

2020

## Who Is Going to Protect the LGBTQ Community from Discrimination - Congress of the Courts?

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### Recommended Citation

Kelsey Dorton, *Who Is Going to Protect the LGBTQ Community from Discrimination - Congress of the Courts?*, 42 CAMPBELL L. REV. 257 (2020).

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# Who is Going to Protect the LGBTQ Community from Discrimination—Congress or the Courts?

KELSEY DORTON\*

## ABSTRACT

*Title VII of the Civil Rights Act of 1964 is supposed to provide equal employment opportunities to all citizens of the United States. However, LGBTQ individuals face discrimination every day in the workplace, and based on the current state of the law, it is unclear whether discrimination based on an individual’s “sexual orientation” or “gender identity” is covered under “sex” in Title VII. This Article explores the term “sex” and its various interpretations by Congress, the courts, and the various states. Further, this Article explains why it is up to Congress, if the Supreme Court of the United States reverses Zarda v. Altitude Express, to pass legislation, such as the Equality Act, to protect the LGBTQ community.*

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## INTRODUCTION

One of the purposes of Title VII of the Civil Rights Act of 1964 is to provide equal employment opportunities to citizens of the United States.<sup>1</sup> Title VII prohibits employers from discriminating against an employee or potential employee “because of such individual’s race, color, religion, sex, or national origin.”<sup>2</sup> But what happens when a transgender or homosexual individual gets fired, is not hired, or is in some way demoted? Has this individual been discriminated against because of “sex”? Based on the law in its current state, are LGBTQ<sup>3</sup> individuals protected? Currently, there is no straightforward answer.

When discriminatory employment decisions are made because of an individual’s sexual orientation or gender identity, issues arise because no clear answer exists as to whether the term “sex” in Title VII of the Civil Rights Act of 1964 includes “sexual orientation” or “gender identity.” Courts have interpreted “sex” in a number of different ways and the federal circuits are split as to whether “sex” includes discrimination based on one’s sexual orientation or gender identity. The Equality Act was originally introduced into the House of Representatives in 2017 to amend the Civil Rights Act of 1964 “to include discrimination based on sexual orientation,

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1. See Equal Employment Opportunities Act, 42 U.S.C. §§ 2000e–2000e-17 \*2012).

2. 42 U.S.C. § 2000e-2(a).

3. LGBTQ is the most commonly used acronym to reference the lesbian, gay, bisexual, transgender, queer or questioning community. *What Does LGBTQ+ Mean?*, OK2BME, <https://perma.cc/9DVK-UJLA>. Often, the acronym is followed by a plus (+) symbol to encompass all of the communities that could fall under the acronym. *Id.* According to the OK2BME Project, following the acronym with a plus encompasses the following: lesbian, gay, bisexual, transgender, transsexual, two-spirit, queer, questioning, intersex, asexual, ally, pansexual, agender, gender queer, bigender, gender variant, and pangender. *Id.*

gender identity, and sex stereotypes,” but Congress has not yet passed this law.<sup>4</sup> The various court decisions, coupled with the fact that the Equality Act is still in its beginning stages, leaves the solution for assessing discrimination disputes up for debate. The prevalent question is whether the courts should take it upon themselves to interpret “sex” to protect LGBTQ individuals, or if it is the job of the legislature to affect widespread change through the passage of the Equality Act or some similar piece of legislation.

Discrimination against LGBTQ individuals occurs often and in numerous different contexts. Although employment discrimination is often the focus of litigation, LGBTQ individuals face discrimination in both housing and educational contexts as well. For example, according to the National Center for Transgender Equality, “[o]ne in five transgender people in the United States has been discriminated when seeking a home, and more than one in ten have been evicted from their homes, because of their gender identity.”<sup>5</sup> Title IX,<sup>6</sup> which prohibits discrimination on the “basis of sex” in education, and the Fair Housing Act,<sup>7</sup> which similarly prohibits discrimination based on “sex” in the housing context, have language similar to Title VII.<sup>8</sup> The same issues arise regarding the interpretation of “sex” in these contexts as well.

There is currently a split of authority on how to interpret “sex,” mostly in the context of Title VII. Some courts have ruled that “sex” includes “gender identity” and “sexual orientation,” while others have ruled that “sex” means only one’s biological identity.<sup>9</sup> Because “gender identity” and “sexual orientation” are not explicitly stated in the language of these statutes, it is up to the courts to interpret “sex” in a manner that includes “gender identity” and “sexual orientation” in order to provide protection for the LGBTQ community.

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4. Equality Act, H.R. 2282, 115th Cong. (2017).

5. *Housing & Homelessness*, NAT’L CTR. FOR TRANSGENDER EQUALITY, <https://perma.cc/AL5D-BGGZ>.

6. 20 U.S.C. § 1681(a) (2012).

7. 42 U.S.C. § 3604(a) (2012).

8. *See* 42 U.S.C. § 2000e-2(a).

9. *Compare* *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 351–52 (7th Cir. 2017) (sexual orientation), *and* *Smith v. City of Salem*, 378 F.3d 566, 567–68 (6th Cir. 2004) (gender identity), *with* *Evans v. Ga. Reg’l Hosp.*, 850 F.3d 1248, 1255 (11th Cir. 2017) (“[T]here is no sexual orientation action under Title VII.”), *and* *Simonton v. Runyon*, 232 F.3d 33, 34 (2d Cir. 2000) (“... Title VII does not prohibit discrimination based on sexual orientation.”), *overruled by* *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018).

Part I of this Article will describe the current culture surrounding the LGBTQ community and provide a more in-depth look at the Equality Act, as well as related proposed legislation that would amend language in the Civil Rights Act of 1964.<sup>10</sup> Part II will explore how state legislatures have handled discrimination based on “sexual orientation” and “gender identity,” as well as the various federal court decisions interpreting “sex.” Part III will discuss *Zarda v. Altitude Express, Inc.*<sup>11</sup> and the recent oral argument before the Supreme Court combining *Zarda* with *Bostock v. Clayton County, Georgia*,<sup>12</sup> including the potential ramifications of the Court’s decision once it is rendered.

