

# Wrongful Termini(gay)tion: A Comparative Analysis of Employment Non-Discrimination Laws and the LGBTQ+ Workplace Protections in South Africa and the United States

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# NOTE

## WRONGFUL TERMI(GAY)TION: A COMPARATIVE ANALYSIS OF EMPLOYMENT NON-DISCRIMINATION LAWS AND LGBTQ+ WORKPLACE PROTECTIONS IN SOUTH AFRICA AND THE UNITED STATES

*Jared Ham*<sup>†</sup>

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INTRODUCTION

Every American deserves the freedom and opportunity to dream the same dreams, chase the same ambitions, and have the same shot at success[.] A growing number of Americans recognize that their LGBT[Q+] family members, friends, and neighbors deserve to be treated like everyone else in the United States. Yet today in America, in the majority of states, LGBT[Q+] Americans live without the protection of fully-inclusive non-discrimination laws. I believe America is ready to take the next steps forward in the march for fairness, equality, and opportunity for every American. It is time to take bold legislative action.<sup>1</sup>

- U.S. Senator Tammy Baldwin

Although the United States has made great strides toward equality for its LGBTQ+ citizens in recent years, South Africa has demonstrated far greater progress concerning equal protection and employment non-discrimination of its LGBTQ+ citizens. The South African Constitution, for example, expressly prohibits all unfair discrimination on the basis of sex, gender, or sexual orientation, whether the government or a private party committed it. In December 2005—a whole decade before *Obergefell v. Hodges*<sup>2</sup>—the South African Constitutional Court handed down *Minister of Home Affairs v. Fourie*, a landmark decision that legalized marriage equality.<sup>3</sup> Moreover, unlike the United States, South Africa has federal laws that prohibit employment discrimination against its LGBTQ+ citizens and provide them with robust workplace protections.

This Note contends that employment non-discrimination laws and workplace protections for LGBTQ+ citizens in the United States are woefully inadequate. Although some states

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<sup>1</sup> Press Release, U.S. Senator Tammy Baldwin, Historic Comprehensive LGBT Non-Discrimination Legislation Re-Introduced in Congress (May 2, 2017), <https://www.baldwin.senate.gov/press-releases/equality-act-2017> [<https://perma.cc/X8UR-ASW5>].

<sup>2</sup> 135 S. Ct. 2584 (2015).

<sup>3</sup> 2006 (1) SA 524 (CC) (S. Afr.).

afford robust protections for those who reside within their borders, many states do not.<sup>4</sup> This results in a legal system in which some citizens are protected by law against employment discrimination on the basis of sexual orientation and gender identity while others are not. “[E]qual dignity in the eyes of the law”<sup>5</sup> cannot and should not depend on one’s zip code. Thus, this Note further contends that the U.S.’ lawmakers and policy-makers should look to South Africa as a model for implementing federal laws that prohibit employment discrimination against LGBTQ+ citizens and provide substantial workplace protections.<sup>6</sup>

Although it is unlikely that the U.S. Constitution will be amended to join the South African Constitution in prohibiting discrimination on the basis of sexual orientation or gender identity,<sup>7</sup> there are other avenues to provide equally robust workplace protections for LGBTQ+ individuals. Perhaps the most promising avenue is federal legislation that mirrors South African laws.<sup>8</sup> Indeed, members of Congress have proposed pieces of legislation that would effectuate significant progress in this area of the law.<sup>9</sup> But not all of the proposed pieces of

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<sup>4</sup> See *infra* subpart II.A.

<sup>5</sup> *Obergefell*, 135 S. Ct. at 2608.

<sup>6</sup> Other commentators have also advocated that the United States’ lawmakers and policymakers should look to South Africa as a model for protecting the rights of LGBTQ+ citizens. See, e.g., Eric C. Christiansen, *Exporting South Africa’s Social Rights Jurisprudence*, 5 LOY. U. CHI. INT’L L. REV. 29, 41 (2007) (“[The South African social rights jurisprudence model] is exportable to other nations seeking to enforce enumerated socio-economic rights because South Africa has created its affirmative social rights jurisprudence that internalizes country-specific justiciability concerns.”); Lisa Newstrom, Note, *The Horizon of Rights: Lessons from South Africa for the Post-Goodridge Analysis of Same-Sex Marriage*, 40 CORNELL INT’L L.J. 781, 803–04 (2007) (“Until American judges and lawmakers are willing to learn from *Fourie*’s analysis by adapting and improving upon it . . . the balance will remain skewed against same-sex families before the doors to the courtroom even open.”).

<sup>7</sup> Cf. Rick Jervis, *Voices: Constitutional Convention an Unlikely Reality*, USA TODAY (Jan. 26, 2016, 12:17 PM), <https://www.usatoday.com/story/opinion/voices/2016/01/26/voices-constitutional-convention-greg-abbott/78849240/> [<https://perma.cc/AU84-BWKA>] (“It’s hard to imagine 34 states deciding on any one thing. Getting 38 of them to agree on a single amendment seems like an impossible dream.”); Thomas F. Schaller, *The End of Amendments?*, U. OF VA. CTR. FOR POL. (Mar. 27, 2014), <http://www.centerforpolitics.org/crystalball/articles/the-end-of-amendments/> [<https://perma.cc/V4N5-FARH>] (“[T]he fact is plans to amend the Constitution are mostly a waste of time because, other than a widely popular and highly-unifying suggested change, it is probably almost impossible to ratify or even propose amendments in our highly-polarized nation and divided national government.”).

<sup>8</sup> See *infra* subpart I.C.

<sup>9</sup> See *infra* Part IV.

legislation are adequate.<sup>10</sup> The United States should strive to implement non-discrimination laws and workplace protections that are equally as forceful as those in South Africa. The Equality Act, rather than the Employment Non-Discrimination Act, is therefore the better piece of proposed legislation to adopt. In the absence of federal non-discrimination laws and workplace protections, each state should continue to “serve as a laboratory” and “try novel . . . experiments.”<sup>11</sup> Additionally, Fortune 500 companies should continue to lead the way in the private sector by providing substantial workplace protections to their LGBTQ+ employees.<sup>12</sup>

In Part I, this Note reviews South African non-discrimination and equal-protection law and jurisprudence by discussing the South African Constitution, landmark Constitutional Court cases, and significant legislation. The cornerstone of South African non-discrimination and equal-protection law and jurisprudence is the Bill of Rights, which explicitly protects LGBTQ+ South Africans from discrimination. The government has reaffirmed the Constitution’s commitment to equal rights for LGBTQ+ South Africans through court decisions and acts of Parliament. This Note argues that South Africa’s progressive non-discrimination and equal-protection legal regime should serve as a model for the United States, which currently lags behind much of the Western democratic world.

In Part II, this Note assesses the current state of non-discrimination and equal-protection law and jurisprudence in the United States. Some states have stringent employment non-discrimination laws and provide robust workplace protections to its LGBTQ+ citizens. But other states have no workplace protections for its LGBTQ+ citizens. And on the federal level, there is no legislation prohibiting employment discrimination based on sexual orientation or gender identity in the private sector.

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<sup>10</sup> Cf. Ed O’Keefe, *Gay Rights Groups Withdraw Support of ENDA after Hobby Lobby Decision*, WASH. POST (July 8, 2014, 4:37 PM), [https://www.washingtonpost.com/news/post-politics/wp/2014/07/08/gay-rights-group-withdrawing-support-of-enda-after-hobby-lobby-decision/?utm\\_term=.C6589d4152d6](https://www.washingtonpost.com/news/post-politics/wp/2014/07/08/gay-rights-group-withdrawing-support-of-enda-after-hobby-lobby-decision/?utm_term=.C6589d4152d6) [https://perma.cc/6BMP-R86S] (“The bill’s religious exemptions clause is written so broadly that ‘ENDA’s discriminatory provision, unprecedented in federal laws prohibiting employment discrimination, could provide religiously affiliated organizations . . . a blank check to engage in workplace discrimination against LGBT[Q+] people . . . .”).

<sup>11</sup> *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

<sup>12</sup> See *infra* subpart IV.C.

In Part III, this Note considers the extension of the protections included in Title VII of the Civil Rights Act of 1964 to LGBTQ+ individuals. The Equal Employment Opportunity Commission has adopted this approach. The federal courts, however, have been more reluctant to do so because the Supreme Court has not expressly decided the issue. Indeed, the Supreme Court recently denied a petition for writ of certiorari in a case dealing with employment discrimination on the basis of sexual orientation and gender identity.

In Part IV, this Note discusses two proposed pieces of federal legislation that address employment discrimination based on sexual orientation and gender identity. Although LGBTQ+ advocacy organizations and their allies once supported the Employment Non-Discrimination Act, they have since withdrawn their support for the Act because of its modesty. The better piece of legislation, this Note argues, is the Equality Act. The Equality Act extends Title VII's protections to LGBTQ+ individuals and better follows the non-discrimination and equal-protection law and jurisprudence of South Africa.

## I

### SOUTH AFRICAN NON-DISCRIMINATION LAW AND JURISPRUDENCE

#### A. The South African Constitution

After South Africa dismantled its apartheid regime, the country adopted a “new and powerful constitution that provide[s] protections for individual rights and remedies for their violation.”<sup>13</sup> Chapter 2 of the South African Constitution includes the Bill of Rights, which “enshrines the rights of *all* people in [South Africa] and affirms the democratic values of human dignity, equality and freedom.”<sup>14</sup> The South African Constitution not only directs the government to “respect” the rights enumerated in the Bill of Rights but also to “protect, promote and fulfill” the rights.<sup>15</sup> The Bill of Rights extends to “*all* law” and regulates the government and “*all* organs of the state.”<sup>16</sup> The Bill of Rights also regulates “natural” and “juris-

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<sup>13</sup> Newstrom, *supra* note 6, at 786.

<sup>14</sup> S. AFR. CONST., ch. 2, § 7(1), 1996 (emphasis added). The South African Constitution took effect on February 4, 1997.

<sup>15</sup> *Id.*, ch. 2, § 7(2).

<sup>16</sup> *Id.*, ch. 2, § 8(1) (emphasis added).

tic” persons in certain circumstances.<sup>17</sup> Furthermore, the Bill of Rights mandates that courts promote “the values that underlie an open and democratic society based on human dignity, equality and freedom” and “the spirit, purport and objects of the Bill of Rights.”<sup>18</sup>

Section 9 of Chapter 2 of the South African Constitution establishes the right of equality. Section 9(1) boldly declares, “*Everyone* is equal before the law and has the right to equal protection and benefit of the law.”<sup>19</sup> Section 9(3) further states, “The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, *sexual orientation*, age, disability, religion, conscience, belief, culture, language and birth.”<sup>20</sup> Discrimination on the basis of one of the grounds in Section 9(3) is presumptively unconstitutional.<sup>21</sup>

The inclusion of sexual orientation in Section 9(3) of the South African Constitution<sup>22</sup> was the product of victory over an oppressive and discriminatory apartheid regime.<sup>23</sup> After apartheid, South Africa began the process of transforming itself into a “human rights state.”<sup>24</sup> Indeed, upon signing the new

<sup>17</sup> *Id.*, ch. 2, § 8(2); see also *id.*, ch. 2, §§ 8(2)–(3) (explaining when a court will apply the Bill of Rights to regulate a natural or juristic person and what factors the court will consider).

<sup>18</sup> *Id.*, ch. 2, §§ 39(1)–(2). The South African Constitution discusses the “spirit, purport and objects of the Bill of Rights” throughout its text. For example, in Chapter 1, the Constitution notes that South Africa is founded on the values of human dignity, equality, human rights, and freedom, among others. See *id.*, ch. 1, § 1. The Preamble includes a similar discussion. See *id.* at pmb1.

<sup>19</sup> *Id.*, ch. 2, § 9(1) (emphasis added).

<sup>20</sup> *Id.*, ch. 2, § 9(3) (emphasis added).

<sup>21</sup> See *id.*, ch. 2, § 9(5) (“Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.”).

<sup>22</sup> Hereinafter referred to as the “Equality Clause.”

<sup>23</sup> See Eric C. Christiansen, Note, *Ending the Apartheid of the Closet: Sexual Orientation in the South African Constitutional Process*, 32 N.Y.U. J. INT’L L. & POL. 997, 1010–18 (2000) [hereinafter *Ending the Apartheid of the Closet*] (explaining the impact that the “realities of apartheid South Africa” had on the South African Bill of Rights and the Equality Clause); see also Tom Lodge, *The Interplay of Non-Violent and Violent Action in the Movement Against Apartheid in South Africa, 1983–94*, in CIVIL RESISTANCE & POWER POLITICS: THE EXPERIENCE OF NON-VIOLENT ACTION FROM GANDHI TO THE PRESENT 213, 227 (Adam Roberts & Timothy Garton Ash eds., 2009) (describing the influence of the progressive activists who participated in drafting the South African Constitution).

<sup>24</sup> Makau wa Mutua, *Hope and Despair for a New South Africa: The Limits of Rights Discourse*, 10 HARV. HUM. RTS. J. 63, 65 (1997); see also Albie Sachs, *Constitutional Developments in South Africa*, 28 N.Y.U. J. INT’L L. & POL. 695, 695 (1996) (“The goal [of the new Constitution] was to move from a racial autocracy to a non-racial democracy, by means of a negotiated transition, the progressive implementation of democracy, and respect for fundamental human rights.”).

South African Constitution, Nelson Mandela declared, “By our presence here today, we solemnly honour the pledge we made to ourselves and to the world, that South Africa shall redeem herself and thereby widen the frontiers of human freedom.”<sup>25</sup> With the new South African Constitution, South Africa became the first country to codify equal protection and freedom from discrimination on the basis of sexual orientation in its constitution.<sup>26</sup> This is especially significant given the state of equality for LGBTQ+ individuals in the rest of the world,<sup>27</sup> and in contrast to other African countries.<sup>28</sup>

It is curious that South Africa became the first country in which “[LGBTQ+ individuals] possessed a level of constitutional

<sup>25</sup> Nelson Mandela, President of South Africa, Speech at the Signing of the Constitution (Dec. 10, 1996), <http://www.sahistory.org.za/archive/speech-president-nelson-mandela-signing-constitution-sharpeville-10-december-1996> [<https://perma.cc/7JPW-CPVH>].

