of sex by imposing the stereotype that men exclusively date women and women exclusively date men.¹¹⁷ As gender-based stereotyping is discrimination on the basis of sex, the landlord’s action in this hypothetical would be an actionable case of discrimination because of sex. Thus, it is difficult to create a situation where an individual was discriminated against on the basis of their sexual orientation or gender identity and either the person’s sex or a common gender stereotype is not also implicated.

The argument that sexual orientation and gender identity are intrinsically linked to sex has started to resonate with courts. Not surprisingly, with very few exceptions, the argument has largely been raised in the employment context under Title VII.¹¹⁸ Courts routinely look to Title VII for guidance in deciding cases under the Fair Housing Act.¹¹⁹ As such, the Title VII cases are instructive to this argument and could pave the way for the Fair Housing Act to

¹¹⁵ Boso, *supra* note 111, at 589.

¹¹⁶ See *Christiansen v. Omnicom Grp.*, 852 F.3d 195, 205–06 (2d Cir. 2017) (Katzmann, C.J., Concurring); see also Boso, *supra* note 111, at 597. As noted previously, this type of discrimination is actionable as sex discrimination.

¹¹⁷ The stereotype used in the hypothetical has been recognized as an actionable gender-based stereotype by the court. *Centola v. Potter*, 183 F. Supp. 2d 403, 410 (D. Mass. 2002).

¹¹⁸ See, e.g., *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018); *Christiansen*, 852 F.3d at 198; *Hively v. Ivy Tech Cmty. College*, 853 F.3d 339, 340–41 (7th Cir. 2017); *Fabian v. Hosp. of Cent. Conn.*, 172 F. Supp. 3d 509, 512 (D. Conn. 2016); *Boutillier v. Hartford Pub. Sch.*, 221 F. Supp. 3d 255, 259 (D. Conn. 2016); *Videckis v. Pepperdine Univ.*, 150 F. Supp. 3d 1151, 1154 (C.D. Cal. 2015); *Baldwin v. Foxx*, No. 0120133080, WL 4397641 at *5 (2015).

¹¹⁹ See *Smith v. Avanti*, 249 F. Supp. 3d 1194, 1199–1200 (D. Colo. 2017); see also *Esses*, *supra* note 111, at 470.

protect individuals from discrimination on the basis of their sexual orientation or gender identity.

The starting point within Title VII case law for expanding the meaning of sex discrimination to include sexual orientation and gender identity is the Supreme Court's decisions in *Price Waterhouse v. Hopkins*¹²⁰ and *Oncale v. Sundowner Offshore Servs. Inc.*¹²¹ These two cases each expanded the scope of actionable sex discrimination under Title VII. *Price Waterhouse* held that gender-based stereotyping could be actionable under Title VII.¹²² *Oncale* held that harassment by someone of the same or opposite sex of the victim was also actionable under Title VII.¹²³ Both these cases, along with the LGBTQ rights cases briefly discussed in Part III,¹²⁴ provide the foundational precedent for the recent cases holding sexual orientation and gender identity to be included as discrimination on the basis of sex.

In 2015, the Equal Employment Opportunity Commission (EEOC) held that “[s]exual orientation discrimination is discrimination”¹²⁵ The EEOC notes that “[s]exual orientation as a concept cannot be defined or understood *without references to sex*. . . . It follows then, that sexual orientation is *inseparable from and inescapably linked* to sex and, therefore that *allegations of sexual orientation discrimination involve sex-based considerations*.”¹²⁶

Recently, the argument that discriminating against someone's sexual orientation is actionable sex discrimination has been accepted by the Seventh Circuit in *Hively v. Ivy Tech Community College*.¹²⁷ In that case, attorneys successfully argued that the plaintiff's denial of a promotion six times because of her sexual

¹²⁰ 490 U.S. 228 (1989).

¹²¹ 523 U.S. 75 (1998).

¹²² *Price Waterhouse*, 490 U.S. at 258.

¹²³ *Oncale*, 523 U.S. at 82.

¹²⁴ *See supra* Part III(B).

¹²⁵ *Baldwin v. Foxx*, No. 0120133080, 2015 WL 4397641 at *5 (E.E.O.C. July 15, 2015).

¹²⁶ *Id.* (emphasis added).