## I. THE LGBTQ COMMUNITY AND THE EQUALITY ACT

### A. Current State of Affairs for the LGBTQ Community

The issues faced by the LGBTQ community have been especially prevalent in media outlets, specifically since current President Donald Trump began his presidential election campaign in 2016. For example, in July of 2017, President Trump, in a series of tweets on his personal Twitter page, banned transgender individuals from serving “in any capacity in the U.S. Military.”<sup>13</sup> Another example that also deals with LGBTQ employment discrimination is highlighted in a recent USA Today article—in which Officer Jay Brome describes the harassment and discrimination he has faced as a gay man with the California Highway Patrol.<sup>14</sup> Yet another recent controversy with regard to the LGBTQ community occurred when leaders of the United Methodist Church (“UMC”) voted and made the decision to “tighten its ban on gay clergy and same-sex marriage and to increase the punishment for violations.”<sup>15</sup> In an article by the *Los Angeles Times*, Tim Baulder, a gay man, discussed his journey to the UMC where

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10. See 20 U.S.C. § 1681(a) (2012); 42 U.S.C. §§ 2000e-2(a), 3604(a); Equality Act, H.R. 2282, 115th Cong. (2017); Equality Act, S. 1006, 115th Cong. (2017); Fair and Equal Housing Act of 2017, H.R. 1447, 115th Cong. (2017); Freedom from Discrimination in Credit Act of 2017, H.R. 2498, 115th Cong. (2017).

11. *Zarda*, 883 F.3d 100.

12. See Transcript of Oral Argument, *Altitude Express, Inc. v. Zarda*, 132 S. Ct. 1599 (2019) (Nos. 17-1618 and 17-1623).

13. Donald J. Trump (@realDonaldTrump), TWITTER (July 26, 2017, 9:04 AM), <https://perma.cc/7C5Q-A8E2>.

14. Kristin Lam, *LGBT Police Officers Say They’ve Faced Horrible Discrimination, and Now They’re Suing*, USA TODAY (Feb. 10, 2019), <https://perma.cc/666A-EWAN>.

15. Hailey Branson-Potts, *As United Methodist Leaders Tighten LGBTQ Ban, Churches Struggle with Path Forward*, L.A. TIMES (Mar. 19, 2019), <https://perma.cc/69ZD-3GB5>.

he became a lead usher at Hollywood UMC.<sup>16</sup> After UMC policy-makers decided to further distance themselves from the LGBTQ community, Baulder, along with many others, now feels betrayed by the church he once called home.<sup>17</sup> According to National Public Radio (“NPR”), the UMC has proposed a split in the church which will be voted on at the UMC’s upcoming general conference.<sup>18</sup> If this proposal were to pass, “it would allow for a ‘traditionalist’ denomination to separate from the United Methodist Church.”<sup>19</sup>

The spotlight on the LGBTQ community continues, but the focus, however, is often not on the discrimination faced in the workplace and thus this form of discrimination may not seem prevalent to some. According to the National Center for Transgender Equality, “[m]ore than one in four transgender people have lost a job due to bias, and more than three-fourths have experienced some form of workplace discrimination.”<sup>20</sup> In response to such instances of discrimination, members of Congress have proposed certain bills in hopes of ending this discrimination.

### *B. The Equality Act*

Rhode Island Representative David Cicilline introduced a version of a bill called “the Equality Act” into the House of Representatives while Oregon Senator Jeff Merkley introduced a version of the Equality Act into the Senate on May 2, 2017.<sup>21</sup> The purpose of the Equality Act is to add both “sexual orientation” and “gender identity” to the protected categories under the Civil Rights Act of 1964, the Fair Housing Act, the Equal Credit Opportunity Act, and jury selection standards.<sup>22</sup> Senator Jeff Merkley worked with Senator Cory Booker and Senator Tammy Baldwin to introduce the Equality Act.<sup>23</sup> In a press release regarding the Equality Act, Senator Booker stated:

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16. *Id.*

17. *Id.*

18. Meg Anderson, *United Methodist Church Announces Proposal to Split Over Gay Marriage*, NPR (Jan. 4, 2020), <https://perma.cc/3WB7-WEZV>.

19. *Id.*

20. *Employment*, NAT’L CTR. FOR TRANSGENDER EQUALITY <https://perma.cc/8RD8-VSLY> (last visited March 21, 2020).

21. Equality Act, H.R. 2282, 115th Cong. (2017); Equality Act, S. 1006, 115th Cong. (2017).

22. *See* H.R. 2282.

23. Press Release, Cory Booker, Senator, United States Senate, *Booker, Merkley, Baldwin Introduce Historic, Comprehensive LGBT Non-Discrimination Bill* (May 2, 2017), <https://perma.cc/L9UQ-54JJ>.

The Equality Act builds on the work of those who have struggled and fought for LGBT rights by extending basic civil rights protections that must be guaranteed to every American . . . . We must never stop fighting . . . for those who endure discrimination because of their gender identity or sexual orientation.<sup>24</sup>

This bill would provide protection to LGBTQ individuals in numerous areas and such protection is certainly needed given how prevalent discrimination is.<sup>25</sup> The Human Rights Campaign, in a blog post on the Equality Act, stated that “nearly two-thirds of LGBTQ Americans report having experienced discrimination in their personal lives.”<sup>26</sup> In the House, the latest action taken was a referral of the Equality Act to the House Judiciary Subcommittee on the Constitution and Civil Justice.<sup>27</sup> In the Senate, the latest action taken was a referral of the Equality Act to the Senate Judiciary Committee.<sup>28</sup> At the end of the 115th Congress, the version of the Equality Act in the House had 201 sponsors, with the latest joining in December of 2018.<sup>29</sup> At the end of the 115th Congress, the version of the Equality Act in the Senate had forty-seven sponsors, with the latest joining in April of 2018.<sup>30</sup>

The Equality Act was reintroduced by Representative David Cicilline in the 116th Congress on March 13, 2019.<sup>31</sup> This version of the bill currently has 240 sponsors and was passed in the House of Representatives on May 17, 2019.<sup>32</sup> The bill passed with a vote of 236-173.<sup>33</sup> On May 20, 2019, the bill was read in the Senate and then referred to the Committee on the Judiciary, and this is the latest action taken with regard to the Equality Act.<sup>34</sup> If the Equality Act were to become law, it would encompass both

24. *Id.*

25. See *The Equality Act*, HUM. RTS. CAMPAIGN (Dec. 21, 2018), <https://perma.cc/BZ6L-5VXY>. “The Equality Act would provide consistent and explicit non-discrimination protections for LGBTQ people across key areas of life, including employment, housing, credit, education, public spaces and services, federally funded programs, and jury service.” *Id.*

26. *Id.*

27. *Committees: H.R. 2282–Equality Act*, CONGRESS.GOV, <https://perma.cc/UTD2-DJL7>.