<sup>26</sup> See Eric C. Christiansen, *Substantive Equality and Sexual Orientation: Twenty Years of Gay and Lesbian Rights Adjudication Under the South African Constitution*, 49 CORNELL INT’L L.J. 565, 566–67 (2016) [hereinafter *Substantive Equality and Sexual Orientation*] (“Among the exceptional elements of the South African Equality Clause is its novel and progressive inclusion of anti-discrimination protections for lesbians and gay men. The prohibition of discrimination based on sexual orientation is particularly important because it occurred—for the first time in any national constitution . . .”).

<sup>27</sup> See James D. Wilets, *Conceptualizing Private Violence Against Sexual Minorities as Gendered Violence: An International and Comparative Law Perspective*, 60 ALB. L. REV. 989, 1028 (1997); see also Sebastian Maguire, *The Human Rights of Sexual Minorities in Africa*, 35 CAL. W. INT’L L.J. 1, 4 (2004) (“In many jurisdictions throughout the world, sexual minorities are considered a criminal class.”); AENGUS CARROLL & LUCAS RAMÓN MENDOS, INT’L LESBIAN, GAY, BISEXUAL, TRANS AND INTERSEX ASS’N, STATE-SPONSORED HOMOPHOBIA: A WORLD SURVEY OF SEXUAL ORIENTATION LAWS 8 (12th ed. 2017), [http://ilga.org/downloads/2017/ILGA\\_State\\_Sponsored\\_Homophobia\\_2017\\_WEB.pdf](http://ilga.org/downloads/2017/ILGA_State_Sponsored_Homophobia_2017_WEB.pdf) [<https://perma.cc/L96U-9L27>] (“There are 72 States that we classify as criminalising States . . .”).

<sup>28</sup> See Maguire, *supra* note 27, at 4 n.10 (listing the African countries that outlaw homosexuality); see also Kim Yi Dionne, *Should We Call Africa Homophobic?*, WASH. POST (July 10, 2015), [https://www.washingtonpost.com/news/monkey-cage/wp/2015/07/10/why-im-not-calling-africa-homophobic-anymore/?utm\\_term=.B02cd7d34693](https://www.washingtonpost.com/news/monkey-cage/wp/2015/07/10/why-im-not-calling-africa-homophobic-anymore/?utm_term=.B02cd7d34693) [<https://perma.cc/Q7K4-W9QP>] (“Likewise, using survey data from 39 countries, the Pew Research Center reports widespread rejection of homosexuality in Africa . . .”); David Smith, *Why Africa is the Most Homophobic Continent*, GUARDIAN (Feb. 22, 2014, 7:06 PM), <https://www.theguardian.com/world/2014/feb/23/africa-homophobia-uganda-anti-gay-law> (“Western liberals eager to see the best in Africa must face an inconvenient truth: this is the most homophobic continent on Earth. Same-sex relations are illegal in 36 of Africa’s 55 countries, according to Amnesty International, and punishable by death in some states. Now a fresh crackdown is under way.”); Jonathan Zimmerman, *An African Epidemic of Homophobia*, L.A. TIMES (June 29, 2013), <http://articles.latimes.com/2013/jun/29/opinion/la-oe-zimmerman-africa-gays-20130630> [<https://perma.cc/8YLL-NFNK>] (“The South African examples speak loud and clear: Gay rights are human rights, not Western ones, so everyone is enjoined to respect them. Too bad other African countries don’t.”).



protection greater than that of any other nation—a level of legal protection that remains pre-eminent twenty years later.”<sup>29</sup> Professor Eric Christiansen notes that, despite South Africa’s religiosity and conservatism, the combination of three factors unique to South Africa in the 1990s ultimately led the drafters to include progressive constitutional protections for LGBTQ+ individuals.<sup>30</sup> The three factors include the (1) history and timing, (2) ideology and non-racialism, and (3) constrained drafting process.<sup>31</sup>

First, South African LGBTQ+ advocacy organizations started to realize a level of legitimacy and political recognition in the years preceding the “fundamental constitutional re-creation of a state that had existed for forty-seven years with discrimination as its primary political and social reality.”<sup>32</sup> The greater legitimacy of LGBTQ+ advocacy organizations and the effort to include representation of various oppressed groups led to the involvement of LGBTQ+ leaders in the anti-apartheid movement.<sup>33</sup> The LGBTQ+ rights movement was also gaining momentum outside of South Africa’s borders. In the early 1990s, the European Court of Human Rights twice affirmed its *Dudgeon v. United Kingdom*<sup>34</sup> decision holding that Section 11 of the United Kingdom’s law criminalizing homosexual acts violated Article 8 of the European Convention on Human Rights.<sup>35</sup> Similarly, the United Nations Human Rights Commission condemned the Australian state of Tasmania for criminalizing ho-

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<sup>29</sup> *Substantive Equality and Sexual Orientation*, *supra* note 26, at 585.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 585–87.

<sup>32</sup> *Id.* at 587.

<sup>33</sup> *Id.* at 586. Professor Christiansen also notes that “unrelated occurrences,” including the outing of an anti-apartheid leader as well as homophobic remarks uttered by a key African National Congress Party figure, also contributed to recognition and involvement of LGBTQ+ organizations in the anti-apartheid movement. *Id.*; see also Derrick Fine & Julia Nicol, *The Lavender Lobby: Working for Lesbian and Gay Rights Within the Liberation Movement*, in *DEFIANT DESIRE: GAY AND LESBIAN LIVES IN SOUTH AFRICA* 269, 269–70 (Mark Gevisser & Edwin Cameron eds., 1995) (describing the unrelated occurrences and how the occurrences led to the African National Congress Party recognizing the importance of equality for LGBTQ+ South Africans).

<sup>34</sup> 45 Eur. Ct. H.R. (ser. A) (1981).

<sup>35</sup> *Substantive Equality and Sexual Orientation*, *supra* note 26, at 586 (discussing *Norris v. Ireland* and *Modinos v. Cyprus*); see also *Norris v. Ireland*, 142 Eur. Ct. H.R. (ser. A) (1988) (holding that Ireland’s law criminalizing homosexual acts violated Article 8 of the European Convention on Human Rights); *Modinos v. Cyprus*, 259 Eur. Ct. H.R. (ser. A) (1993) (holding that Cyprus’s law criminalizing homosexual acts violated Article 8 of the European Convention on Human Rights); see generally European Convention on Human Rights art. 8, Nov. 4, 1950, 213 U.N.T.S. 222 (establishing the right to respect for private life and family).

mosexual acts.<sup>36</sup> And although the Canadian Supreme Court upheld a law that excluded same-sex spouses from collecting guaranteed income supplements, the Court held that Section 15 of the Canadian Charter of Rights and Freedoms includes sexual orientation as a protected ground.<sup>37</sup> In sum, the fall of apartheid and the process of drafting a new constitution transpired concurrently with the LGBTQ+ rights movement gaining momentum both within and beyond South Africa's borders.

Second, the principles of "non-racialism" and substantive equality guided the African National Congress Party (ANC) and the anti-apartheid movement more broadly.<sup>38</sup> The principle of non-racialism demands that the government both safeguard human rights and immediately terminate any and all discrimination.<sup>39</sup> Indeed, the ANC's 1955 Freedom Charter declares, "All Shall be Equal Before the Law!" and "All Shall Enjoy Equal Human Rights!," and generally expresses a commitment to equality and anti-discrimination.<sup>40</sup> This vision of a South Africa "founded on the principles of equality, multi-racial democracy, and human dignity" persevered from its initial articulation in the 1955 Freedom Charter through the fall of apartheid.<sup>41</sup> Fortunately for the National Coalition for Gay and Lesbian Equality (NCGLE) and other LGBTQ+ advocacy organizations, this vision favored both including the groups in the process of drafting a new constitution and expressly codifying LGBTQ+ rights in the new constitution.<sup>42</sup> Additionally, the NCGLE and other LGBTQ+ advocacy organizations formed coalitions with the ANC and other anti-apartheid political

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<sup>36</sup> U.N. Human Rights Comm., *Toonen v. Australia*, Communication No. 488/1992, U.N. Doc. CCPR/C/50/D/488/1992 (1994); *see also* G.A. Res. 2200 (XXI), annex, International Covenant on Civil and Political Rights (Dec. 19, 1966) [hereinafter ICCPR] (establishing the right to equal protection before the law without discrimination).

<sup>37</sup> *See Egan v. Canada*, [1995] 2 S.C.R. 513 (Can.) (holding that sexual orientation is a protected ground under Section 15 of the Canadian Charter of Rights and Freedoms); *see generally* Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act 1982, c. 11, § 15(1) (U.K.) ("Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.").

<sup>38</sup> *Substantive Equality and Sexual Orientation*, *supra* note 26, at 586.

<sup>39</sup> *Id.* at 587.

<sup>40</sup> *The Freedom Charter*, SOUTH AFR. HIST. ONLINE, <http://www.sahistory.org.za/article/freedom-charter> [<https://perma.cc/DYH2-YVF2>] (last updated Aug. 4, 2016).

<sup>41</sup> *Substantive Equality and Sexual Orientation*, *supra* note 26, at 586.

<sup>42</sup> *Ending the Apartheid of the Closet*, *supra* note 23, at 1037–38.

organizations prior to the abolition of apartheid in South Africa.<sup>43</sup>

Third, party-based delegates and other experts largely negotiated and drafted the new constitution behind closed doors.<sup>44</sup> Small thematic committees consisting only of a relatively small number of delegates and experts were responsible for sequentially drafting and revising the text of each section of the constitution.<sup>45</sup> Additionally, the drafting process occurred under “tight time constraints” and “strong political pressure”—from both within and beyond South Africa’s borders.<sup>46</sup> This process resulted in a few influential party elites and experts dictating a substantial portion of the new constitution’s text.<sup>47</sup> Many of these drafters wholeheartedly espoused the principles of “non-racialism” and substantive equality, and staunchly advocated for the inclusion of LGBTQ+ protections and rights in the new constitution’s text.<sup>48</sup> Moreover, the NCGLE and other LGBTQ+ advocacy organizations leveraged their preexisting coalition with the ANC to ensure that the constitution included protections on the basis of sexual orientation.<sup>49</sup>

Although the South African Constitution is a progressive document that enshrines human dignity, equality, and freedom for LGBTQ+ South Africans, this Note recognizes that it is not without shortcomings. Section 16 of Chapter 2 of the South African Constitution establishes the right of freedom of expression.<sup>50</sup> Subsection 2 of Section 16 excepts certain acts of expression from constitutional protection.<sup>51</sup> The exceptions include: war propaganda, incitement of imminent violence, and hate speech based on protected grounds that incites harm.<sup>52</sup> While the hate speech exception renders hate speech based on race, ethnicity, gender, or religion unprotected expression, it does not explicitly do so for sexual orientation.<sup>53</sup>

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<sup>43</sup> See Jacklyn Cock, *Engendering Gay and Lesbian Rights: The Equality Clause in the South African Constitution*, 26 *WOMEN’S STUD. INT’L F.* 35, 36 (2003). But this alliance caused significant disagreement within the ANC over LGBTQ+ rights both before and during the transition period. See also Fine & Nicol, *supra* note 33, at 270–72.

<sup>44</sup> *Substantive Equality and Sexual Orientation*, *supra* note 26, at 587.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> See Newstrom, *supra* note 6, at 786.

<sup>50</sup> S. AFR. CONST., ch. 2, § 16, 1996.

<sup>51</sup> See *id.*, ch. 2, § 16(2).

<sup>52</sup> *Id.*, ch. 2, § 16(2)(a)–(c).

<sup>53</sup> Compare *id.*, ch. 2, § 16(2)(c), with *id.*, ch. 2, § 9(3).

Section 37 similarly does not include sexual orientation as a protected ground.<sup>54</sup> Section 37 of Chapter 2 of the South African Constitution establishes when a state of emergency may be declared and the implications of such a declaration concerning the rights established in Chapter 2.<sup>55</sup> Subsection 5 of Section 37 states:

No Act of Parliament that authorises a declaration of a state of emergency, and no legislation enacted or other action taken in consequence of a declaration, may permit or authorise—any derogation from a section mentioned in column 1 of the Table of Non-Derogable Rights, to the extent indicated opposite that section in column 3 of the Table.<sup>56</sup>

According to the Table of Non-Derogable Rights, the right of equality is protected from legislation related to a state of emergency declaration only “[w]ith respect to unfair discrimination solely on the grounds of race, colour, ethnic or social origin, sex, religion or language.”<sup>57</sup> Thus, both Sections 16 and 37 demonstrate that the South African Constitution, which boldly prohibits discrimination on the basis of sexual orientation, still fails to provide the broadest protections for LGBTQ+ South Africans. Nonetheless, the United States can look to the South African Constitution as a model for enacting robust legal protections for LGBTQ+ citizens.

## B. South African Constitutional Court Cases

After successfully advocating to include LGBTQ+ rights and protections in the South African Constitution, the NCGLE and other LGBTQ+ advocacy organizations immediately began challenging discriminatory laws still in effect from the apartheid era.<sup>58</sup> In response to these challenges, the Constitutional Court, South Africa’s highest court, used the Equality Clause to unanimously strike down countless discriminatory laws.<sup>59</sup> By using the Equality Clause to invalidate the discrimi-

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<sup>54</sup> Compare *id.*, ch. 2, § 37(5)(c), Table of Non-Derogable Rights, with *id.*, ch. 2, § 9(3).

<sup>55</sup> *Id.*, ch. 2, § 37.

<sup>56</sup> *Id.*, ch. 2, § 37(5)(c).

<sup>57</sup> *Id.* Table of Non-Derogable Rights.

<sup>58</sup> *Substantive Equality and Sexual Orientation*, *supra* note 26, at 588; Maguire, *supra* note 27, at 11.