¹²⁷ 853 F.3d 339, 340 (7th Cir. 2017).

orientation was sex-based discrimination.¹²⁸ From the outset, the court noted that the question presented was purely one of statutory interpretation. The court noted, “[w]e must decide . . . what it means to discriminate on the basis of sex, and in particular *whether actions taken on the basis of sexual orientation are a subset of actions taken on the basis of sex.*”¹²⁹ Hively argued that either under a comparative method (where the court should determine if the plaintiff would be treated the same if all things were equal but her sex) or under *Loving v. Virginia*’s¹³⁰ right to intimate association the court could conclude sex based discrimination existed.¹³¹ The Seventh Circuit accepted both of arguments stating that “[i]t would require considerable calisthenics to remove the “sex” from “sexual orientation” and that such an attempt would not be reconcilable with the plain language of Title VII.¹³²

The Seventh Circuit is not the only court to grapple with this novel argument. Panels of the Eleventh and Second Circuits also recently heard cases alleging sexual orientation discrimination under Title VII’s prohibition on sex discrimination.¹³³ Each panel noted the presence of controlling precedent preventing them from finding in favor of the plaintiffs.¹³⁴ In a concurring opinion, however, two judges in the Second Circuit urged the remainder of the court to sit en banc in order to consider whether sexual orientation and gender identity are protected as discrimination on the basis of sex.¹³⁵ In his

¹²⁸ See Braden Campbell, *Full 7th Cir. Could Rewrite Book on Sex-Orientation Bias*, LAW360 LEXIS NEXIS (Nov. 28, 2016), <https://www.law360.com/articles/866479/full-7th-circ-could-rewrite-book-on-sex-orientation-bias>.

¹²⁹ *Hively*, 853 F.3d at 343 (emphasis added).

¹³⁰ 388 U.S. 1 (1967).

¹³¹ *Hively*, 853 F.3d at 345.

¹³² *Id.* at 350.

¹³³ *Christiansen v. Omnicom Grp.*, 852 F.3d 195, 199–200 (2d Cir. 2017); *Evans v. Georgia Reg’l Hosp.*, 850 F.3d 1248, 1255 (11th Cir. 2017).

¹³⁴ *Christiansen*, 852 F.3d at 199; *Evans*, 850 F.3d at 1255.

¹³⁵ *Christensen*, 852 F.3d at 207 (Katzmann, C.J., concurring). The Second Circuit later sat *en banc* in *Zarda v. Altitude Express, Inc.* and reversed circuit precedent by holding that discrimination on the basis of sexual orientation is actionable sex discrimination. See *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 108, 132 (2d Cir. 2018).

concurrence, Chief Judge Katzmann articulated similar points as the court in *Hively*, however, he also emphasized how the law has changed in the decades since the controlling cases were decided¹³⁶ as well as recent district court cases dealing with sexual orientation and gender-based stereotypes.¹³⁷ Recognizing the significance of the issue, Chief Judge Katzmann concluded by remarking that this question “well may be . . . ultimately address[ed]” by the Supreme Court.¹³⁸

Hively, *Christansen*, and similar cases are significant for a number of reasons. These cases show that the courts are beginning to recognize that the “line between sex discrimination and sexual orientation discrimination . . . does not exist, save as a lingering and faulty judicial construct.”¹³⁹ These cases also show the federal courts’ recognition that sexual orientation and gender identity discrimination can be solved by the judiciary via statutory interpretation. Finally, as these cases are in employment discrimination and the courts often look to employment cases to resolve novel questions in housing discrimination, these decisions could directly combat the effects of discrimination on the basis of sexual orientation and gender identity in housing.

This argument has also been raised with limited success in housing. In *Smith v. Avanti*, a federal case decided in 2017, the plaintiffs, a cisgender and a transgender lesbian couple, alleged that they were denied housing *because of sex*.¹⁴⁰ The couple alleged that while the defendant was originally willing to rent a property to the plaintiffs, she was no longer willing after meeting them because of

¹³⁶ In the Second Circuit the relevant controlling cases when *Christiansen* was decided, *Simonton v. Runyon*, 232 F.3d 33 (2d Cir. 2000) and *Dawson v. Bumble & Bumble*, 398 F.3d 211 (2d Cir. 2005) were decided nearly twenty-years ago. *Christiansen*, 852 F.3d at 202 (Katzmann, C.J., concurring).

¹³⁷ *Christensen*, 852 F.3d at 205 (Katzmann, C.J., concurring) (citing *Boutillier v. Hartford Pub. Sch.*, 221 F. Supp. 3d 255, 269 (D. Conn. 2016); *Videckis v. Pepperdine Univ.*, 150 F. Supp. 3d 1151, 1154 (C.D. Cal. 2015); *Fabian v. Hosp. of Cent. Conn.*, 172 F. Supp. 3d 509, 512 (D. Conn. 2016)).