28. *Committees: S. 1006–Equality Act*, CONGRESS.GOV, <https://perma.cc/9GML-MNZW>.

29. *Cosponsors: H.R. 2282–Equality Act*, CONGRESS.GOV, <https://perma.cc/D3KU-QCUS>.

30. *Cosponsors: S. 1006–Equality Act*, CONGRESS.GOV, <https://perma.cc/C9NV-N9X2>.

31. *Text: H.R. 5–Equality Act*, CONGRESS.GOV, <https://perma.cc/LC9F6TJ5>.

32. *Cosponsors: H.R. 5–Equality Act*, CONGRESS.GOV, <https://perma.cc/HE3J-SYNF>.

33. *All Actions: H.R. 5–Equality Act*, CONGRESS.GOV, <https://perma.cc/8K7B-5UZG>.

34. *Id.*

the changes proposed in the Fair and Equal Housing Act as well as the Freedom from Discrimination in Credit Act.<sup>35</sup>

### *C. Related Legislation*

The Equality Act is a more comprehensive piece of legislation than either the Fair and Equal Housing Act or the Freedom from Discrimination in Credit Act. However, if the Equality Act fails, a related piece of legislation could still provide a step in the right direction. The Fair and Equal Housing Act was reintroduced in the 116th Congress on April 30, 2019, and the Freedom from Discrimination in Credit Act has not been reintroduced.<sup>36</sup> Even without the reintroduction of this bill, it is helpful to examine and see how members of Congress are attempting to make changes, even if it is not in the same wide-ranging manner as the Equality Act.

#### *1. The Fair and Equal Housing Act of 2017 and the Fair and Equal Housing Act of 2019*

Virginia Representative Scott Taylor introduced the Fair and Equal Housing Act of 2017 into the United States House of Representatives on March 9, 2017.<sup>37</sup> The purpose of this bill was to add both “sexual orientation” and “gender identity” to the language of the Fair Housing Act and to extend protections of the Act to “persons suffering discrimination on the basis of sex or sexual orientation, and for other purposes.”<sup>38</sup> According to the Human Rights Campaign, approximately twenty-five percent of transgender individuals have reported some type of discrimination with regard to housing.<sup>39</sup> At the close of the 115th Congress, the Fair and Equal Housing Act of 2017 had been referred to the House Judiciary Subcommittee on the Constitution and Civil Justice.<sup>40</sup> The bill had 104 sponsors with the latest joining in October of 2018.<sup>41</sup>

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35. See Text: *H.R. 5—Equality Act*, *supra* note 31.

36. All Actions: *H.R. 2402—Fair and Equal Housing Act of 2019*, CONGRESS.GOV, <https://perma.cc/QEB7-6UBM>.

37. Fair and Equal Housing Act of 2017, H.R. 1447, 115th Cong. (2017).

38. *Id.*

39. Jennifer Pike Bailey, *Fair and Equal Housing Act Introduced in Congress*, HUM. RTS. CAMPAIGN (Mar. 9, 2017), <https://perma.cc/Q72R-6WEW>.

40. Committees: *H.R. 1447—Fair and Equal Housing Act of 2017*, CONGRESS.GOV, <https://perma.cc/4TST-ZG2E>.

41. Cosponsors: *H.R. 1447—Fair and Equal Housing Act of 2017*, CONGRESS.GOV, <https://perma.cc/F6PX-WK8Q>.



On April 30, 2019, Virginia Senator Tim Kaine introduced the Fair and Equal Housing Act of 2019.<sup>42</sup> This bill was referred to the Committee on the Judiciary after its introduction in the Senate.<sup>43</sup> The bill has twenty-four sponsors in the Senate with the latest joining in January of 2020.<sup>44</sup> Also on April 30, 2019, Illinois Representative Brad Schneider introduced the Fair and Equal Housing Act of 2019 in the House of Representatives.<sup>45</sup> The bill was referred to the Committee on the Judiciary, which then referred the bill to the Subcommittee on the Constitution, Civil Rights, and Civil Liberties on May 20, 2019.<sup>46</sup> The bill currently has forty-nine sponsors in the House with the latest joining in January of 2020.<sup>47</sup>

## 2. *Freedom from Discrimination in Credit Act of 2017*

New Jersey Representative Josh Gottheimer introduced the Freedom from Discrimination in Credit Act of 2017 on May 17, 2017.<sup>48</sup> Its purpose was to add “sexual orientation” and “gender identity” to the protected categories of the Equal Credit Opportunity Act.<sup>49</sup> At the close of the 115th Congress, this bill had been referred to the House Committee on Financial Services.<sup>50</sup> The Freedom from Discrimination in Credit Act of 2017 had eighty-seven sponsors with the latest joining in December of 2018.<sup>51</sup>

Although the Freedom from Discrimination Act has not been reintroduced and the Fair and Equal Housing Act of 2019 has not made significant progress, the passing of the Equality Act, which has been reintroduced and has passed in the House, would encompass both the provisions of the Fair and Equal Housing Act and the Freedom from Discrimination in Credit Act.

42. Fair and Equal Housing Act of 2019, S. 1246., 116th Cong. (2019).

43. *All Actions: S. 1246–Fair and Equal Housing Act of 2019*, CONGRESS.GOV, <https://perma.cc/V8VC-DAA6>.

44. *Cosponsors: S. 1246–Fair and Equal Housing Act of 2019*, CONGRESS.GOV, <https://perma.cc/X86W-LB7C>.

45. Fair and Equal Housing Act of 2019, H.R. 2402, 116th Cong. (2019).

46. *All Actions: H.R. 2402*, *supra* note 36.

47. *Cosponsors: H.R. 2402–Fair and Equal Housing Act of 2019*, CONGRESS.GOV, <https://perma.cc/7XPV-KMDU>.

48. Freedom from Discrimination in Credit Act of 2017, H.R. 2498, 115th Cong. (2017).

49. *Id.* The purpose of the Equal Credit Opportunity Act is to keep creditors from discriminating against credit applicants based on certain protected categories. *The Equal Credit Opportunity Act*, U.S. DEP’T JUST. (Nov. 8, 2017), <https://perma.cc/ZNY3-A9CD>.

50. *Committees: H.R. 2498–Freedom from Discrimination in Credit Act of 2017*, CONGRESS.GOV, <https://perma.cc/4VFP-SDGY>.

51. *Cosponsors: H.R. 2498–Freedom from Discrimination in Credit Act of 2017*, CONGRESS.GOV, <https://perma.cc/M6UF-FPPR>.