<sup>59</sup> See, e.g., *J v. Dir. Gen.* 2003 (5) SA 621 (CC) at 15–16 para. 23 (S. Afr.) (striking down a prohibition of registering both the non-biological and biological homosexual parents on the birth certificate of a child born from artificial insemination); *Du Toit v. Minister for Welfare and Population Dev.* 2003 (2) SA 198 (CC) at 25 para. 25, 34–35 para. 44 (S. Afr.) (striking down sections of the Child Care Act that unconstitutionally discriminated on the basis of sexual orientation in the

natory laws, the Constitutional Court unequivocally reaffirmed equal protection under the law for LGBTQ+ South Africans.<sup>60</sup> South African Equal Protection jurisprudence, unlike that in the United States, mandates applying the same level of scrutiny and protection to each protected class recognized in the Equality Clause.<sup>61</sup> Another key difference between South African Equal Protection jurisprudence and American Equal Protection jurisprudence is the judicial system's consideration of "dignity."<sup>62</sup> The Constitutional Court has held that the equality rights provided in Section 9 of the South African Constitution's Bill of Rights inextricably intertwine with the dignity rights

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adoption context); *Satchwell v. President of the Republic of S. Afr.* 2002 (6) SA 1 (CC) at paras. 21, 37 (S. Afr.) (striking down sections of the Judge's Remuneration and Conditions of Employment Act 88 of 1989 that unconstitutionally discriminated on the basis of sexual orientation in the employment benefit context); *Nat'l Coal. for Gay & Lesbian Equal. v. Minister of Home Affairs* 2000 (2) SA 1 (CC) at para. 98 (S. Afr.) (striking down a section of the Aliens Control Act of 1991 that unconstitutionally discriminated on the basis of sexual orientation in the immigration context); *Nat'l Coal. for Gay & Lesbian Equal. v. Minister of Justice* 1999 (1) SA 6 (CC) at para. 106 (S. Afr.) (striking down sodomy laws that unconstitutionally targeted homosexuals in the criminal law context).

<sup>60</sup> *Substantive Equality and Sexual Orientation*, *supra* note 26, at 588.

<sup>61</sup> Compare *Nat'l Coal. for Gay & Lesbian Equal.* 1999 (1) SA 6 (CC) at para. 55 (S. Afr.) ("[Neither] our Constitution [n]or jurisprudence require us, in the way that the United States Constitution requires of its Supreme Court, in the case of ' . . . rights not readily identifiable in the Constitution's text,' to ' . . . identify the nature of the rights qualifying for heightened judicial protection.'"), with *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (applying strict scrutiny to race-based classifications), *Craig v. Boren*, 429 U.S. 190, 197 (1976) (applying intermediate scrutiny to sex-based classifications), and *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (applying rational basis scrutiny to sexual-orientation-based classifications).

<sup>62</sup> Compare *Nat'l Coal. for Gay & Lesbian Equal.* 1999 (1) SA 6 (CC) at para. 55 (S. Afr.) ("The 1996 Constitution contains express privacy and dignity guarantees as well as an express prohibition of unfair discrimination on the ground of sexual orientation, which the United States Constitution does not." (footnote omitted)), with *Obergefell v. Hodges*, 135 S. Ct. 2584, 2639 (2015) (Thomas, J., dissenting) ("[T]he Constitution contains no 'dignity' Clause, and even if it did, the government would be incapable of bestowing dignity."). Unlike in American jurisprudence, the right to dignity is widely recognized in international human rights jurisprudence. See, e.g., Universal Declaration of Human Rights, G.A. Res. 217 (III) A, Universal Declaration of Human Rights, (Dec. 10, 1948) at pmbl. ("Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world . . ."); ICCPR, *supra* note 36, at pmbl. ("[T]he inherent dignity and . . . the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world . . ."); G.A. Res. 2200 (XXI) A, annex, International Covenant on Economic, Social and Cultural Rights, (Dec. 16, 1966) at pmbl. ("[T]he inherent dignity and . . . the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world . . .").

provided in Section 10.<sup>63</sup> Three landmark cases, which this Note discusses below, demonstrate the South African government's dedication to equal rights and equal protection under the law for LGBTQ+ South Africans. The United States—whether through legislation or judicial decisions—should follow South Africa's example.

Although South African courts routinely invoke the South African Constitution to enforce equal protection and equal dignity, problems still persist for many. While attitudes in South Africa are improving, studies show overwhelming opposition to homosexual conduct.<sup>64</sup> The level of opposition to homosexuality in South Africa also far exceeds the level of opposition in nations with similar legal protections.<sup>65</sup> And LGBTQ+ individuals still face discrimination and violence from private actors.<sup>66</sup> Indeed, in 2014, Minister of Justice Jeff Radebe noted, "Notwithstanding the comprehensive constitutional and legal framework and protection for LGBT[Q+] persons, we have sadly witnessed acts of discrimination and violent attacks being perpetrated against LGBT[Q+] persons."<sup>67</sup> The problems are amplified for LGBTQ+ individuals who are poor, Black, or female.<sup>68</sup> For example, the practice of "corrective rape," which is used primarily but not exclusively against Black lesbians, entails sexually assaulting LGBTQ+ individuals to "cure" them

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<sup>63</sup> See, e.g., *Nat'l Coal. for Gay & Lesbian Equal.* 1999 (1) SA 6 (CC) at para. 28 (S. Afr.) ("[T]he common-law crime of sodomy [in addition to an infringement of the right to equality] also constitutes an infringement of the right to dignity which is enshrined in section 10 of our Constitution."). Justice Sachs also underscored the interrelation of the rights to equality and dignity. See *id.* at 150, 156–57 paras. 120, 125.

<sup>64</sup> See TOM W. SMITH, NORC/U. CHI., GSS CROSS-NATIONAL REPORT NO. 31: CROSS-NATIONAL DIFFERENCES IN ATTITUDES TOWARDS HOMOSEXUALITY 1, 17 (2011) (explaining that a 2008 study found that about 84% of South Africans indicated that same-sex sexual activity was "always wrong" while only about 8% of South Africans indicated that it was "not wrong at all"); *The Global Divide on Homosexuality: Greater Acceptance in More Secular and Affluent Countries*, PEW RES. CTR. (June 4, 2013), <http://www.pewglobal.org/2013/06/04/the-global-divide-on-homosexuality/> [<https://perma.cc/E2PL-UHE5>] (explaining that a 2013 study found that about 61% of South Africans indicated that "homosexuality should not be accepted by society" while only 32% of South Africans indicated that homosexuality "should be accepted").

<sup>65</sup> See *supra* note 64.

<sup>66</sup> See HUMAN RTS. WATCH & INT'L GAY & LESBIAN HUM. RTS. COMM'N, MORE THAN A NAME: STATE-SPONSORED HOMOPHOBIA AND ITS CONSEQUENCES IN SOUTHERN AFRICA 179–230 (2003) [hereinafter HUMAN RIGHTS WATCH].

<sup>67</sup> *Programme Against LGBTI Violence Launched*, NEWS24 (Apr. 29, 2014, 4:31 PM), <https://www.news24.com/SouthAfrica/News/Programme-against-LGBTI-violence-launched-20140429> [<https://perma.cc/GP3J-Z5AL>].

<sup>68</sup> See HUMAN RIGHTS WATCH, *supra* note 66, at 187–96.

of their homosexuality.<sup>69</sup> This Note does not argue that the fight for equality in South Africa is over. Rather, this Note argues that South Africa is a model to which the United States should look concerning employment non-discrimination laws and workplace protections.

1. National Coalition for Gay and Lesbian Equality v. Minister of Justice

In *National Coalition for Gay and Lesbian Equality (NCGLE) v. Minister of Justice*, the Constitutional Court of South Africa unanimously invalidated the common-law crime of sodomy and struck down a section of the Sexual Offences Act.<sup>70</sup> The Court based its decision on the Bill of Rights of the South African Constitution, including the rights to equality, dignity, and privacy.<sup>71</sup> One commentator describes the case as “the most meaningful judicial victory for the gay rights movement since the abolition of apartheid.”<sup>72</sup>

The Afrikaner ideology’s oppressive commitment to maintaining “morality” in South Africa produced a legal regime that targeted and discriminated against LGBTQ+ South Africans.<sup>73</sup>

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<sup>69</sup> Lydia Smith, *Corrective Rape: The Homophobic Fallout of Post-Apartheid South Africa*, TELEGRAPH (May 21, 2015, 7:00 AM), <http://www.telegraph.co.uk/women/womens-life/11608361/Corrective-rape-The-homophobic-fallout-of-post-apartheid-South-Africa.html> [<https://perma.cc/Q8Z5-DFHF>] (“South Africa has one of the highest rates of rape in the world—including ‘corrective rape’—used to ‘cure’ lesbian women of their homosexuality.”); see also Clare Carter, *The Brutality of ‘Corrective Rape,’* N.Y. TIMES (July 27, 2013), <http://www.ny-times.com/interactive/2013/07/26/opinion/26corrective-rape.html> [<https://perma.cc/K7ZZ-A5PX>] (“[I]t became evident to me that multiple layers of South African society were responsible for the epidemic of corrective rape and that bias, apathy and culpability ran deeper than I could have imagined: in educational and religious institutions, the criminal justice system, and even within families.”); Lee Middleton, *‘Corrective Rape’: Fighting a South African Scourge*, TIME (Mar. 8, 2011), <http://content.time.com/time/world/article/0,8599,2057744,00.html> [<https://perma.cc/8AB5-TS4W>] (“Gays and lesbians are a particular target [of homophobic sexual violence] in South Africa, as they are across Africa, where traditional social conservatism is being distilled into an angry homophobia.”).

<sup>70</sup> 1999 (1) SA 6 (CC) at 131 para. 106 (S. Afr.). The Constitutional Court also struck down discriminatory parts of the Criminal Procedures Act and the Security Officers Act. *Id.* at 101–02 para. 74. The Criminal Procedure Act considered sodomy as equivalent to murder, rape, and fraud. See Criminal Procedure Act 51 of 1977, Sched. 1 (S. Afr.).

<sup>71</sup> *Nat’l Coal. for Gay & Lesbian Equal.* 1999 (1) SA 6 (CC) at paras. 27–31 (S. Afr.); see also S. AFR. CONST., ch. 2, §§ 9, 10, 14, 1996 (recognizing the rights to equality, dignity, and privacy).

<sup>72</sup> Ryan Goodman, *Beyond the Enforcement Principle: Sodomy Laws, Social Norms, and Social Panoptics*, 89 CALIF. L. REV. 643, 680 (2001).

<sup>73</sup> Glen Retief, *Keeping Sodomy Out of the Lager: State Repression of Homosexuality in Apartheid South Africa*, in DEFIANT DESIRE, *supra* note 33, at 99, 99–111. The Afrikaner ideology’s oppressive commitment to maintaining morality

Indeed, South Africa did not recognize sodomy as a crime until Dutch colonizers brought the Roman-Dutch common law to South Africa in the seventeenth century.<sup>74</sup> The common law of sodomy criminalized a range of sexual activities and prohibited any sexual act lacking the purpose of procreation.<sup>75</sup> An individual convicted of sodomy was often sentenced to death.<sup>76</sup>

When the British gained control of South Africa from the Dutch in 1806, the British preserved the common-law crime of sodomy.<sup>77</sup> The British went even further in the nineteenth century, enacting and enforcing criminal codes that criminalized homosexual conduct between men.<sup>78</sup> Furthermore, by the twentieth century, the government continued to enforce the common-law crime of sodomy and other “unnatural” sexual-activity prohibitions for homosexual conduct but not for heterosexual conduct.<sup>79</sup>

When the Afrikaner Reunited National Party gained control of the South African House of Assembly from the British Union Party in 1948, the Afrikaner Reunited National Party began enacting a myriad of oppressive laws.<sup>80</sup> The post-1948 apartheid laws included laws that codified the common-law criminalization of sodomy and homosexual conduct between men.<sup>81</sup> For example, the Immorality Act of 1957 prohibited certain conduct “relating to brothels and unlawful carnal intercourse and other acts in relation thereto,”<sup>82</sup> which included

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also motivated the apartheid policies aimed at preserving the moral purity of the white nation. See Voris E. Johnson, Comment, *Making Words on a Page Become Everyday Life: A Strategy to Help Gay Men and Lesbians Achieve Full Equality Under South Africa’s Constitution*, 11 EMORY INT’L L. REV. 583, 591 (1997).

<sup>74</sup> Heidi Joy Schmid, *Decriminalization of Sodomy Under South Africa’s 1996 Constitution: Implications for South African and U.S. Law*, 8 CARDOZO J. INT’L & COMP. L. 163, 165 (2000); see generally Kevan Botha & Edwin Cameron, *South Africa*, in SOCIOLEGAL CONTROL OF HOMOSEXUALITY: A MULTI-NATION COMPARISON 5, 5–9 (Donald J. West & Richard Green eds., 1997) (presenting a survey of sodomy laws).

<sup>75</sup> Pierre De Vos, *On the Legal Construction of Gay and Lesbian Identity and South Africa’s Transitional Constitution*, 12 S. AFR. J. HUM. RTS. 265, 274 (1996).

<sup>76</sup> *Id.* at 274–75. But sentencing individuals convicted of sodomy to death became disfavored by 1886. See Botha & Cameron, *supra* note 74, at 11–12.

<sup>77</sup> Johanna Bond, *Gender and Non-Normative Sex in Sub-Saharan Africa*, 23 MICH. J. GENDER & L. 65, 120 (2016).

<sup>78</sup> See Schmid, *supra* note 74, at 165.

<sup>79</sup> Johnson, *supra* note 73, at 592.

<sup>80</sup> WILLEM DE KLERK, *THE PURITANS IN AFRICA* 215–20 (1983).

<sup>81</sup> Johnson, *supra* note 73, at 592.

<sup>82</sup> Sexual Offences Act 23 of 1957 (S. Afr.). The Immorality Act of 1988 renamed the Immorality Act of 1957 as the Sexual Offences Act of 1957. See Johnson, *supra* note 73, at 593 n.40.



acts such as interracial sex, prostitution, and cruising.<sup>83</sup> Although the Immorality Act of 1957 did not explicitly criminalize homosexual conduct between men, the government later did so using the Act as the basis.<sup>84</sup>

Following a police raid in Forest Town, South Africa involving a party of homosexual men, the government amended the Immorality Act of 1957 to include Section 20A.<sup>85</sup> The amended section imposed punishment on “[any] male person who commits with another male person at a party any act which is calculated to stimulate sexual passion or to give sexual gratification . . . .”<sup>86</sup> The amendment also raised the age of consent for homosexual men to nineteen, while maintaining the age of consent for everyone else at sixteen.<sup>87</sup>

In 1997, the NCGLE and the South African Human Rights Commission filed a constitutional challenge to sodomy laws in the High Court.<sup>88</sup> The challengers contended that the sodomy laws targeted only men and homosexual conduct between men.<sup>89</sup> This targeting, the challengers argued, violated the Equality Clause of the South African Constitution by unfairly discriminating based on gender and sexual orientation.<sup>90</sup> The High Court agreed.<sup>91</sup>

On appeal, the Constitutional Court unanimously affirmed the High Court’s decision and struck down the challenged sodomy laws.<sup>92</sup> Justice Ackermann, addressing the principal issue of whether the sodomy laws violated the right of equality,

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<sup>83</sup> Schmid, *supra* note 74, at 166. Some commentators define “cruising” as a term to describe the act of men looking for casual sex. See Jordan Blair Woods, *Don’t Tap, Don’t Stare, and Keep Your Hands to Yourself! Critiquing the Legality of Gay Sting Operations*, 12 J. GENDER RACE & JUST. 545, 545 n.3 (2009).