¹³⁸ *Christensen*, 852 F.3d at 207 (Katzmann, C.J., concurring).

¹³⁹ *Videckis*, 150 F. Supp. 3d at 1159.

¹⁴⁰ Complaint at 1, 4, 11, *Smith v. Avanti*, 249 F. Supp. 3d 1194 (D. Colo. 2017).

their “uniqueness.”¹⁴¹ The complaint asserted that the Fair Housing Act’s prohibition on discrimination based on sex includes “sex stereo *Christensen*, 852 F.3d at 205 types, . . . the sex of the spouse, . . . sexual orientation, . . . and . . . gender identity and expression.”¹⁴² “[D]iscrimination ‘on the basis of sex’ encompasses both the biological differences between men and women, *and gender discrimination, that is discrimination based on a failure to conform to stereotypical gender norms.*”¹⁴³ The District Court accepted the plaintiff’s arguments as to gender-based stereotypes and held the Smiths had an actionable claim under the Fair Housing Act.¹⁴⁴ However, the court only accepted the Smiths’ claims related to gender stereotypes and explicitly declined to hold sexual orientation discrimination itself was actionable.¹⁴⁵

As the case law demonstrates, in most of the country, an LGBTQ plaintiff alleging discrimination is protected only from discrimination on the basis of gender-based stereotypes. While this may capture some of the discrimination, it likely does not capture all discriminatory actions against LGBTQ people. Building on *Price Waterhouse*, *Oncale*, and landmark LGBTQ rights cases like *Romer*, *Lawrence*, *Windsor*, and *Obergefell*, the federal courts are starting to realize that the current paradigm is unworkable. Accordingly, the courts are beginning to hold there is no bright line between “sex” and “sexual orientation” and accordingly there should not be such a line in the law. While the changes presently are happening primarily in employment cases, given the courts often look to Title VII cases for assistance in determining novel issues in housing,¹⁴⁶ this progressive expansion of the meaning of sex to include sexual orientation and gender identity will protect LGBTQ individuals from the

¹⁴¹ *Id.* at 2, 3.

¹⁴² *Id.* at 11, 12.

¹⁴³ Pl.’s Mot. Sum. J. 6, *Smith v. Avanti*, 249 F. Supp. 3d 1194 (D. Colo. 2017) (quoting *Smith v. City of Salem*, 378 F.3d 566, 573 (6th Cir. 2004) (emphasis added)).

¹⁴⁴ *Smith v. Avanti*, 249 F. Supp. 3d 1194, 1201 (D. Colo. 2017).

¹⁴⁵ *Id.* The court noted that the Tenth Circuit law explicitly held that sex discrimination did not extend to include sexual orientation discrimination. *Id.* at 1200 (citing *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1222 (10th Cir. 2007)).

¹⁴⁶ *See Esses*, *supra* note 111, at 470.

problems associated with being married on Sunday and evicted on Monday.

V. WHAT SHOULD THE FUTURE LOOK LIKE?

As noted, housing discrimination amongst the LGBTQ community is a significant problem.¹⁴⁷ To prevent this issue, the federal government, via the judiciary, should provide housing protections based on sexual orientation and gender identity. The Court can accomplish this relatively easily. First, the Court should recognize the conflict in the circuits relating to the meaning of the word “sex” in Title VII by granting certiorari at the first opportunity and holding “sex” to include sexual orientation and gender identity in Title VII and analogous statutes.¹⁴⁸ At the same time, the Court should determine that LGBTQ individuals are a quasi-suspect class that is subject to intermediate scrutiny in order to provide lasting protections for the LGBTQ community.

A. “Because of Sex” Should Be Interpreted to Prevent Discrimination Based on Sexual Orientation and Gender Identity

The Seventh Circuit’s opinion in *Hively* was a great first step toward judicially achieved protections against discrimination on the basis of sexual orientation and gender identity in housing. As the Seventh is presently one of two circuits to hold that the word “sex” includes sexual orientation and gender identity in Title VII¹⁴⁹ this is

¹⁴⁷ See discussion *supra* Part I; see also Lambda Legal, *Lambda Legal on the Case: Smith v. Avanti*, YOUTUBE (June 17, 2016) <https://www.youtube.com/watch?v=Le7aMuDjmDQ>. “Housing discrimination is a pervasive problem for LGBT people and is very much underreported.” *Id.*

¹⁴⁸ Title VII prevents discrimination on the basis of “race, color, religion, sex, or national origin” 42 U.S.C. § 2000e-2(a)(1) (2012). The Fair Housing Act prevents discrimination on the basis of “race, color, religion, sex, familial status, or national origin.” 42 U.S.C. § 3604(b). Apart from the addition of familial status in the Fair Housing Act, the two statutes are identical.