## II. INTERPRETATION OF "SEX"

*A. How State Legislatures Have Handled "Sexual Orientation" and "Gender Identity"*

State legislatures across the country have made the decision to add "gender identity" and "sexual orientation" to their nondiscrimination laws. According to the Movement Advancement Project, twenty-one states, in addition to the District of Columbia, have included "sexual orientation" and "gender identity" as protected classes in their laws.<sup>52</sup> In addition to the states that include "gender identity" and "sexual orientation" in their laws, Michigan and Pennsylvania have interpreted their current laws prohibiting "sex discrimination" to include "sexual orientation and/or gender identity."<sup>53</sup> Wisconsin has laws that prohibit discrimination based on "sexual orientation," but "gender identity" is not included.<sup>54</sup> The number of states that have adopted protective language into their laws showcases a promising trend in the direction of providing equal opportunities to the LGBTQ community.

*B. Judicial Interpretations of "Sex"*

This section examines two Supreme Court and four circuit court of appeals cases interpreting "sex." Each case adds something unique to the developing views on how to interpret "sex" in workplace discrimination suits. The exploration of the interpretation of "sex" in this section shows how federal courts went from interpreting "sex" to mean only biological sex to including sex stereotyping under the umbrella of "sex" discrimination.

*1. Price Waterhouse v. Hopkins*

In *Price Waterhouse v. Hopkins*, the United States Supreme Court examined the manner in which sex stereotyping plays into discrimination based on "sex."<sup>55</sup> Ann Hopkins was a senior manager for Price Waterhouse, a nationwide professional accounting partnership, and the only woman out

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52. *Non-Discrimination Laws*, MOVEMENT ADVANCEMENT PROJECT, <https://perma.cc/8Z5J-3LFC>. The states which include these classes as protected ones are: Washington, Oregon, California, Nevada, Hawaii, Utah, Colorado, New Mexico, Minnesota, Iowa, Illinois, Maryland, Delaware, New Jersey, Connecticut, Rhode Island, Massachusetts, New York, Vermont, New Hampshire, and Maine. *Id.*

53. *Id.*

54. *Id.*

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

of the eighty-eight individuals proposed for partnership in 1982.<sup>56</sup> Out of the 662 individuals who were partners at Price Waterhouse, only seven were women.<sup>57</sup> Hopkins was considered, but subsequently denied partnership.<sup>58</sup> She believed she was denied partnership because she was a woman.<sup>59</sup> Based on her work ethic and success with closing large contracts for Price Waterhouse, and thus making the company a great deal of money, Hopkins believed there was no other logical reason.<sup>60</sup> Therefore, she brought an action under Title VII arguing that she was discriminated against based on “sex.”<sup>61</sup>

The United States District Court for the District of Columbia held that “Price Waterhouse had unlawfully discriminated against Hopkins on the basis of sex by consciously giving credence and effect to partners’ comments that resulted from sex stereotyping.”<sup>62</sup> The United States Court of Appeals for the District of Columbia Circuit agreed that Price Waterhouse had discriminated against Hopkins because of her sex, and the case went to the Supreme Court on an issue of burden of proof as the district court and the court of appeals differed on their decision with regard to that issue.<sup>63</sup> When it decided to grant certiorari in this case, the Court began its evolution of the interpretation of “sex.”<sup>64</sup>

In the majority opinion, the Court described a number of instances where male partners at Price Waterhouse made stereotypical comments about Hopkins being a woman.<sup>65</sup> For example, one partner stated that Hopkins used curse words and was not ladylike, while another partner stated that she “should ‘walk more femininely, talk more femininely, dress more

56. *Id.* at 231–33.

57. *Id.* at 233.

58. *Id.* at 231–32.

59. *Id.* at 232.

60. *See id.* at 233–34. Hopkins was hailed as putting forth an “outstanding performance” when she secured a \$25 million contract for the firm. *Id.* at 233.

61. *Id.* at 232.

62. *Id.* at 237.

63. *Id.* (“Under [the Court of Appeals’] approach, an employer is not deemed to have violated Title VII if it proves that it would have made the same decision in the absence of an impermissible motive, whereas, under the District Court’s approach, the employer’s proof in that respect only avoids equitable relief.”). With regard to the burden issue, the Supreme Court held:

[O]nce a plaintiff in a Title VII case shows that gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving that it would have made the same decision even if it had not allowed gender to play such a role.

*Id.* at 244–45.

64. *Id.* at 250.

65. *Id.* at 235.

femininely, wear make-up, have her hair styled, and wear jewelry.”<sup>66</sup> When the Court examined sex stereotyping under Title VII, it stated that “an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.”<sup>67</sup> The Court often used the terms “gender” and “sex” interchangeably in this opinion.<sup>68</sup>

*Price Waterhouse v. Hopkins* shows the beginnings of the evolution of “sex” interpretation. After the Supreme Court’s decision in *Price Waterhouse*, “sex” no longer meant only biological identification, the term “sex” grew to mean that discriminating based on stereotypes or generalizations about an individual’s gender also falls under the term “sex.” Thus discrimination based on a failure to meet certain sex stereotypes, like *Hopkins*, is unlawful.<sup>69</sup>

## 2. *Oncale v. Sundowner Offshore Services, Inc.*

*Oncale v. Sundowner Offshore Services, Inc.* presented the Supreme Court of the United States with the issue of whether harassment by a same-sex co-worker violated Title VII’s prohibition against discrimination based on “sex.”<sup>70</sup> Joseph Oncale, while working at Sundowner Offshore Services, was forced to endure “sex-related” actions on more than one occasion and was often referred to by derogatory terms—intended to identify him as a gay man—by his coworkers.<sup>71</sup> Oncale was also the victim of physical assault and was threatened with rape by a male co-worker.<sup>72</sup> The United States District Court for the Eastern District of Louisiana ruled that because Oncale was a male, he had no cause of action against members of the same sex under Title VII.<sup>73</sup> The United States Court of Appeals for the Fifth Circuit, based on the same reasoning and circuit precedent, affirmed the decision of the lower court.<sup>74</sup>

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66. *Id.*

67. *Id.* at 250.

68. *See id.*

69. *See id.* at 258 (stating that the Court “sit[s] not to determine whether Ms. Hopkins is nice, but to decide whether the partners reacted negatively to her personality because she is a woman.”).

70. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 76 (1998).

71. *Id.* at 77.