<sup>84</sup> Johnson, *supra* note 73, at 593.

<sup>85</sup> See Schmid, *supra* note 74, at 166; Immorality Amendment Act 57 of 1969 (S. Afr.). For a more comprehensive discussion of the police raid and the Immorality Amendment Act, see Johnson, *supra* note 73, at 593–95.

<sup>86</sup> Immorality Amendment Act 57 of 1969, § 3 (S. Afr.). Section 3 of the 1969 Act inserted Section 20A into the 1957 Act.

<sup>87</sup> See *id.* at § 1. Section 1 of the 1969 Act altered Section 14 of the 1957 Act. The age of consent for homosexual women was raised to nineteen in 1988. See Immorality Amendment Act 2 of 1988, § 5 (S. Afr.). Section 5 of the 1988 Act altered Section 14 of the 1957 Act.

<sup>88</sup> *Nat’l Coal. for Gay & Lesbian Equal. v. Minister of Justice* 1998 (6) BCLR 726 (W) at para. 2 (S. Afr.).

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*; see also Cathi Albertyn & Beth Goldblatt, *The Decriminalization of Gay Sexual Offences: The National Coalition for Gay and Lesbian Equality v The Minister of Justice and Others*, 1998 (6) BCLR 726 (W), 14 S. AFR. J. ON HUM. RTS. 461, 461–68 (1998) (describing Judge Heher’s decision in *Nat’l Coal. for Gay & Lesbian Equal.* 1998 (6) BCLR 726 (W)).

<sup>92</sup> *Nat’l Coal. for Gay & Lesbian Equal.* 1999 (1) SA 6 (CC) at para. 30 (S. Afr.).

applied a three-step discrimination analysis.<sup>93</sup> The analysis asks whether: (1) the action discriminates based on a particular ground, (2) the discrimination is unfair, and (3) the unfair discrimination is justified.<sup>94</sup>

Concerning the first inquiry of the analysis, the Court concluded that the challenged sodomy laws targeted men and specifically homosexual conduct between men.<sup>95</sup> Thus, the challenged sodomy laws discriminated on the basis of gender and sexual orientation.<sup>96</sup> Addressing the second inquiry, the Court noted that discrimination based on a ground stated in the Equality Clause is presumptively unfair.<sup>97</sup> In the alternative, the Court considered several factors to determine whether the discrimination was unfair.<sup>98</sup> Justice Ackermann elaborated:

In order to determine whether the discriminatory provision has impacted on complainants unfairly, various factors must be considered. These would include: (a) the position of the complainants in society and whether they have suffered in the past from patterns of disadvantage . . . ; (b) the nature of the provision or power and the purpose sought to be achieved by it . . . ; (c) with due regard to (a) and (b) above, and any other relevant factors, the extent to which the discrimination has affected the rights or interests of complainants and whether it has led to an impairment of their fundamental human dignity or constitutes an impairment of a comparably serious nature.<sup>99</sup>

The Court concluded that: (a) homosexual men are a “permanent minority in society” and have been disadvantaged; (b) the nature of the sodomy laws is to criminalize “private conduct of consenting adults which causes no harm to anyone else”; and (c) the discrimination has “gravely affected” the rights and “deeply impaired” the fundamental dignity of homosexual

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<sup>93</sup> See *id.* at paras. 15–19 (describing the discrimination analysis and citing *Harksen v. Lane* 1998 (1) SA 300 (CC) at para. 53 (S. Afr.)). The discrimination analysis which Justice Ackermann applied has since become the “standard analysis for all discrimination questions.” *Substantive Equality and Sexual Orientation*, *supra* note 26, at 589.

<sup>94</sup> *Nat’l Coal. for Gay & Lesbian Equal.* 1999 (1) SA 6 (CC) at paras. 16–17 (S. Afr.).

<sup>95</sup> *Id.* at paras. 11–13, 26.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at paras. 17–18.

<sup>98</sup> *Id.* at para. 19.

<sup>99</sup> *Id.* (citing *Harksen v. Lane* NO 1998 (1) SA 300 (CC) at paras. 50–51 (S. Afr.)).

men.<sup>100</sup> Thus, the challenged sodomy laws discriminated unfairly.<sup>101</sup> Finally, concerning the third inquiry, the Court stated that the unfair discrimination may be justified only if it satisfied the Limitations Clause of the Constitution.<sup>102</sup> The Court ultimately held, however, that “there is nothing which can be placed in the other balance of the scale” and that “[t]he inevitable conclusion is that the discrimination in question is unfair. . . .”<sup>103</sup> Thus, the challenged sodomy laws violated Section 9 of Chapter 2 of the South African Constitution.<sup>104</sup>

In its analysis of whether the challenged sodomy laws violated the rights of dignity and privacy, the Court considered court cases from other countries dealing with sodomy laws.<sup>105</sup> The Court recognized a trend in which Western democracies began decriminalizing sodomy and adopting more liberal legal attitudes toward LGBTQ+ individuals.<sup>106</sup> The Court also noted that the United States was an exception to the trend.<sup>107</sup> Justice Ackermann and the Court aptly noted that *Bowers v. Hardwick* was decided by a narrow majority of the United States Supreme Court,<sup>108</sup> the case was the “subject of sustained criticism,”<sup>109</sup> and the case was largely inconsistent with the more

<sup>100</sup> *Nat'l Coal. for Gay & Lesbian Equal.* 1999 (1) SA 6 (CC) at paras. 23–26 (S. Afr.) (citing Edwin Cameron, *Sexual Orientation and the Constitution: A Test Case for Human Rights*, 110 S. AFR. L.J. 450, 452–58 (1993)).

<sup>101</sup> *Nat'l Coal. for Gay & Lesbian Equal.* 1999 (1) SA 6 (CC) at para. 26 (S. Afr.).

<sup>102</sup> *Id.* at para. 17; *see also* S. AFR. CONST., ch. 2, § 36(1), 1996 (“The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality[,] and freedom, taking into account all relevant factors . . .”).

<sup>103</sup> *Nat'l Coal. for Gay & Lesbian Equal.* 1999 (1) SA 6 (CC) at para. 27 (S. Afr.).

<sup>104</sup> *Id.*

<sup>105</sup> *See id.* at paras. 40–57; *see also supra* notes 34–37 and accompanying text (discussing *Dudgeon*, *Norris*, *Toonen*, and *Egan*).

<sup>106</sup> *Nat'l Coal. for Gay & Lesbian Equal.* 1999 (1) SA 6 (CC) at para. 52 (S. Afr.).

<sup>107</sup> *Id.* at para. 53; *see also* *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) (upholding the sodomy laws of Georgia and numerous other states).

<sup>108</sup> *Nat'l Coal. for Gay & Lesbian Equal.* 1999 (1) SA 6 (CC) at para. 53 (S. Afr.). *Bowers* was decided by a 5–4 majority of the United States Supreme Court. *See Bowers*, 478 U.S. at 186. The Court later overturned *Bowers* in *Lawrence v. Texas*. *See Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

<sup>109</sup> *Nat'l Coal. v. Gay & Lesbian Equal.* 1999 (1) SA 6 (CC) at para. 54 (S. Afr.); *see also* Thomas C. Grey, *Bowers v. Hardwick Diminished*, 68 U. COLO. L. REV. 373, 385–86 (1997) (“As a result, [*Bowers*] remains formally on the books, ‘still good law’ only in the sense that it is available to be cited as binding precedent in a lower court against anyone who actually attempts a direct privacy attack on a sodomy statute. But outside that specific and increasingly peripheral context, it appears that its rational basis holding has, without much ceremony, been ushered off the constitutional stage.”).

recent case of *Romer v. Evans*.<sup>110</sup> In addition to disregarding *Bowers* for those reasons, the Court also observed that the South African Constitution is far more progressive in its protections for its LGBTQ+ citizens than the U.S. Constitution.<sup>111</sup> Even though the United States Supreme Court eventually struck down sodomy laws, the South African Constitutional Court did so nearly a decade earlier. The *NCGLE Sodomy Constitutional Court* case demonstrates South Africa's commitment to equal protection for its LGBTQ+ citizens—a model to which the United States can and should look. The same is true for the *Satchwell* and *Fourie* cases, which this Note discusses below.

## 2. *Satchwell v. President of the Republic of South Africa*

In *Satchwell v. President of the Republic of South Africa*, the Constitutional Court of South Africa unanimously invalidated sections of the Judges' Remuneration and Conditions of Employment Act of 1989.<sup>112</sup> The Court held that denying same-sex spouses of judges the same employment benefits that the government affords to opposite-sex spouses of judges violated the Bill of Rights of the South African Constitution.<sup>113</sup>

Similar to the Sexual Offences Act and the other sodomy laws of the oppressive apartheid regime, the Judges' Remuneration and Conditions of Employment Act targeted and discriminated against LGBTQ+ South Africans.<sup>114</sup> The Act stipulated that the surviving spouse of a deceased judge would receive a portion of the judge's salary.<sup>115</sup> In 2001, Kathy Satchwell, an openly lesbian judge, and her partner, Lesley Louise Carnelley, filed a constitutional challenge to the Act in the High Court.<sup>116</sup> Although Satchwell and Carnelley were not legally married, they had been in an "intimate, committed, exclusive, and permanent relationship since about 1986" and "live[d] in every

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<sup>110</sup> *Nat'l Coal. for Gay & Lesbian Equal.* 1999 (1) SA 6 (CC) at para. 54 (S. Afr.); see also *Romer v. Evans*, 517 U.S. 620, 635–36 (1996) (invalidating an amendment to the Colorado constitution that prohibited local ordinances protecting individuals based on sexual orientation).

<sup>111</sup> *Nat'l Coal. for Gay & Lesbian Equal.* 1999 (1) SA 6 (CC) at para. 55 (S. Afr.); see also *supra* notes 61–62 and accompanying text (comparing South African and American jurisprudence concerning equal protection and dignity).

<sup>112</sup> 2002 (6) SA 1 (CC) at paras. 21, 37 (S. Afr.); see also Judges' Remuneration and Conditions of Employment Act 88 of 1989 (S. Afr.).

<sup>113</sup> *Satchwell* 2002 (6) SA 1 (CC) at paras. 23, 37 (S. Afr.).

<sup>114</sup> See Judges' Remuneration and Conditions of Employment Act, *supra* note 112.

<sup>115</sup> *Id.*

<sup>116</sup> See *Satchwell v. President of the Republic of South Africa* 2001 (12) BCLR 1284 (T) (S. Afr.).

respect as a married couple . . . .”<sup>117</sup> They argued that the Judges’ Remuneration and Conditions of Employment Act provided benefits to the spouses of heterosexual judges, but withheld benefits from the partners of homosexual judges.<sup>118</sup> This unequal treatment, Satchwell and Carnelley contended, violated the Equality Clause of the South African Constitution by unfairly discriminating based on sexual orientation.<sup>119</sup> The High Court agreed, holding that the word “spouse” be read as “spouse or partner, in a permanent same-sex life partnership.”<sup>120</sup>

On appeal, the Constitutional Court unanimously affirmed in large part the High Court’s decision and held that denying equal benefits to homosexual partners is unconstitutional.<sup>121</sup> The Court noted that it recognized various forms of legal partnerships in a previous case.<sup>122</sup> Additionally, the Court pointed to woman-to-woman marriages in traditional African societies.<sup>123</sup> The Court next applied the three-step discrimination analysis applied in the *Harksen* and *NCGLE Sodomy Constitutional Court* cases.<sup>124</sup> The Court concluded that the Judges’ Remuneration and Conditions of Employment Act discriminated based on sexual orientation.<sup>125</sup> Thus, the Court presumed the discrimination to be unfair and unconstitutional.<sup>126</sup> Finally, the Constitutional Court held that the word “spouse” instead be read as “spouse or partner, in a permanent same-sex life partnership *in which the partners have undertaken reciprocal duties of support.*”<sup>127</sup>

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<sup>117</sup> *Satchwell* 2002 (6) SA 1 (CC) at para. 4 (S. Afr.). See *id.* at para. 5 for further “evidence of their emotional and financial inter-dependence.”

<sup>118</sup> *Id.* at para. 3.

<sup>119</sup> *Id.* at para. 14.

<sup>120</sup> *Id.* at para. 1.

<sup>121</sup> *Id.* at para. 26.

<sup>122</sup> *Id.* at para. 12 (citing *Nat’l Coal. for Gay and Lesbian Equal. v. Minister of Home Affairs* 2000 (2) SA 1 (CC) at para. 36 (S. Afr.)).

<sup>123</sup> *Satchwell* 2002 (6) SA 1 (CC) at para. 12 (S. Afr.); see generally C.O. Akpangbo, A “Woman to Woman” Marriage and the Repugnancy Clause: A Case of Putting New Wine into Old Bottles, 14 AFR. L. STUD. 87, 92 (1977) (“If the local law recognises a ‘woman to woman’ marriage, and the incidents of such status are sought to be enforced, it is not the place of the law to invoke the repugnancy test to exclude the application of such customary rules.”).

<sup>124</sup> *Satchwell* 2002 (6) SA 1 (CC) at paras. 20–21 (S. Afr.); see also *supra* note 93 and accompanying text.

<sup>125</sup> *Satchwell* 2002 (6) SA 1 (CC) at para. 21 (S. Afr.).

<sup>126</sup> *Id.* at para. 23; see also S. AFR. CONST., ch. 2, § 9(5), 1996.