¹⁴⁹ See *Hively v. Ivy Tech Cmty. College*, 843 F.3d 339, 341–42 (7th Cir. 2017) (discussing how nine of the remaining circuits have held sex to not include sexual

an issue that the Supreme Court will likely resolve.¹⁵⁰ As such, when faced with an opportunity, the Court should agree to hear a case implicating the meaning of sex in Title VII. When they hear such a case, the Court should follow the Second and Seventh Circuits' analysis and hold that "discrimination on the basis of sex" includes discrimination on the basis of sexual orientation and gender identity. As federal courts often look to Title VII case law to resolve novel issues under the Fair Housing Act,¹⁵¹ an expansion of the meaning of sex could be incorporated to the Fair Housing Act relatively easily and without further action by the Supreme Court. Under this route, no intervention from Congress would be needed; the courts would simply interpret the current language of Title VII and then later do the same thing with the nearly identical language of the Fair Housing Act.

In addition to this strategy being the most viable, the argument is sensible. As courts have noted, the only place where a line between sexual orientation and sex exists is "as a lingering and faulty judicial construct."¹⁵² Discrimination on the basis of sex already prevents discrimination because of gender-based stereotypes. Yet because of that "lingering and faulty judicial construct" the "ultimate gender non-conformity," and "prototypical sex-stereotyping animus" is itself not protected under federal anti-

orientation and gender identity). Since *Hively*, the Second Circuit has held that discrimination on the basis of sexual orientation is actionable sex discrimination. See *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 108 (2d Cir. 2018).

¹⁵⁰ If the Supreme Court resolves this issue, it will not be through *Hively* as *Ivy Tech* has not applied for certiorari to the Court. Michael W. Stevens, *Justice Gorsuch Likely to Have Significant Impact on Labor & Employment Cases Before the U.S. Supreme Court*, SEYFARTH SHAW LLP (May 9, 2017), <http://www.laborandemploymentlawcounsel.com/2017/05/justice-gorsuch-likely-to-have-significant-impact-on-labor-and-employment-cases-before-the-u-s-supreme-court/>. However, it is likely that the Court will eventually hear some case addressing this issue. *Id.* Theresa M. Sprain & John E. Pueschel, *Seventh Circuit Court Rules Sexual Orientation is Protected Class: Kimberly Hively v. Ivy Tech Cmty. College*, NAT. L. REV. (Apr. 6, 2017), <http://www.natlawreview.com/article/seventh-circuit-court-rules-sexual-orientation-protected-class-kimberly-hively-v-ivy>.

¹⁵¹ See *Smith v. Avanti*, 249 F. Supp. 3d 1194, 1199–1200 (D. Colo. 2017); see also *Esses*, *supra* note 111 at 470.

¹⁵² *Videckis v. Pepperdine Univ.*, 150 F. Supp.3d 1151, 1159 (C.D. Cal. 2015).

discrimination laws.¹⁵³ It is time for this anomaly to be changed. It is time for judges to realize that a legal system that allows an LGBTQ individual to be married on Sunday and evicted on Monday is fundamentally unjust and to interpret existing law to rectify this injustice.

B. The LGBTQ Community Should Be Determined to Be Protected in Constitutional Analysis by Intermediate Scrutiny

When the Court takes a case addressing the meaning of discrimination because of sex, the Court should also use that case to guarantee protections for LGBTQ people by holding sexual orientation and gender identity to be constitutionally protected via intermediate scrutiny. Numerous lower courts have reached this conclusion and determined LGBTQ people should be protected by heightened scrutiny rather than a rational basis test in constitutional analysis.¹⁵⁴ However, while the Supreme Court has mentioned levels of scrutiny in the LGBTQ context, they have never explicitly held that gay people are subject to heightened scrutiny.¹⁵⁵ For example, in the Court's most recent case, they again were silent as to the appropriate level of scrutiny for the LGBTQ community.¹⁵⁶

The Supreme Court should declare LGBTQ people to be a quasi-suspect class subject to intermediate scrutiny. In marriage cases in both California and Hawaii, the courts' conclusions of law determined that LGBTQ people should be protected by heightened scrutiny.¹⁵⁷ As intermediate scrutiny is the standard that applies to

¹⁵³ See *Boutillier v. Hartford Pub. Sch.*, 221 F. Supp. 3d 255, 269 (D. Conn. 2016) (“homosexuality is the ultimate gender non-conformity, the prototypical sex stereotyping animus”).