72. *Id.*

73. *Id.*

74. *Id.* Both the District Court and the Court of Appeals relied on the Fifth Circuit’s decision in *Garcia v. Elf Atochem North America, Inc.* *Id.* In *Garcia*, the Fifth Circuit held that

The Supreme Court of the United States reversed the lower courts and held that “sex” protects both men and women: “[W]e hold today that nothing in Title VII necessarily bars a claim of discrimination ‘because of . . . sex’ merely because the plaintiff and the defendant . . . are of the same sex.”<sup>75</sup> The *Oncale* case demonstrated an evolution in “sex” interpretation. In the past, “sex” was interpreted to mean discrimination against only those of the opposite sex, but this case solidified that “sex” applies to discrimination against those of the same sex as well.<sup>76</sup>

### 3. Smith v. City of Salem

*Smith* presented the United States Court of Appeals for the Sixth Circuit with the issue of whether an individual who has been diagnosed with Gender Identity Disorder<sup>77</sup> and who has begun to conform to his or her gender identity rather than biological identity is protected from discrimination based on “sex.”<sup>78</sup> Smith worked for several years as a lieutenant at a fire department in Salem, Ohio, and Smith identified as a “transsexual.”<sup>79</sup> After Smith was diagnosed with Gender Identity Disorder, Smith began conforming with the recommended treatment, including beginning to act in a more feminine manner as he gradually transitioned from male to female.<sup>80</sup>

Once this process started to take place, Smith began overhearing remarks that he was too feminine and received inquiries from coworkers about why he was not acting more masculine.<sup>81</sup> In response to these comments, Smith went to his superior, Thomas Eastek, to inform him of his

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harassment by a male against another male is not sexual harassment and therefore is not protected under Title VII. *Garcia v. Elf Atochem N. Am.*, 28 F.3d 446, 452 (5th Cir. 1994).

75. *Oncale*, 523 U.S. at 79 (first set of ellipses in original).

76. *Id.* “When the *Oncale* decision was announced in 1998, it was widely praised for sending a message that ‘male or female, gay or straight, nobody should have to face sexual harassment when they go to work in the morning.’” Jonathan Gartner, *Looking Back at Justice Scalia’s Decision in Oncale: “because of . . . sex,”* ONLABOR (May 18, 2016), <https://perma.cc/KAN5-F9XJ>.

77. Gender Identity Disorder is no longer a recognized diagnosis and has been changed to gender incongruence. Sophie Lewis, *World Health Organization Removes “Gender Identity Disorder” from List of Mental Illnesses*, CBS NEWS (May 29, 2019), <https://perma.cc/VJ4V-BV6J>. “Gender incongruence is better known as gender dysphoria, the feeling of distress when an individual’s gender identity is at odds with the gender assigned at birth.” *Id.*

78. *Smith v. City of Salem*, 378 F.3d 566, 567–68 (6th Cir. 2004).

79. *Id.* at 568.

80. *Id.*

81. *Id.*

transition from male to female and of the conflict with his coworkers.<sup>82</sup> Smith asked Eastek to keep their conversation private; however, Eastek disclosed the information to the Fire Department Chief, Walter Greenamyre.<sup>83</sup> Greenamyre then went to the City of Salem's executive body "with the intention of using Smith's transsexualism and its manifestations as a basis for terminating his employment."<sup>84</sup> The executive body came up with a plan to ultimately terminate Smith.<sup>85</sup> The Equal Employment Opportunity Commission ("EEOC") granted Smith permission to initiate proceedings against the City for its actions.<sup>86</sup> The City ultimately suspended Smith from his job.<sup>87</sup>

The United States District Court for the Northern District of Ohio dismissed Smith's sex discrimination claims, stating that Smith failed to properly state a claim for "sex" stereotyping, and Smith appealed to the United States Court of Appeals for the Sixth Circuit.<sup>88</sup> The Sixth Circuit considered Smith's allegations that he was discriminated against based on the fact that he did not conform to the "sex stereotypes of how a man should look and behave" when he began dressing and conducting himself in a more feminine way.<sup>89</sup> The court agreed with Smith and found that the proceedings to terminate him began after he started to take on a more feminine appearance at work and after Smith's conversation with Eastek about the diagnosis of Gender Identity Disorder and plans to transition fully to a female.<sup>90</sup> The court ultimately determined that because Smith "alleged that his failure to conform to sex stereotypes concerning how a man should look and behave was the driving force behind Defendants' actions, Smith ha[d] sufficiently pleaded claims of sex stereotyping and gender discrimination."<sup>91</sup>

Although this case is only binding in the Sixth Circuit, the reasoning set forth by the court provides guidance as well as persuasion for other circuits. This case is important for interpreting "sex" to include "gender

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82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* at 569. As a part of the plan to terminate Smith, the committee planned to require that Smith undertake a number of psychological evaluations in hopes that Smith would not accept this, thereby allowing the City to terminate him for "insubordination." *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* at 572.

90. *Id.*

91. *Id.*

identity” and “sexual orientation” because it solidifies that “sex” includes not only biological male and female constructs, but also gender discrimination.<sup>92</sup> Thus, a strong argument exists that discrimination based on “sexual orientation” or “gender identity” is based on a failure of such individuals to meet the stereotypes of mainstream society and is thus unlawful based on the term “sex” in the language of Title VII.

#### 4. *Hively v. Ivy Tech Community College of Indiana*

The United States Court of Appeals for the Seventh Circuit in *Hively v. Ivy Tech Community College of Indiana* was faced with the question of whether “sex” discrimination included discrimination based on an individual’s “sexual orientation.”<sup>93</sup> Kimberly Hively, an “openly lesbian” individual, was a part-time professor at Ivy Tech Community College.<sup>94</sup> She started working at Ivy Tech in 2000, and between the years 2009 and 2014 she applied for a number of different full-time positions and was denied each time.<sup>95</sup> Ms. Hively filed a charge with the EEOC, was granted a right to sue letter, and filed her action in the district court.<sup>96</sup> The district court dismissed her action for failure to state a claim and Hively appealed.<sup>97</sup> Because the United States Supreme Court had yet to speak on this specific question, the United States Court of Appeals for the Seventh Circuit made the decision to take a “fresh look at our position in light of developments at the Supreme Court.”<sup>98</sup> The circuit court stated that the operative question in this case was “whether actions taken on the basis of sexual orientation are a subset of actions taken on the basis of sex.”<sup>99</sup>

The Seventh Circuit dismissed the idea that legislative history is necessarily controlling in interpreting the language of a statute.<sup>100</sup> Referencing *Oncale*, the court stated “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.”<sup>101</sup> The court ultimately held that “sexual orientation” is included under “sex” in Title

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92. Gender discrimination: “discrimination based on a failure to conform to stereotypical gender norms.” *Id.* at 573.