<sup>127</sup> *Satchwell* 2002 (6) SA 1 (CC) at paras. 34, 37 (S. Afr.) (emphasis added).

### 3. Minister of Home Affairs v. Fourie

In *Minister of Home Affairs v. Fourie*, the Constitutional Court of South Africa unanimously invalidated the common-law definition of marriage and struck down a section of the Marriage Act.<sup>128</sup> The Court held that denying same-sex couples the same status and benefits of marriage that the government affords to opposite-sex couples violated the Bill of Rights of the South African Constitution.<sup>129</sup>

The Marriage Act governs the formation of marriages and the procedures of marriage ceremonies.<sup>130</sup> Although the Act does not specifically stipulate that a marriage is only between one man and one woman, some courts interpreted the Act to mean exactly that.<sup>131</sup> Additionally, according to the South African common law, which developed from Roman-Dutch law, marriage is the “union of one man with one woman, to the exclusion . . . of all others.”<sup>132</sup> In 2002, Marie Fourie and her partner, Cecelia Bonthuys, filed a constitutional challenge in the High Court to the limitation of marriage to one man and one woman.<sup>133</sup> Fourie and Bonthuys had been in a relationship for more than ten years and wished to get married and obtain legal recognition as spouses.<sup>134</sup> They argued that excluding homosexual couples from civil marriages and legal recognition as spouses violated the Equality Clause of the South African Constitution by unfairly discriminating based on sexual orientation.<sup>135</sup> The High Court disagreed and refused to invalidate the exclusion of homosexual couples from marriage.<sup>136</sup>

On appeal, the Supreme Court of Appeal reversed the High Court’s decision.<sup>137</sup> The Supreme Court unanimously found that excluding homosexual couples from marriage unfairly discriminated based on sexual orientation and the majority opinion interpreted the common-law definition of marriage to include homosexual couples.<sup>138</sup> The majority opinion, how-

<sup>128</sup> 2006 (1) SA 524 (CC) at paras. 118, 120 (S. Afr.); *see also* Marriage Act 25 of 1961 (S. Afr.).

<sup>129</sup> *Fourie* 2006 (1) SA 524 (CC) at paras. 78–79, 114 (S. Afr.).

<sup>130</sup> Marriage Act, *supra* note 128; *Fourie* 2006 (1) SA 524 (CC) at para. 3.

<sup>131</sup> *Fourie* 2006 (1) SA 524 (CC) at para. 7 (S. Afr.) (discussing the decision of the High Court).

<sup>132</sup> *Id.* at paras. 3–4 (S. Afr.) (citing *Mashia Ebrahim v. Mahomed Essop* 1905 TS 59, 61 (S. Afr.)).

<sup>133</sup> *Minister of Home Affairs v. Fourie* (2002) ZAGPHC 1 (S. Afr.).

<sup>134</sup> *Fourie* 2006 (1) SA 524 (CC) at para. 1 (S. Afr.).

<sup>135</sup> *Id.* at paras. 2–3.

<sup>136</sup> *Id.* at para. 7.

<sup>137</sup> *Id.* at para. 12.

<sup>138</sup> *Id.* at paras. 12, 22.

ever, did not render judgment on the Marriage Act.<sup>139</sup> The minority opinion, on the other hand, would have interpreted the Marriage Act to include homosexual couples.<sup>140</sup>

Justice Albie Sachs, writing for a unanimous Constitutional Court, first reviewed the prior Constitutional Court cases dealing with unfair discrimination based on sexual orientation.<sup>141</sup> According to the Court, those cases proclaimed that equality, dignity, freedom, and human rights form the foundation of South African society and its legal system.<sup>142</sup> The Court elaborated:

[W]hat is at stake is not simply a question of removing an injustice experienced by a particular section of the community. At issue is a need to affirm the very character of our society as one based on tolerance and mutual respect. The test of tolerance is not how one finds space for people with whom, and practice with which, one feels comfortable, but how one accommodates the expression of what is discomfiting.<sup>143</sup>

The Court then discussed the importance of marriage and concluded that exclusion of homosexual couples from marriage constitutes unfair discrimination.<sup>144</sup> Thus, the Court held that both the common-law definition of marriage and Section 30(1) of the Marriage Act violate Section 9 of the Bill of Rights.<sup>145</sup> The Court, however, deferred implementation of its ruling for one year in order to provide Parliament the opportunity to correct the violation.<sup>146</sup> Justice O'Regan, while disagreeing with "very little in the comprehensive and careful judgment of [Justice] Sachs," dissented on the choice of remedy.<sup>147</sup> The proper remedy, Justice O'Regan opined, is a decision by the Constitutional Court reading-in language to Section 30(1) of the Marriage Act that comports with the provisions of Section 9 of the Bill of Rights.<sup>148</sup>

In 2006, Parliament passed the Civil Unions Act, which legalized marriage equality in South Africa.<sup>149</sup> With the Civil

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<sup>139</sup> *Id.* at paras. 21–22.

<sup>140</sup> *Id.* at paras. 30–31.

<sup>141</sup> *See id.* at paras. 49–59; *see also supra* note 59 and accompanying text.

<sup>142</sup> *Fourie* 2006 (1) SA 524 (CC) at para. 60 (S. Afr.).

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at paras. 64, 71, 78.

<sup>145</sup> *Id.* at para. 78.

<sup>146</sup> *Id.* at para. 162.

<sup>147</sup> *Id.* at para. 165 (O'Regan, J., dissenting).

<sup>148</sup> *Id.* at para. 169 (O'Regan, J., dissenting).

<sup>149</sup> *Substantive Equality and Sexual Orientation*, *supra* note 26, at 596; *see also* Civil Union Act 17 of 1996 (S. Afr.).

Unions Act, South Africa became the fifth country in the world to legalize marriage equality.<sup>150</sup> The United States would not legalize marriage equality for nearly another decade.<sup>151</sup> *Fourie* is simply another example demonstrating that South Africa should serve as a model for the United States in the realm of equal protection for LGBTQ+ individuals. Although the United States has since legalized marriage equality,<sup>152</sup> “*justice too long delayed is justice denied.*”<sup>153</sup> The same is true in the employment discrimination context.

### C. South African Non-Discrimination Laws

#### 1. *The Employment Equity Act*

In 1998, the South African Parliament enacted the Employment Equity Act (EEA) pursuant to the mandate set forth in Section 9(4) of the Bill of Rights.<sup>154</sup> The EEA specifically forbids discrimination in the employment context and seeks to correct the disparities, disadvantages, and discrimination caused by apartheid.<sup>155</sup> The purpose of the EEA is to attain employment equity by “promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination” and “implementing affirmative[-]action measures to redress the disadvantages in employment experienced by designated groups.”<sup>156</sup> To fulfill this purpose, the EEA requires that *every* employer update their employment policies and practices to eliminate any unfair discrimination on the enumerated protected grounds.<sup>157</sup> The EEA includes both gender and sexual orientation as protected grounds on the basis of

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<sup>150</sup> *Gay Marriage Around the World*, PEW RES. CTR. (Aug. 8, 2017), <http://www.pewforum.org/2017/08/08/gay-marriage-around-the-world-2013/> [<https://perma.cc/LEL2-7XGD>] (listing the countries that have legalized marriage equality).

<sup>151</sup> See *supra* Introduction.

<sup>152</sup> See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607–08 (2015).

<sup>153</sup> Martin Luther King Jr., *The Negro Is Your Brother*, ATLANTIC MONTHLY, Aug. 1963, at 78, reprinted in Martin Luther King Jr., *Letter from Birmingham Jail*, ATLANTIC (Feb. 2018), <https://www.theatlantic.com/magazine/archive/2018/02/letter-from-birmingham-jail/552461/> [<https://perma.cc/K8KG-43ZF>] (emphasis added) (“For years now I have heard the word ‘wait.’ It rings in the ear of every Negro with piercing familiarity. This ‘wait’ has almost always meant ‘never.’ . . . We must come to see, with the distinguished jurist of yesterday, that ‘justice too long delayed is justice denied.’”).

<sup>154</sup> Employment Equity Act 55 of 1998 (S. Afr.); see also S. AFR. CONST., ch. 2, § 9(4), 1996 (“No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.”).

<sup>155</sup> Employment Equity Act 55 of 1998 pmbl. (S. Afr.).

<sup>156</sup> *Id.* § 2.

<sup>157</sup> *Id.* § 5.



which employers may not unfairly discriminate.<sup>158</sup> The prohibition of unfair discrimination also extends to harassment in the workplace based on a protected ground.<sup>159</sup>

Not only does the EEA prohibit unfair discrimination but it also mandates that certain employers implement affirmative-action measures.<sup>160</sup> The EEA defines affirmative-action measures as “measures designed to ensure that suitably qualified people from designated groups have equal-employment opportunities and are equitably represented in all occupational categories and levels in the workforce of a designated employer.”<sup>161</sup> To implement affirmative-action measures, the EEA provides that certain employers must consult with its employees, conduct an analysis, prepare an employment equity plan, and report on its progress to the Director-General.<sup>162</sup> Finally, to help advise the Minister of Labour and monitor and enforce the provisions of the EEA, the Act establishes a Commission for Employment Equity.<sup>163</sup>

## 2. *The Promotion of Equality and Prevention of Unfair Discrimination Act*

Like the EEA, Parliament passed the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA) pursuant to Section 9(4) of the Bill of Rights.<sup>164</sup> The PEPUDA seeks to eliminate “deeply embedded” “social and economic inequalities” and unfair discrimination remaining from “colonialism, apartheid and patriarchy.”<sup>165</sup> To achieve its end, the PEPUDA prohibits unfair discrimination, harassment, and hate speech based on the enumerated protected grounds.<sup>166</sup> Like Section 9 of the Bill of Rights, the PEPUDA includes gender and sexual orientation as protected grounds.<sup>167</sup> Although the PEPUDA specifically highlights race, gender, and disability throughout its text, the Act does not differentiate between the enumerated

<sup>158</sup> *Id.* § 6(1).

<sup>159</sup> *Id.* § 6(3).

<sup>160</sup> *Id.* § 13(1).

<sup>161</sup> *Id.* § 15(1).

<sup>162</sup> *Id.* § 13(2); *see also id.* §§ 16, 19–21 (further elaborating on the steps enumerated in § 13(2)).

<sup>163</sup> *Id.* ch. 4.

<sup>164</sup> Saras Jagwanth, *Affirmative Action in a Transformative Context: The South African Experience*, 36 CONN. L. REV. 725, 730 (2004).

<sup>165</sup> Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 pmb. (S. Afr.).

<sup>166</sup> *Id.* ch. 2.

<sup>167</sup> *Id.* ch. 1.

protected grounds.<sup>168</sup> Finally, the PEPUDA establishes special Equality Courts to address discrimination by private parties.<sup>169</sup>

The PEPUDA and EEA are more than mere non-discrimination laws; they both impose a duty to promote equality on state and non-state actors.<sup>170</sup> The acts are not only reactive but also proactive.<sup>171</sup> Some commentators note that legislation like the PEPUDA and EEA recognize that discrimination and inequality are systemic and structural.<sup>172</sup> Although the first step for the United States is to implement federal employment non-discrimination laws and robust workplace protections for LGBTQ+ individuals,<sup>173</sup> the ultimate goal should be to implement legislation like the PEPUDA and EEA. States that have already enacted robust workplace protections for LGBTQ+ individuals should begin to “experiment” with legislation modeled after the PEPUDA and EEA.<sup>174</sup>

## II

### THE CURRENT STATE OF NON-DISCRIMINATION LAW AND JURISPRUDENCE IN THE UNITED STATES AND THE POST-*OBERGEFELL* LGBTQ+ RIGHTS MOVEMENT

In the aftermath of *Windsor*,<sup>175</sup> *Hollingsworth*,<sup>176</sup> and *Obergefell*<sup>177</sup>—the recent landmark marriage equality cases—the focus of the LGBTQ+ rights movement in the United States has shifted from marriage equality to employment and housing discrimination.<sup>178</sup> Chad Griffin, President of the Human

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<sup>168</sup> Jagwanth, *supra* note 164, at 741; *see also* Promotion of Equality and Prevention of Unfair Discrimination Act, *supra* note 165, §§ 7–9.

<sup>169</sup> *Id.* at ch. 4.

<sup>170</sup> Jagwanth, *supra* note 164, at 741.

<sup>171</sup> *Id.*

<sup>172</sup> *See* SANDRA FREDMAN, DISCRIMINATION LAW 122 (2002) (“The duty [to promote equality] becomes that, not just of compensating identified victims, but of restructuring institutions. Correspondingly, the duty-bearer is identified as the body in the best position to perform this duty.”).

<sup>173</sup> *See infra* Part IV.

<sup>174</sup> *See infra* note 181 and accompanying text.

<sup>175</sup> *United States v. Windsor*, 570 U.S. 744 (2013) (invalidating the Defense of Marriage Act for denying equal treatment to same-sex marriages).

<sup>176</sup> *Hollingsworth v. Perry*, 570 U.S. 693 (2013) (affirming the California Supreme Court’s decision to invalidate Proposition 8’s definition of marriage as a union between a heterosexual couple).