¹⁵⁴ See cases cited *supra* note 58 and related text.

¹⁵⁵ See, e.g., *Romer v. Evan*, 517 U.S. 620, 634–635 (1996) (noting that the Colorado state statute failed to meet even rational basis); see also Bornstein, *supra* note 83, at 71.

¹⁵⁶ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597 (2015).

¹⁵⁷ See *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 997 (N.D. Cal. 2010) (“Although Proposition 8 fails to possess even a rational basis, the evidence presented at trial shows that gays and lesbians are the type of minority *strict*

discrimination based on “sex,”¹⁵⁸ the same standard applies to sexual orientation and gender identity discrimination, as “sex” includes sexual orientation and gender identity.¹⁵⁹ In fact, if the Court were to hold that discrimination on the basis of sexual orientation and gender identity were included in the law’s prohibition on discrimination on the basis of sex, it would take considerable maneuvering to also hold that the two concepts were not also the same under constitutional analysis. Such a decision would effectively remove the line between sex and sexual orientation for the purposes of statutes while maintaining the “lingering and faulty judicial construct” in constitutional analysis. While it is possible for statutes to grant more rights and protections than what is guaranteed under the Constitution, it does not make sense to construe the same concept differently in different locations.

With that said, some have argued for LGBTQ individuals to be subject to strict rather than intermediate scrutiny. There is a bona fide history of discrimination and prejudice against the gay community that continues today.¹⁶⁰ Sexual orientation and gender identity are immutable as both traits set at an early age and are highly resistant to change.¹⁶¹ Courts and scholars have also determined that LGBTQ people are a discrete and insular minority with limited protection in the political process.¹⁶² Acting on this body of research and precedent, the Court properly could determine gay individuals to be a suspect class. While the argument has merit, because of the compelling arguments to interpret “discrimination because of sex” to include sexual orientation and gender identity, it would be improper to hold discrimination based on gender (sex) to a lower standard than discrimination based on sexual orientation and gender identification. Such an interpretation and constitutional holding

scrutiny was designed to protect”) (emphasis added); *see also* *Baehr v. Lewin*, 852 P.2d 44, 68 (Haw. 1993).

¹⁵⁸ *See* *United States v. Virginia*, 518 U.S. 515, 570 (1996); *Craig v. Boren*, 429 U.S. 190, 198–99 (1976).

¹⁵⁹ *See supra* Part III.

¹⁶⁰ *See supra* Part I.

¹⁶¹ *See generally* *Perry*, 704 F. Supp. 2d 921, at 966.

¹⁶² *See generally* *id.* at 997.

would render all facets of sex discrimination to be hopelessly unworkable. Holding the gay community to be protected constitutionally under intermediate scrutiny will protect LGBTQ people both in housing and countless other legal areas.

CONCLUSION

Over the past sixty years, the LGBTQ community has come a considerable distance. Gay individuals today have a wealth of rights that those who marched at Stonewall could only dream of. Much of this was through the work of the courts. Two of the largest victories in LGBTQ rights, striking down laws criminalizing same sex sexual activity and affirming the right to marry, happened via the judiciary. Today, despite the rights that LGBTQ people have fought for, there still is no federal antidiscrimination statute for housing. The Fair Housing Act protects against discrimination only on the basis of “race, color, religion, sex, family status, or national origin.”¹⁶³ On the state level, twenty-eight states have no protections for LGBTQ people in the areas of housing. In the absence of congressional action, it is time for the judiciary to address that. It is time for the courts to interpret “discrimination because of sex” in the Fair Housing Act to include sexual orientation and gender identity and it is time for the courts to declare that LGBTQ people are similarly protected by intermediate scrutiny. The judiciary has the precedent and authority to act in the absence of congressional action. Courts must once again protect America’s LGBTQ citizens from the harmful effects of discrimination and from being married on Sunday and evicted from their homes on Monday.

¹⁶³ 42 U.S.C. § 3604(a) (2012).