93. *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 340–41 (7th Cir. 2017).

94. *Id.* at 341.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 343.

100. *Id.* at 343–44.

101. *Id.* at 345.

VII.<sup>102</sup> In so holding, the court based its decision on the direction in which Supreme Court decisions have been heading with regard to sexual orientation.<sup>103</sup>

The logic of the Supreme Court's decisions, as well as the common-sense reality that it is actually impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex, persuade us that the time has come to overrule our previous cases that have endeavored to find and observe that line.<sup>104</sup>

In a concurring opinion in *Hively*, Judge Posner proposed adopting the statutory interpretation method of judicial interpretive updating.<sup>105</sup> This method refers to interpreting a law to "satisfy modern needs and understandings" despite what the "original meaning" might be.<sup>106</sup> Judge Posner stated that "today 'sex' has a broader meaning than the genitalia you're born with."<sup>107</sup>

Judge Posner's proposal has been met with some criticism by statutory originalists. Josh Blackman, a law professor who specializes in constitutional law, is an example of someone on the other end of the interpretation spectrum from Posner.<sup>108</sup> In his blog posts, Professor Blackman discussed instances where judges have used modern definitions to interpret "sex," but he stated that with regard to statutory originalism, "[s]uch latter-day definitions are irrelevant."<sup>109</sup> To support the irrelevance of modern definitions to statutory interpretation, Blackman discussed the views of the late Justice Scalia, which essentially rejected dependence on definitions in dictionaries that were not even thought of at the time a statute was drafted.<sup>110</sup>

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102. *Id.* at 351–52.

103. *Id.* at 349.

104. *Id.* at 350–51.

105. *Id.* at 352 (Posner, J., concurring).

106. *Id.*

107. *Id.* at 354.

108. *About Josh*, JOSH BLACKMAN'S BLOG, <https://perma.cc/X7TX-22T6>.

109. Josh Blackman, *Statutory Originalism*, JOSH BLACKMAN'S BLOG (Feb. 26, 2017), <https://perma.cc/K9NH-WN5R>.

110. *Id.*; see also Josh Blackman, *Judge Posner's "Judicial Interpretive Updating"*, JOSH BLACKMAN'S BLOG (Apr. 5, 2017), <https://perma.cc/9648-PXR9> ("Nonsense is an apt way to describe Posner's opinion.").



5. *Evans v. Georgia Regional Hospital*

*Evans v. Georgia Regional Hospital* presented to the United States Court of Appeals for the Eleventh Circuit the familiar issue of whether discrimination based on “sexual orientation” is covered under Title VII.<sup>111</sup> Jameka Evans filed suit against her employer alleging that she had faced discrimination based on the fact that she was homosexual and also because she did not conform to gender stereotypes.<sup>112</sup> Evans worked as a security officer at Georgia Regional Hospital for over a year before she left the position on her own free will.<sup>113</sup> Evans contended that she did not receive equal pay and that she was assaulted and harassed because of her sexual orientation during her employment.<sup>114</sup> Evans described a “hostile work environment” and stated that because she did not dress nor carry herself like a stereotypical female, she was discriminated against.<sup>115</sup> A magistrate judge in the United States District Court for the Southern District of Georgia issued a report and recommendation which “reasoned that—based on case law from all circuits that had addressed the issue—Title VII ‘was not intended to cover discrimination against homosexuals.’”<sup>116</sup> The magistrate judge further reasoned that “Evans’s claim of discrimination based on gender non-conformity . . . was ‘just another way to claim discrimination based on sexual orientation.’”<sup>117</sup> Evans appealed the magistrate judge’s report and recommendation, and the district court, after conducting a *de novo* review, adopted the report.<sup>118</sup>

The Eleventh Circuit agreed that “[d]iscrimination based on failure to conform to a gender stereotype is sex-based discrimination,” and stated that in previous cases it had specifically held that “gender-nonconformity was sex discrimination.”<sup>119</sup> Thus, the Eleventh Circuit ruled that the district court erred on this specific issue.<sup>120</sup> However, on the issue of whether discrimination based on sexual orientation is itself actionable under Title VII, the court ruled it was not.<sup>121</sup> The Eleventh Circuit refused to re-evaluate prior precedent which ruled that “sexual orientation”

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111. *Evans v. Ga. Reg’l Hosp.*, 850 F.3d 1248, 1250 (11th Cir. 2017).

112. *Id.*

113. *Id.* at 1251.

114. *Id.*

115. *Id.*

116. *Id.* at 1252 (quoting the magistrate court).

117. *Id.* (quoting the magistrate court).

118. *Id.* at 1253.

119. *Id.* at 1254.

120. *Id.* at 1254–55.

121. *Id.* at 1255.

discrimination is not “sex” discrimination.<sup>122</sup> The court dismissed the argument that because “gender non-conformity and same-sex discrimination” are actionable under Title VII, sexual orientation discrimination is as well.<sup>123</sup> Because the Supreme Court had not specifically addressed the issue of “sexual orientation” discrimination with regard to Title VII, the court refused to depart from precedent.<sup>124</sup>

Unlike the previously discussed circuit court decisions, *Evans* shows the other side of the spectrum when it comes to interpreting “sex” to include “sexual orientation” and “gender identity.” The Eleventh Circuit ultimately determined that because the Supreme Court had not taken up the specific issue involved in this case, it should just rely on precedent and leave LGBTQ individuals unprotected.<sup>125</sup> This reflects the question at the center of the current circuit split: Does workplace discrimination based on “sex” encompass discrimination based on “sexual orientation” and “gender identity”?

### III. *ZARDA V. ALTITUDE EXPRESS, INC.*: A POSSIBLE SOLUTION

The tension between circuits may soon be alleviated by *Zarda v. Altitude Express*, which was combined with *Bostock v. Clayton* for oral argument in front of the Supreme Court of the United States.<sup>126</sup> The evolution of *Zarda* and its precedent in the United States Court of Appeals for the Second Circuit also reflects the judicial trend towards a more encompassing definition of “sex.”