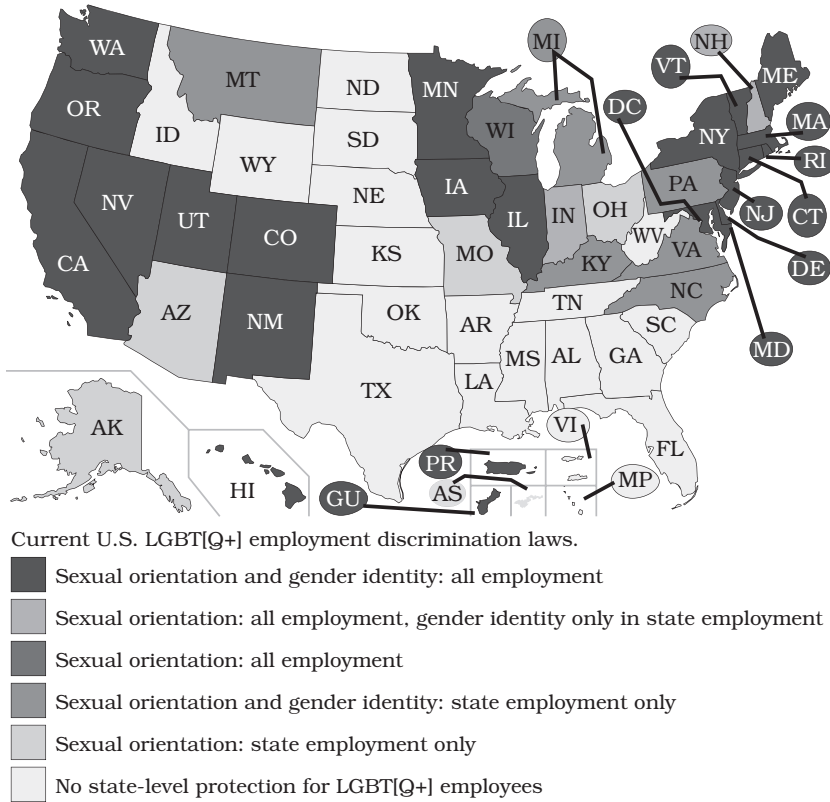
<sup>177</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (invalidating state bans of same-sex marriage).

<sup>178</sup> This is not to say that problems concerning the realization of the right to marriage equality did not persist after *Obergefell*. *See, e.g.*, *Barber v. Bryant*, 860 F.3d 345, 350–51 (5th Cir. 2017) (considering Mississippi’s version of the First Amendment Defense Act (HB 1523), which Mississippi passed in response to *Obergefell*); *Miller v. Davis*, 123 F. Supp. 3d 924, 930–32 (E.D. Ky. 2015) (consid-

Rights Campaign, notably said, “Even after this 50 state marriage victory at the Supreme Court, in most states in this country, a couple who gets married at 10 a.m. remain[s] at risk of being fired from their jobs by noon and evicted from their home by 2 p.m. simply for posting their wedding photos on Facebook.”<sup>179</sup>

A. State Employment Non-Discrimination Protections

FIGURE 1<sup>180</sup>



ering a county clerk’s refusal to grant marriage licenses to same-sex couples after *Obergefell*); *Searcy v. Strange*, 81 F. Supp. 3d 1285, 1286–87 (S.D. Ala. 2015) (considering Alabama’s refusal to comply with federal court orders to begin same-sex marriages after *Obergefell*); cf. Ira C. Lupu, *Moving Targets: Obergefell, Hobby Lobby, and the future of LGBT Rights*, 7 ALA. C.R. & C.L. L. REV. 1, 4 (2015) (“I will appraise the legal and political salience of *Hobby Lobby*, and religious freedom concerns more generally, with respect to the development of LGBT anti-discrimination law.”).

<sup>179</sup> *Historic Marriage Equality Ruling Generates Momentum for New Non-Discrimination Law*, HUMAN RTS. CAMPAIGN (July 7, 2015), <https://www.hrc.org/blog/historic-marriage-equality-ruling-generates-momentum-for-new-non-discrimina> [<https://perma.cc/CW7V-3Q8U>].

<sup>180</sup> *LGBT Employment Discrimination in the United States*, WIKIPEDIA (last edited

Currently in the United States, over half of the states and territories have employment non-discrimination statutes that protect both on the basis of sexual orientation and gender identity in both the public and private sector.<sup>181</sup> Two states have employment non-discrimination statutes that protect only on the basis of sexual orientation in both the public and private sector.<sup>182</sup> Several states have an executive order, administrative order, or a similar action prohibiting discrimination on the basis of sexual orientation and gender identity in only the public sector.<sup>183</sup> Finally, a few states have an executive order, administrative order, or a similar action prohibiting discrimination only on the basis of sexual orientation and only in the public sector.<sup>184</sup> The remaining seventeen states have no employment non-discrimination protections for LGBTQ+ Americans.<sup>185</sup>

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Feb. 1, 2018, 6:28 AM), [https://en.wikipedia.org/wiki/LGBT\\_employment\\_discrimination\\_in\\_the\\_United\\_States](https://en.wikipedia.org/wiki/LGBT_employment_discrimination_in_the_United_States) [<https://perma.cc/RQ4J-5KP9>].

<sup>181</sup> For a comprehensive discussion of the states and territories, see *Know Your Rights: Transgender People and the Law*, ACLU [hereinafter *Know Your Rights*], <https://www.aclu.org/know-your-rights/transgender-people-and-law> [<https://perma.cc/G952-9SY4>]; JEROME HUNT, CTR. FOR AM. PROGRESS ACTION FUND, A STATE-BY-STATE EXAMINATION OF NONDISCRIMINATION LAWS AND POLICIES (2012), [https://www.americanprogress.org/wp-content/uploads/issues/2012/06/pdf/state\\_nondiscrimination.pdf](https://www.americanprogress.org/wp-content/uploads/issues/2012/06/pdf/state_nondiscrimination.pdf) [<https://perma.cc/KY42-YMF5>].

<sup>182</sup> These states include New Hampshire and Wisconsin. See HUNT, *supra* note 181. In March 2018, however, the New Hampshire House of Representatives passed HB 1319, which prohibits discrimination based on gender identity in employment, housing, and places of public accommodation. See Dominique Mosbergen, *New Hampshire House Votes to Protect Transgender People from Discrimination*, HUFFINGTON POST (Mar. 8, 2018, 3:04 AM), [https://www.huffingtonpost.com/entry/new-hampshire-transgender-anti-discrimination-bill\\_us\\_5aa0c62de4b0d4f5b66d5a88](https://www.huffingtonpost.com/entry/new-hampshire-transgender-anti-discrimination-bill_us_5aa0c62de4b0d4f5b66d5a88) [<https://perma.cc/TQL5-YBF9>].

<sup>183</sup> See sources cited *supra* note 181; see also Mosbergen, *supra* note 182 (discussing the New Hampshire House of Representatives's approval of a new transgender non-discrimination law).

<sup>184</sup> See HUNT, *supra* note 181.

<sup>185</sup> Some cities and localities in these states, however, have passed local non-discrimination ordinances. See, e.g., Lauren McGaughy, *Shreveport Becomes Second City in Louisiana After New Orleans to Pass Non-Discrimination Ordinance*, TIMES-PICAYUNE (Dec. 10, 2013), [http://www.nola.com/politics/index.ssf/2013/12/fairness\\_ordinance\\_shreveport\\_lgbt\\_gay\\_la.html](http://www.nola.com/politics/index.ssf/2013/12/fairness_ordinance_shreveport_lgbt_gay_la.html) [<https://perma.cc/SJ4V-2TMC>]. Similarly, cities and localities in states that do not prohibit protections on the basis of either gender identity or sexual orientation have passed local non-discrimination ordinances. See, e.g., Dustin Gardiner & Amy B. Wang, *Phoenix City Council Votes to Amend Discrimination Law*, AZ CENTRAL (Feb. 28, 2013, 9:38 AM), <http://archive.azcentral.com/community/phoenix/articles/20130226phoenix-discrimination-law-amend.html> [<https://perma.cc/XPM9-D5UV>]; Eric M. Johnson, *Anchorage Lawmakers Pass LGBT Anti-Discrimination Law*, REUTERS (Sept. 30, 2015, 4:10 PM), <https://www.reuters.com/article/us-usa-alaska-lgbt/anchorage-lawmakers-pass-lgbt-anti-discrimination-law-idUSKCN0RU2MX20150930> [<https://perma.cc/8ALJ-7CUF>]; Sanjay Talwani, *Nondiscrimination Ordinance Passes Unanimously in Helena*, BILLINGS GAZETTE (Dec. 18, 2012), <http://>

## B. Federal Employment Non-Discrimination Protections

Although LGBTQ+ advocacy organizations and their allies have put ample resources into pushing federal legislation that provides protections for LGBTQ+ citizens, they have very little to show for their efforts.<sup>186</sup> The only federal law that expressly prohibits discrimination on the basis of sexual orientation or gender identity is the Violence Against Women Act.<sup>187</sup> Two other significant pieces of federal legislation that protect LGBTQ+ citizens are the Hate Crimes Prevention Act and the Don't Ask, Don't Tell Repeal Act.<sup>188</sup> When Congress repealed Don't Ask, Don't Tell, however, only lesbian, gay, and bisexual service members enjoyed the "significant victory."<sup>189</sup> The law still barred transgender service members from serving in the armed forces openly.<sup>190</sup> Given the lack of support in Congress

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billingsgazette.com/news/state-and-regional/montana/nondiscrimination-or-nance-passes-unanimously-in-helena/article\_1ea97782-b180-57fb-9e41-08ebf8b462b6.html [https://perma.cc/5ELN-ED5Y].

<sup>186</sup> See Lisa Bornstein & Megan Bench, *Married on Sunday, Fired on Monday: Approaches to Federal LGBT Civil Rights Protections*, 22 WM. & MARY J. OF WOMEN & L. 31, 46 (2015); Lupu, *supra* note 178, at 12.

<sup>187</sup> Violence Against Women Act, 42 U.S.C. § 13925(b)(13) (2012) (current version at 34 U.S.C. § 12291(b)(13) (2018)) ("No person in the United States shall, on the basis of actual or perceived race, color, religion, national origin, sex, gender identity, . . . sexual orientation, or disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity funded in whole or in part with funds made available under the Violence Against Women Act . . ."); Lupu, *supra* note 178, at 12.

<sup>188</sup> See Bornstein & Bench, *supra* note 186, at 46; Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act, Pub. L. No. 111-84, 123 Stat. 2835, 2839 (2009) (codified at 18 U.S.C. § 249(a)(2) (2012)) (adding sexual orientation and gender identity as protected classes under the federal hate crime law); Don't Ask, Don't Tell Repeal Act, Pub. L. No. 111-321 (2010) (repealing the policy that barred openly LGB citizens from serving in the armed forces). By the time Congress repealed Don't Ask, Don't Tell, some federal courts had already ruled the policy to be unconstitutional. See, e.g., *Log Cabin Republicans v. United States*, 716 F. Supp. 2d 884, 929 (C.D. Cal. 2010), *vacated as moot*, 658 F.3d 1162 (9th Cir. 2011) (per curiam) ("Plaintiff has demonstrated it is entitled to the relief sought on behalf of its members, a judicial declaration that the Don't Ask, Don't Tell Act violates the Fifth and First Amendments, and a permanent injunction barring its enforcement.").

<sup>189</sup> See Bornstein & Bench, *supra* note 186, at 47.

<sup>190</sup> See *id.* The Obama Administration later lifted the transgender military ban. See Matthew Rosenberg, *Transgender People Will Be Allowed to Serve Openly in Military*, N.Y. TIMES (June 30, 2016), <https://www.nytimes.com/2016/07/01/us/transgender-military.html> [https://perma.cc/8F66-7HQ9]. But the Trump administration subsequently reversed the Obama Administration's decision and reinstated the transgender military ban. See Julie Hirschfeld Davis & Helene Cooper, *Trump Says Transgender People Will Not Be Allowed in the Military*, N.Y. TIMES (July 26, 2017), <https://www.nytimes.com/2017/07/26/us/politics/trump-transgender-military.html> [https://perma.cc/D4YV-FNF9]. Several federal courts have already enjoined the reinstatement of the transgender military ban. See, e.g., *Doe v. Trump*, 275 F. Supp. 3d 167, 217 (D.D.C. 2017)

for more substantial protections for LGBTQ+ citizens, LGBTQ+ advocacy organizations and their allies have explored other options.<sup>191</sup> In fact, the executive and judicial branches are responsible for bestowing most of the current LGBTQ+ protections.<sup>192</sup>

In 1998, President Bill Clinton signed Executive Order 13,087, which prohibits discrimination based on sexual orientation in the federal civilian workforce. But President Clinton noted the limited scope of his Executive Order: “This Executive Order states Administration policy but does not and cannot create any new enforcement rights (such as the ability to proceed before the Equal Employment Opportunity Commission). Those rights can be granted only by legislation passed by the Congress, such as the Employment Non-Discrimination Act.”<sup>193</sup> In 2014, President Obama signed Executive Order 13,672, which adds gender identity to the classes afforded workplace protections in the federal civilian workforce.<sup>194</sup> Additionally, Executive Order 13,672, in tandem with Executive Order 13,673,<sup>195</sup> added both sexual orientation and gender identity to the protected classes in the federal government contractor and sub-contractor workforce policy. President Trump, however, issued an Executive Order in March 2017, that effectively guts key parts of President Obama’s Executive Orders.<sup>196</sup>

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(“Plaintiffs’ motion for preliminary injunction is GRANTED, however, in that the Court will preliminarily enjoin Defendants from enforcing the [Trump administration’s] Accession and Retention Directives . . . .”); *Stone v. Trump*, 280 F. Supp. 3d 747, 772 (D. Md. 2017) (“Plaintiffs’ Motion for Preliminary Injunction [relating to the policies and directives encompassed in President Trump’s August 25, 2017 Memorandum] is GRANTED.”); *Karnoski v. Trump*, 2017 U.S. Dist. LEXIS 203481, at \*32–33 (W.D. Wash. Dec. 11, 2017) (“The Court GRANTS Plaintiffs’ Motion for a Preliminary Injunction, and hereby enjoins [the Trump administration] from taking any action relative to transgender individuals that is inconsistent with the status quo that existed prior to President Trump’s July 26, 2017 announcement.”).

<sup>191</sup> See Lupu, *supra* note 178, at 12.

<sup>192</sup> See Bornstein & Bench, *supra* note 186, at 46.

<sup>193</sup> Press Release, Office of the Press Secretary, The White House, Statement by the President (May 28, 1998) (announcing President Clinton’s execution of Executive Order No. 13,087, 3 C.F.R. § 13087 (1999)).

<sup>194</sup> Exec. Order No. 13,672, 79 Fed. Reg. 42,971 (2014); see also 41 C.F.R. § 60-1.1 (2017) (“The purpose of the regulations in this part is to achieve the aims of [certain Executive Orders] for the promotion and insuring of equal opportunity for all persons, without regard to race, color, religion, sex, *sexual orientation*, *gender identity*, or national origin, employed or seeking employment with Government contractors or with contractors performing under federally assisted construction contracts.” (emphasis added)).

<sup>195</sup> Exec. Order No. 13,673, 81 Fed. Reg. 58,653 (2015).