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122. *Id.*; see *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979) (stating that “[d]ischarge for homosexuality is not prohibited by Title VII”). The Eleventh Circuit in *Evans* further disagreed with the argument that *Price Waterhouse* and *Oncale* supported a cause of action for discrimination based on “sexual orientation,” stating, “The fact that claims for gender non-conformity and same-sex discrimination can be brought pursuant to Title VII does not permit us to depart from *Blum*.” *Evans*, 850 F.3d at 1256.

123. *Evans*, 850 F.3d at 1256.

124. *Id.* at 1257.

125. The *Evans* decision was referenced as precedent and reaffirmed by the Eleventh Circuit in *Bostock v. Clayton Cty. Bd. of Comm’rs*, 723 Fed. App’x 964 (11th Cir. 2018), *cert. granted*, 139 S. Ct. 1599 (2019). The Eleventh Circuit agreed that Title VII does not cover discrimination based on sexual orientation. *Id.* at 964–65. This court made reference to the possibility of overturning *Evans* if it were sitting *en banc*. *Id.* at 965. However, a judge of this court asked for a poll to be taken on whether the case should be heard *en banc* and a majority of the court voted no. *Bostock v. Clayton Cty. Bd. of Comm’rs*, 894 F.3d 1335, 1335 (11th Cir. 2018).

126. *Bostock v. Clayton County, Georgia*, SCOTUSBLOG, <https://perma.cc/42VZ-56NJ>.

### A. *Simonton v. Runyon*

Prior to *Zarda*, *Simonton v. Runyon* was precedent with regard to discrimination based on “sexual orientation” in the Second Circuit.<sup>127</sup> In *Simonton*, the Second Circuit considered whether Title VII prohibited discrimination based on “sexual orientation.”<sup>128</sup> Dwayne Simonton, a postal service worker whose sexual orientation was known at his place of employment, was subjected to humiliating remarks at work.<sup>129</sup> Co-workers also placed graphic materials around his locker and work space.<sup>130</sup> Because of this harassment, Simonton filed suit arguing that he “suffered by reason of his sexual orientation.”<sup>131</sup> The United States District Court for the Eastern District of New York dismissed the case on the grounds that Simonton had not stated a cognizable claim because Title VII “does not prohibit discrimination based on sexual orientation.”<sup>132</sup> The Second Circuit condemned the abuse Simonton had endured, but ultimately agreed with the district court and held “sex” does not include “sexual orientation.”<sup>133</sup> In February of 2018, the Second Circuit, sitting *en banc*, overruled its prior precedent *Simonton v. Runyon*.<sup>134</sup>

### B. *Zarda v. Altitude Express, Inc.*

Donald Zarda worked as a skydiving instructor and, as an essential part of his job, he was required to be in “close physical proximity” to clients when performing dives.<sup>135</sup> The incident which led to this case occurred when Zarda told one of his clients that he was gay in an attempt to make her more comfortable.<sup>136</sup> Instead, the client accused Zarda of touching her in a way that made her uncomfortable, and she told her boyfriend that Zarda

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127. *Simonton v. Runyon*, 232 F.3d 33 (2d Cir. 2000), *overruled by* *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018).

128. *Id.* at 34.

129. *Id.* at 34–35.

130. *Id.* at 35.

131. *Id.* at 34.

132. *Id.*

133. *Id.* at 35. The Second Circuit dismissed *Oncale* as being helpful to Simonton’s case because “Simonton has alleged that he was discriminated against not because he was a man, but because of his sexual orientation. Such a claim remains non-cognizable under Title VII.” *Id.* at 36.

134. *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018), *cert. granted*, 139 S. Ct. 1599 (2019).

135. *Id.* at 108.

136. *Id.*

tried to justify his behavior by informing her of his sexual orientation.<sup>137</sup> The client's boyfriend went to Zarda's boss with this information and he was subsequently fired.<sup>138</sup> According to Zarda, he did not touch this client in an inappropriate manner and was only fired because of "his reference to his sexual orientation."<sup>139</sup> Zarda brought suit and claimed he had been discriminated against because of his sexual orientation and that he was terminated from his job as a skydiving instructor "because he failed to conform to male sex stereotypes by referring to his sexual orientation."<sup>140</sup>

The United States District Court for the Eastern District of New York granted summary judgment in favor of the employer ruling that "although there was sufficient evidence to permit plaintiff to proceed with his claim for sexual orientation under New York law, plaintiff had failed to establish a prima facie case of gender stereotyping discrimination under Title VII."<sup>141</sup> A panel of the Second Circuit affirmed the trial court and held that Title VII's protections do not include "sexual orientation" based on prior precedent.<sup>142</sup> However, the Second Circuit granted Zarda's motion for a rehearing *en banc*, and ultimately made the decision to overturn its prior precedent and hold that "sexual orientation discrimination is motivated, at least in part, by sex and is thus a subset of sex discrimination."<sup>143</sup>

To reach its holding, the Second Circuit first identified the question it had to answer: "whether an employee's sex is necessarily a motivating factor in discrimination based on sexual orientation."<sup>144</sup> According to the court, if the answer to this question is yes, then discrimination based on "sexual orientation" is discrimination based on "sex."<sup>145</sup> The Second Circuit answered this question in the affirmative:

[T]he most natural reading of [Title VII]'s prohibition on discrimination 'because of . . . sex' is that it extends to sexual orientation discrimination because sex is necessarily a factor in sexual orientation. This statutory reading is reinforced by considering the question from the perspective of sex stereotyping because sexual orientation discrimination is predicated on

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137. *Id.*

138. *Id.* at 108–09.

139. *Id.* at 109.

140. *Id.* at 107.

141. *Id.* at 109.

142. *Zarda v. Altitude Express, Inc.*, 855 F.3d 76, 80 (2d Cir. 2017), *aff'd in part, vacated in part on reh'g* by 833 F.3d 100 (2d Cir. 2018), *cert. granted*, 139 S. Ct. 1599 (2019).

143. *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 112 (2d Cir. 2018), *cert. granted*, 139 S. Ct. 1599 (2019).

144. *Id.*

145. *Id.*

assumptions about how persons of a certain sex can or should be, which is an impermissible basis for adverse employment actions.<sup>146</sup>

With this ruling, the Second Circuit in *Zarda* showcases how circuits are now willing to overturn binding precedent and ultimately hold that “sex” discrimination includes discrimination based on “sexual orientation,” in part by turning to persuasive reasoning set out in other circuits as well as guidance from the Supreme Court. The judicial branch may well be the one to protect LGBTQ citizens from workplace discrimination.

### C. Implications of the Upcoming Supreme Court Decision

*Zarda v. Altitude Express* and *Bostock v. Clayton* were consolidated and argued before the Supreme Court on October 8, 2019.<sup>147</sup> During these oral arguments, the Justices asked a variety of questions to both sides and posited multiple hypotheticals to the attorneys, including an interesting hypothetical from Justice Sotomayor about Hooters uniforms.<sup>148</sup> Based on the arguments, “[l]egal pundits have observed that the oral arguments reflected a closely divided Court with Justice Neil Gorsuch being the likely swing vote in a 5-4 decision.”<sup>149</sup>

If the Court were to affirm the decision of the Second Circuit in *Zarda*, discrimination based on “sexual orientation” and “gender identity” would be covered under the protections of Title VII. A decision in the affirmative would likely have significant ramifications on both employers and employees alike because of the significant number of LGBTQ individuals in the workplace who have stated they have been discriminated against.<sup>150</sup> Employers will likely have to implement new policies in the workplace to be compliant with such a decision.<sup>151</sup> If the Court were to reverse the *Zarda* decision and determine that “sexual orientation” and “gender identity” are not covered under Title VII, prior Supreme Court precedent could be in

146. *Id.*

147. *Bostock v. Clayton County, Georgia*, *supra* note 126.

148. Transcript of Oral Argument, *supra* note 12, at 18–19. In that oral argument, Justice Sotomayor asked if “a dress code for Hooters that requires all women to wear a scantily—a scant dress, is that discriminatory?” *Id.* at 18.

149. Paul Nason, *Hot Issue for 2020: U.S. Supreme Court to Rule on Sexual Orientation and Gender Identity Discrimination*, JDSUPRA (Jan. 24, 2020), <https://perma.cc/Y7EP-QF4S>.

150. “In 2011, about 8 million Americans identified as lesbian, gay, or bisexual. Of those who so identified, roughly 25% reported experiencing workplace discrimination because their sexual preference did not match their employer’s expectations.” Kayla Platt Rady, *The Circuit Court Showdown: Will SCOTUS Say Yay or Nay Under Title VII to LGBT Workplace Discrimination?*, JDSUPRA (Jan. 17, 2020), <https://perma.cc/K9UF-NAAY>.

151. *See id.*

danger.<sup>152</sup> If the Court rules against the employees and determines that such discrimination is not covered under Title VII, then it will be solely left to Congress to protect the LGBTQ community by passing the Equality Act or a similar piece of legislation.

### CONCLUSION

The varying federal court decisions on the interpretation of “sex” in Title VII have paved the way for arguments about interpreting “sex” to include “sexual orientation” and “gender identity,” as well as the inverse. Courts, particularly the Supreme Court, have expanded the meaning of “sex” over the decades. Particularly, *Price Waterhouse* and *Oncale* extended the meaning of “sex” by taking it from being viewed as only discrimination against the opposite sex to now including discrimination by the same sex and gender stereotyping.<sup>153</sup> The stronger argument, in light of recent Supreme Court decisions, is to interpret “sex” to include both “sexual orientation” and “gender identity” because it is inconceivable to attempt to separate discrimination based on sex from discrimination based on “gender identity” or “sexual orientation”—all of which have blatant undertones of sex.<sup>154</sup> Classifying discrimination based on “sexual orientation” and “gender identity” as “sex stereotyping” seems to be the most legally sound way for courts to interpret “sex” in a manner which provides protection to the LGBTQ community.

Additionally, the reasoning set forth by the Second Circuit in *Zarda* is persuasive to point courts in the direction of finding that discrimination based on “sexual orientation” is a “subset of sex discrimination” and is therefore actionable under Title VII.<sup>155</sup> With this ruling, the court helped to pave the way for other courts who may be similarly governed by precedent like *Simonton* to do what is right for the LGBTQ community and to

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152. See *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

153. See *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

154. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604–05 (2015). In *Obergefell*, the Supreme Court had the issue of the legality of same-sex marriage to consider. Although this case is not related to Title VII, it is important to see how the Court has recently viewed the issues facing the LGBTQ community. The Court held that under the Due Process and Equal Protection Clauses, couples of the same-sex cannot be deprived of the fundamental right to marry. *Id.*

155. *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 112–13 (2d Cir. 2018), *cert. granted*, 139 S. Ct. 1599 (2019).

recognize that discrimination based on “sexual orientation” is discrimination based on “sex.”<sup>156</sup>

When discriminatory decisions are made, whether it be in the workplace or even when searching for a home, they are made because the decisionmaker looks at these individuals and thinks, “Well, this is just not the way things are supposed to be.” This bias is exactly what discrimination on a failure to conform to gender norms looks like, and it is what the Supreme Court determined was protected in *Price Waterhouse* and classified as impermissible stereotyping based on sex.<sup>157</sup> Further, as the Seventh Circuit explained in *Hively*, it is such a basic and common sense notion that discrimination based on “sexual orientation” is discrimination based on “sex.”<sup>158</sup>

A substantial number of states have made the decision to add protections to their discrimination laws and a number of courts have interpreted “sex” to include “gender identity” and “sexual orientation.” In light of these legislative acts, it seems only logical to continue to move in a direction where courts interpret “sex” in a way that protects the LGBTQ citizens from harsh discrimination. Given the difficulty that members of Congress have in crossing party lines to pass legislation, the future of the Equality Act is on unsteady ground. In the absence of passing such legislation, courts should interpret discrimination based on “sexual orientation” and “gender identity” as being part of “sex stereotyping” based on nonconformance to gender norms. The term “sex” is intrinsically linked with “sexual orientation” and “gender identity,” and therefore courts must interpret “sex” in such a way that extends protections to the LGBTQ persons.

Discrimination based on “sexual orientation” and “gender identity” in the workplace, education, and housing will likely only continue to grow as time goes on. It is important that these individuals are allowed the same protections as any other citizen of the United States. The language of Title VII should be amended to include language to specifically protect individuals based on “sexual orientation” and “gender identity.” Congress should follow the examples set by numerous states and pass the Equality Act to add “sexual orientation” and “gender identity” as protected classes. However, if this bill is not passed, then it is up to the courts to interpret “sex” in a manner which includes “sexual orientation” and “gender identity” to afford the LGBTQ community the same rights as others.

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156. *Id.*; see also *Simonton v. Runyon*, 232 F.3d 33 (2d. Cir. 2000), *overruled by Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018).

157. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989).

158. *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 350 (7th Cir. 2017).