<sup>196</sup> Exec. Order No. 13,782, 82 Fed. Reg. 15,607 (2017); see also 48 C.F.R. § 22 (2017) (“Prescrib[ing] contracting policy and procedures for implementing

In other words, federal government contractors and sub-contractors will again be able to discriminate based on sexual orientation and gender identity.

At the federal level, however, there are no employment non-discrimination laws or LGBTQ+ workplace protections for employees in the private sector. Currently, members of Congress have introduced the Equality Act, but no meaningful action has yet been taken.<sup>197</sup> Given the grim prospects of passing the Equality Act into law,<sup>198</sup> LGBTQ+ advocacy organizations and their allies have sought alternative strategies for ensuring employment non-discrimination protections. One of these alternative strategies is arguing that Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of sexual orientation and gender identity.

### III

#### TITLE VII

The drafters of the Civil Rights Act of 1964 included Title VII to eradicate employment discrimination based on race.<sup>199</sup> But Title VII is not limited merely to employment discrimination based on race.<sup>200</sup> Indeed, Title VII states:

It shall be an unlawful employment practice for an employer  
(1) to fail or refuse to hire or to discharge any individual, or

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pertinent labor laws . . . ."); Zack Ford, *Trump Revokes Executive Order, Weakens Protections for LGBT Workers*, THINKPROGRESS (Mar. 29, 2017, 12:53 PM), <https://thinkprogress.org/trump-gutted-lgbt-executive-order-8dd0e3be69a/> [<https://perma.cc/N724-XUZ6>] ("Enforcement of 13672, the LGBT protections, does not require this order, but would have been stronger with it."). Also, Executive Order 13,673 was preliminarily enjoined in October 2016. See *Assoc'd Builders & Contractors of Se. Tex. v. Rung*, No. 1:6-CV-425, 2016 U.S. Dist. LEXIS 155232 (E.D. Tex. Oct. 24, 2016).

<sup>197</sup> Equality Act of 2017, S. 1006, 115th Cong. (2017) ("A bill . . . [t]o prohibit discrimination on the basis of sex, gender identity, and sexual orientation . . . ."); see also *infra* subpart III.B. The Equality Act was introduced in the U.S. Senate on May 2, 2017, but still has not been considered by the Senate Judiciary Committee as of August 2018. See *S.1006 - Equality Act*, CONGRESS.GOV, <https://www.congress.gov/bill/115th-congress/senate-bill/1006/committees?q=%7B%22search%22%3A%5B%22Employment+Non-Discrimination+Act%22%5D%7D&r=2> [<https://perma.cc/3TYH-R9HS>].

<sup>198</sup> See e.g., Ana Valens, *The LGBTQ Equality Act is Headed Back to Congress—But It Faces a Tough Crowd*, DAILY DOT (Mar. 15, 2017, 6:14 AM), <https://www.dailydot.com/irl/lgbtq-equality-act-headed-back-congress-faces-tough-crowd/> [<https://perma.cc/86M2-F76W>] ("[W]ith the Republicans holding a majority in both the House and Senate, activists fear that the act will be shot down before any substantial progress can be made[.]").

<sup>199</sup> Melissa Wasser, Note, *Legal Discrimination: Bridging the Title VII Gap for Transgender Employees*, 77 OHIO ST. L.J. 1109, 1123 (2016) (citing *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662 (9th Cir. 1977)).

<sup>200</sup> See 42 U.S.C. § 2000e-2(a) (2012).

otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.<sup>201</sup>

To bring a cognizable claim under Title VII, a plaintiff must show that an employer adversely treated a plaintiff qualified for the position but did not adversely treat similarly situated individuals, and the plaintiff's race, color, religion, sex, or national origin motivated the difference in treatment.<sup>202</sup> For a cognizable employment discrimination claim on the basis of sex, a plaintiff can show that an impermissible motive based on sex or sex stereotyping caused the adverse treatment.<sup>203</sup> Some courts have held that the term "sex" in Title VII applies both to sex and gender.<sup>204</sup>

#### A. The Equal Employment Opportunity Commission

In 2012 and 2015, respectively, the Equal Employment Opportunity Commission (EEOC) ruled that Title VII prohibits employment discrimination on the basis of gender identity and sexual orientation as a form of sex discrimination.<sup>205</sup> The EEOC has determined that both sex-stereotyping and per se discrimination based on sexual orientation or gender identity are prohibited by Title VII.<sup>206</sup> These determinations not only

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<sup>201</sup> *Id.*

<sup>202</sup> *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

<sup>203</sup> *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 250 (1989).

<sup>204</sup> *See, e.g.,* Schwenk v. Hartford, 204 F.3d 1187, 1202 (9th Cir. 2000) ("Thus, under *Price Waterhouse*, 'sex' under Title VII encompasses both sex—that is, the biological differences between men and women—and gender."); Smith v. City of Salem, 378 F.3d 566, 572 (6th Cir. 2004) ("As Judge Posner has pointed out, the term 'gender' is one 'borrowed from grammar to designate the sexes as viewed as social rather than biological classes.' . . . The Supreme Court made clear that in the context of Title VII, discrimination because of 'sex' includes gender discrimination . . . ." (citation omitted)).

<sup>205</sup> U.S. EQUAL EMP'T OPPORTUNITY COMM'N, *Facts About Discrimination in Federal Government Employment Based on Marital Status, Political Affiliation, Status as a Parent, Sexual Orientation, and Gender Identity*, EEOC.gov, <https://www.eeoc.gov/federal/otherprotections.cfm> [<https://perma.cc/64KQ-ETVY>]; *see also* Baldwin v. Foxx, EEOC Appeal No. 0120133080, 2015 WL 4397641 (EEOC July 16, 2015); Macy v. Holder, EEOC Appeal No. 0120120821, 2012 WL 1435995 (EEOC Apr. 20, 2012).

<sup>206</sup> *See, e.g.,* EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 100 F. Supp. 3d 594 (E.D. Mich. 2015) (holding that Title VII prohibits both sex-stereotyping and



bind federal agencies but federal courts may also give the determinations deference.<sup>207</sup> This Note further discusses two of these cases below. Attorney General Jeff Sessions and the Department of Justice, however, have since issued legal guidelines declaring that employment discrimination on the basis of sexual orientation or gender identity is legal under Title VII.<sup>208</sup> This has resulted in confusion concerning the law and the U.S. government taking inconsistent positions in litigation.<sup>209</sup>

In *Macy v. Holder*, the EEOC ruled that discrimination on the basis of gender identity is tantamount to sex discrimination.<sup>210</sup> The complainant, Mia Macy, alleged that the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) discriminated against her based on her gender identity.<sup>211</sup> Macy applied for a job at the ATF's crime laboratory in Walnut Creek, California.<sup>212</sup> After applying, she spoke with the Director of the Wal-

per se discrimination based on gender identity); *EEOC v. Lakeland Eye Clinic, P.A.*, No. 8:14-CV-02421-MSS-AEP (M.D. Fla., Sept. 25, 2014) (holding that Title VII prohibits both sex-stereotyping and per se discrimination based on gender identity); *Baldwin*, 2015 WL 4397641 (holding that Title VII prohibits per se discrimination based on sexual orientation); *Macy*, 2012 WL 1435995 (holding that Title VII prohibits per se discrimination based on gender identity); *Veretto v. Donahoe*, EEOC Appeal No. 0120110873, 2011 WL 2663401 (EEOC July 1, 2011) (holding that Title VII prohibits sex-stereotyping based on sexual orientation).

<sup>207</sup> Bornstein & Bench, *supra* note 186, at 41; Laura Anne Taylor, Note, *A Win for Transgender Employees: Chevron Deference for the EEOC's Decision in Macy v. Holder*, 2013 UTAH L. REV. 1165, 1190 (2013); but see Theodore W. Wern, Note, *Judicial Deference to EEOC Interpretations of the Civil Rights Act, the ADA, and the ADEA: Is the EEOC a Second Class Agency?*, 60 OHIO ST. L.J. 1533, 1534 (1999) (questioning whether courts are obligated to give deference to EEOC guidelines and rules).

<sup>208</sup> See Sari Horwitz & Spencer S. Hsu, *Sessions Ends Workplace Protections for Transgender People Under Civil Rights Act*, WASH. POST (Oct. 5, 2017), [https://www.washingtonpost.com/local/public-safety/trump-administration-asks-court-to-toss-out-challenge-to-military-transgender-ban/2017/10/05/3819aec4-a9d5-11e7-92d1-58c702d2d975\\_story.html?utm\\_term=.7f26d029d7b2](https://www.washingtonpost.com/local/public-safety/trump-administration-asks-court-to-toss-out-challenge-to-military-transgender-ban/2017/10/05/3819aec4-a9d5-11e7-92d1-58c702d2d975_story.html?utm_term=.7f26d029d7b2) [<https://perma.cc/8DL3-KJA8>] ("In a memo to his U.S. attorney offices and agency heads, Sessions said that Title VII of the Civil Rights Act of 1964 does not protect transgender people from workplace discrimination by private employers and state and local governments."); Alan Feuer, *Justice Department Says Rights Law Doesn't Protect Gays*, N.Y. TIMES (July 27, 2017), <https://www.nytimes.com/2017/07/27/nyregion/justice-department-gays-workplace.html> [<https://perma.cc/9JXQ-TAD8>] ("The Justice Department has filed court papers arguing that a major federal civil rights law does not protect employees from discrimination based on sexual orientation. . . .").

<sup>209</sup> See Feuer, *supra* note 208 ("In its brief, the Trump administration's Justice Department said the E.E.O.C., which had also filed court papers supporting [the plaintiff in an employment discrimination action], was 'not speaking for the United States.'").

<sup>210</sup> *Macy v. Holder*, EEOC Appeal No. 0120120821, 2012 WL 1435995, at \*14 (EEOC Apr. 20, 2012).

<sup>211</sup> *Id.* at \*1, \*3.

<sup>212</sup> *Id.* at \*1.

nut Creek lab, who assured Macy that she would get the position pending a simple background check.<sup>213</sup> But once she disclosed her transition from male to female on her background check, the ATF hired someone else for the position.<sup>214</sup> The EEOC noted that in *Price Waterhouse* the Supreme Court held that under Title VII's protection an employer may only consider gender for employment decisions when gender is an occupational qualification.<sup>215</sup> Therefore, the EEOC held that discrimination on the basis of gender identity violates Title VII of the Civil Rights Act of 1964 because it "by definition, [is] discrimination 'based on . . . sex.'"<sup>216</sup>

Similarly, in *Baldwin v. Foxx*, the EEOC ruled that discrimination on the basis of sexual orientation equates to sex discrimination.<sup>217</sup> The complainant, David Baldwin, alleged that the Federal Aviation Administration (FAA) discriminated against him based on his sexual orientation.<sup>218</sup> After working at the FAA's Miami facility in a temporary role and expressing his desire for an open permanent position as a Front Line Manager, the FAA did not hire him for the position.<sup>219</sup> Baldwin alleged that his supervisor, who was involved in the selection process for the permanent position, made several disparaging comments concerning Baldwin's sexual orientation.<sup>220</sup> The EEOC again cited *Price Waterhouse* for the proposition that employers may not "rel[y] upon sex-based considerations" or "take gender into account when making employment decisions."<sup>221</sup> That proposition applies to claims brought by LGBTQ+ complainants just as it would to heterosexual complainants.<sup>222</sup> And because "[d]iscrimination on the basis of sexual orientation is premised on sex-based preferences, assumptions, expectations, stereotypes, or norms," the EEOC concluded that discrimination on the basis of sexual orientation violates Title VII of the Civil Rights Act of 1964.<sup>223</sup>

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213 *Id.* at \*2.

214 *Id.* at \*2-3.

215 *Id.* at \*6 (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 242 (1989)).

216 *Id.* at \*11.

217 *Baldwin v. Foxx*, EEOC Appeal No. 0120133080, 2015 WL 4397641, at \*6-7 (EEOC July 16, 2015).

218 *Id.* at \*1.

219 *Id.* at \*2.

220 *Id.*

221 *Id.* at \*4 (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239 (1989)).

222 *Id.* at \*5.

223 *Id.*

## B. In the Courts

The federal courts' findings that Title VII bans employment discrimination on the basis of gender identity or sexual orientation have generally cited two Supreme Court cases for support. In *Price Waterhouse v. Hopkins*, the Supreme Court held that employment discrimination on the basis of gender stereotyping is unlawful sex discrimination under Title VII.<sup>224</sup> The case involved a female senior manager, Ann Hopkins, at a nationwide professional accounting firm.<sup>225</sup> Some of the partners in her office recommended Hopkins for partnership candidacy.<sup>226</sup> The process of selecting new partners entailed the firm soliciting written comments about each partnership candidate.<sup>227</sup> The partners ultimately decided not to admit Hopkins to the partnership, but rather to "hold" her for reconsideration the next year.<sup>228</sup> Some of the comments indicated that she was too "aggressive," "harsh," "difficult to work with," "impatient," and "macho."<sup>229</sup> One partner even remarked that she needed "a course at charm school."<sup>230</sup> Additionally, Hopkins was told to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry" to improve her partnership admission prospects.<sup>231</sup> As a result of this experience, Hopkins alleged that her firm, Price Waterhouse, violated Title VII by discriminating against her based on sex.<sup>232</sup>

Just three years prior, the Supreme Court held that sexual harassment constitutes sex discrimination under Title VII.<sup>233</sup> The Court, quoting *City of Los Angeles Department of Water & Power v. Manhart*,<sup>234</sup> stated that Title VII's "because of sex" provision includes "the entire spectrum of disparate treatment of men and women resulting from [gender] stereotypes."<sup>235</sup> The Court emphasized its view that "[the United States is] beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated

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<sup>224</sup> 490 U.S. at 258.

<sup>225</sup> *Id.* at 232.

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

<sup>228</sup> *Id.* at 233.

<sup>229</sup> *Id.* at 235.

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> *Id.* at 232.

<sup>233</sup> See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 72-73 (1986).

<sup>234</sup> 435 U.S. 702, 707 n.13 (1978) (citation omitted).

<sup>235</sup> *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989).

with their group . . . .”<sup>236</sup> The Court’s reasoning ostensibly prohibits employers from disciplining employees if they would not similarly discipline employees of a different sex for identical conduct or expression. Thus, *Price Waterhouse* seemingly “permit[s] an enormous range of discrimination claims.”<sup>237</sup>

Nine years later, in *Oncale v. Sundowner Offshore Services, Inc.*, the Supreme Court held that same-sex harassment constitutes unlawful sex discrimination under Title VII.<sup>238</sup> The case involved several male coworkers committing “sex-related, humiliating actions” against the petitioner, Joseph Oncale.<sup>239</sup> The harassment, however, did not stop there; the coworkers also “physically assaulted Oncale in a sexual manner” and threatened to rape him.<sup>240</sup> Oncale complained to supervisors, but they did nothing.<sup>241</sup> Eventually, Oncale quit and requested that the documentation show that he “voluntarily left due to sexual harassment and verbal abuse.”<sup>242</sup> Justice Scalia, writing for the majority, declared, “Title VII prohibits ‘discriminat[ion] . . . because of . . . sex’ . . . . [This] must extend to [sex-based discrimination] of any kind that meets the statutory requirements.”<sup>243</sup> He reasoned that Title VII prohibits any workplace conduct that meets the statutory requirements, including same-sex sexual harassment.<sup>244</sup> But the Supreme Court has never explicitly addressed the issue of extending Title VII protections to LGBTQ+ individuals alleging employment discrimination on the basis of gender identity or sexual

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<sup>236</sup> *Id.*

<sup>237</sup> Ian Ayres & Richard Luedeman, *Tops, Bottoms, and Versatiles: What Straight Views of Penetrative Preferences Could Mean for Sexuality Claims Under Price Waterhouse*, 123 YALE L.J. 714, 720 (2013); see also I. Bennett Capers, Note, *Sex(ual Orientation) and Title VII*, 91 COLUM. L. REV. 1158, 1187 (1991) (“Because lesbians and gays by definition undermine the notion of a binary gender system, extension of rights to them would challenge the reward/penalization schema as it now operates . . . . This would further not only the implicit objectives of *Price Waterhouse v. Hopkins*, but also the explicit objectives of Title VII.”); Zachary A Kramer, Note, *The Ultimate Gender Stereotype: Equalizing Gender-Conforming and Gender-Nonconforming Homosexuals Under Title VII*, 2004 U. ILL. L. REV. 465, 497 (2004) (“Although originally conceived in the context of a heterosexual woman, the gender stereotyping theory of sex discrimination [articulated in *Price Waterhouse v. Hopkins*] has proved beneficial to a substantial portion of the homosexual community . . . .”).

<sup>238</sup> 523 U.S. 75, 82 (1998).

<sup>239</sup> *Id.* at 77.

<sup>240</sup> *Id.*

<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

<sup>243</sup> *Id.* at 79–80.

<sup>244</sup> *Id.* at 80.

orientation. Thus, most federal Circuit Courts of Appeals remain reluctant to do so.<sup>245</sup>

### 1. *Federal District Courts and Circuit Courts of Appeals*

Some federal courts, however, have been willing to find a private right of action under Title VII for employment discrimination on the basis of gender identity.<sup>246</sup> For example, in *Mickens v. General Electric Co.*, a federal district court denied a defendant-employer's motion to dismiss a Title VII sex-discrimination claim in which a transgender plaintiff-employee was fired for supposed attendance issues.<sup>247</sup> The supposed attendance issues, however, resulted from Mykel Mickens, the plaintiff-employee, having to use a distant bathroom after his

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<sup>245</sup> See, e.g., *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 762 (6th Cir. 2006) (“[S]exual orientation is not a prohibited basis for discriminatory acts under Title VII.”); *Dawson v. Bumble & Bumble*, 398 F.3d 211, 218 (2d Cir. 2005) (“[A] gender stereotyping claim should not be used to ‘bootstrap protection for sexual orientation into Title VII.’”); *Medina v. Income Support Div.*, 413 F.3d 1131, 1135 (10th Cir. 2005) (“Title VII’s protections . . . do not extend to harassment due to a person’s sexuality.”); *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 261 (3d Cir. 2001) (“Congress has repeatedly rejected legislation that would have extended Title VII to cover sexual orientation.”); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999) (“Title VII does not proscribe harassment simply because of sexual orientation.”); see also Ayres & Luedeman, *supra* note 237, at 719 (“Congress has repeatedly failed to include sexual orientation as an explicitly protected category under Title VII. In deference to Congress, even the most progressive of courts have therefore only granted relief to bi/homosexual plaintiffs who focus on their nonsexual gender-nonconformity—such as their manner of speech or dress—rather than on their bi/homosexuality itself.”).

<sup>246</sup> See, e.g., *Kastl v. Maricopa Cty. Cmty. Coll. Dist.*, 325 Fed. Appx. 492, 493 (9th Cir. 2009) (“[T]ransgender individuals may state viable sex discrimination claims on the theory that the perpetrator was motivated by the victim’s real or perceived non-conformance to socially-constructed gender norms. After [*Price Waterhouse v. Hopkins* and *Schwenk v. Hartford*], it is unlawful to discriminate against a transgender (or any other) person because he or she does not behave in accordance with an employer’s expectations for men or women.”); *Roberts v. Clark Cty. Sch. Dist.*, 215 F. Supp. 3d 1001, 1014 (D. Nev. 2016) (“[B]ecause it appears that the Ninth Circuit would hold that gender-identity discrimination is actionable under Title VII, I see no reason to depart from the heavy weight of this authority. Nothing in the few contrary decisions cited by the [defendant] persuades me otherwise. The contrary Seventh and Tenth Circuit decisions provide no cogent analysis of Title VII’s language or Supreme Court caselaw.”); *Doe v. Arizona*, No. CV-15-02399-PHX-DGC, 2016 U.S. Dist. LEXIS 36229, at \*6 (D. Ariz. Mar. 21, 2016) (“Plaintiff states that he is transgender, thereby satisfying the ‘protected status’ element of a gender discrimination claim. Plaintiff alleges that his supervisors have tolerated harassment of him and have breached his confidentiality by informing prison inmates of his transition. These allegations satisfy the ‘adverse employment action’ and ‘disparate treatment’ elements of a gender discrimination claim.” (citations omitted)).

<sup>247</sup> No. 3:16CV-00603-JHM, 2016 U.S. Dist. LEXIS 163961, at \*9–10 (W.D. Ky. Nov. 29, 2016).

employer denied him use of a more proximal male bathroom.<sup>248</sup> Additionally, Mickens's supervisor targeted Mickens for harassment and reprimand and told Mickens that nothing could be done about it.<sup>249</sup> The court acknowledged that the Sixth Circuit and the Supreme Court were in a position at the time to address the issue of discrimination on the basis of gender identity, albeit in the context of Title IX.<sup>250</sup> Nonetheless, the court held that Mickens sufficiently pled that his employer discriminated against him because "he did not conform to the gender stereotype of what someone who was born female should look and act like."<sup>251</sup>

Similarly, in *Chavez v. Credit Nation Auto Sales*, the Eleventh Circuit reversed summary judgment for the defendant-employer when the plaintiff-employee claimed that she was terminated because she was transgender and there was sufficient circumstantial evidence to create triable issues of fact concerning "her employer's discriminatory intent" and "[her employer's] gender bias [as] 'a motivating factor' in [her termination]."<sup>252</sup> The plaintiff-employee, Jennifer Chavez, met with the president of her employer, Credit Nation, to discuss her gender transition.<sup>253</sup> At this meeting, the president said he was "nervous" about Chavez's "condition," told Chavez not to "bring up" the issue of her transition, and instructed Chavez not to wear "a dress or miniskirt."<sup>254</sup> A few days later, Credit Nation's vice president told Chavez to "tone it down" and to be "'very careful' because [the president] 'didn't like' the implications of Chavez's planned gender transition."<sup>255</sup> After disclosing her gender transition, Chavez became the subject of heightened scrutiny and unusual discipline.<sup>256</sup> Finally, Credit Nation did not follow its own policies in the events leading up to Chavez's termination.<sup>257</sup> The court, considering the totality of this evidence,

<sup>248</sup> *Id.* at \*2-3.

<sup>249</sup> *Id.* at \*3.

<sup>250</sup> *Id.* at \*9 (citing *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709 (4th Cir. 2016), *cert. granted in part*, 137 S. Ct. 369 (2016); *Bd. of Educ. of the Highland Local Sch. Dist. v. U.S. Dept. of Educ.*, No. 2:16-CV-524, 2016 WL 6125403 (S.D. Ohio Oct. 20, 2016), *aff'd sub nom. Dodds v. U.S. Dept. of Educ.*, 845 F.3d 217, 222 (6th Cir. 2016)).

<sup>251</sup> *Id.* at \*9 ("[W]hat is clear is that the Plaintiff's complaint sufficiently alleges facts to support discrimination or disparate treatment claims based upon . . . gender non-conformity or sex stereotyping.").

<sup>252</sup> 641 Fed. Appx. 883, 892 (11th Cir. 2016).

<sup>253</sup> *Id.* at 885.

<sup>254</sup> *Id.* at 890-91.

<sup>255</sup> *Id.* at 891.

<sup>256</sup> *Id.*

<sup>257</sup> *Id.* at 892.

determined that Chavez put forth sufficient evidence to constitute a triable issue of fact concerning her Title VII claim.<sup>258</sup>

Most recently, in *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, the Sixth Circuit reversed summary judgment for the employer–defendant and granted summary judgment for the EEOC on behalf of the employee–plaintiff.<sup>259</sup> In doing so, the court held that Title VII prohibits discrimination on the basis of gender identity.<sup>260</sup> The case involved a funeral home director, Aimee Stephens, who worked for a closely held for-profit funeral home.<sup>261</sup> The funeral home’s mission statement reflected the Christian values of its owners, and its dress policy imposed different requirements for male and female employees.<sup>262</sup> The owner of the funeral home terminated Stephens after Stephens informed him that she would be transitioning from male to female.<sup>263</sup> Additionally, she had indicated that she would be dressing as a woman while at work.<sup>264</sup> Although the Sixth Circuit noted that the district court correctly held that Stephens was fired due to sex stereotyping, it also noted that the district court erred when determining that discrimination based on gender identity is not actionable under Title VII.<sup>265</sup> The court cited to *Hively v. Ivy Tech Community College of Indiana*,<sup>266</sup> *Price Waterhouse v. Hopkins*,<sup>267</sup> *G.G. v. Gloucester County School Board*,<sup>268</sup> *Oncale v. Sundowner Offshore Services, Inc.*,<sup>269</sup> and *Zarda v. Altitude Express*<sup>270</sup> for support.<sup>271</sup>

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<sup>258</sup> *Id.*

<sup>259</sup> *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 599 (6th Cir. 2018).

<sup>260</sup> *Id.* at 580 (“[W]e hold that the EEOC could pursue a claim under Title VII on the ground that the Funeral Home discriminated against Stephens on the basis of her transgender status and transitioning identity.”).

<sup>261</sup> *Id.* at 566.

<sup>262</sup> *Id.* at 567–69.

<sup>263</sup> *Id.* at 569.

<sup>264</sup> *Id.*

<sup>265</sup> *Id.* at 574–82.

<sup>266</sup> 853 F.3d 339 (7th Cir. 2017) (en banc); *see also infra* pp. 272–73 (discussing *Hively*).

<sup>267</sup> 490 U.S. 228 (1989).

<sup>268</sup> 822 F.3d 709 (4th Cir. 2016); *see also infra* note 342 (discussing the Supreme Court’s decision to vacate and remand the Fourth Circuit’s decision).

<sup>269</sup> 523 U.S. 75 (1998).

<sup>270</sup> 883 F.3d 100 (2d Cir. 2018) (en banc); *see also infra* pp. 273–74 (discussing *Zarda*).

<sup>271</sup> *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 574–78 (6th Cir. 2018).

The same is true for employment discrimination on the basis of sexual orientation.<sup>272</sup> For example, in *EEOC v. Scott Medical Health Center*, a federal district court denied a defendant–employer’s motion to dismiss, ruling, “Title VII’s ‘because of sex’ provision prohibits discrimination on the basis of sexual orientation.”<sup>273</sup> The case involved a telemarketing manager making offensive remarks to an employee, Dale Baxley, based on Baxley’s sexual orientation.<sup>274</sup> Baxley is a gay man and had a male partner.<sup>275</sup> Baxley’s employer, Scott Medical Health Center, later constructively terminated him.<sup>276</sup> The EEOC discovered the workplace discrimination and sexual harassment directed at Baxley in the course of a separate investigation concerning the same manager’s workplace discrimination and sexual harassment directed at five of Baxley’s former female coworkers.<sup>277</sup> The EEOC filed a complaint against Scott Medical Health Center on behalf of Baxley, alleging that the manager’s conduct created a hostile work environment and violated Title VII.<sup>278</sup> The court rejected Scott Medical Health Center’s contention that Title VII does not prohibit discrimination based on sexual orientation.<sup>279</sup> The district court reasoned that the Supreme Court’s decision in *Price Waterhouse v. Hopkins*<sup>280</sup> and *Oncale v. Sundowner Offshore Services, Inc.*<sup>281</sup> compelled its finding that Title VII protected employees from workplace discrimination based on sexual orientation.<sup>282</sup> In reaching its

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<sup>272</sup> See, e.g., *Videckis v. Pepperdine Univ.*, 150 F. Supp. 3d 1151, 1159 (C.D. Cal. 2015) (“[T]he line between sex discrimination and sexual orientation discrimination is ‘difficult to draw’ because that line does not exist, save as a lingering and faulty judicial construct.”); *Isaacs v. Felder Servs., LLC*, 143 F. Supp. 3d 1190, 1193 (M.D. Ala. 2015) (“[T]he Equal Employment Opportunity Commission [correctly concluded] that claims of sexual orientation-based discrimination are cognizable under Title VII.”).

<sup>273</sup> 217 F. Supp. 3d 834, 839 (W.D. Pa. 2016).

<sup>274</sup> *Id.* at 836 (“Specifically, the Complaint alleges [the telemarketing manager] ‘routinely made unwelcome and offensive comments about [Mr.] Baxley, including but not limited to regularly calling him ‘fag,’ ‘faggot,’ ‘[expletive] faggot,’ and ‘queer,’ and making statements such as ‘[expletive] queer can’t do your job.’”).

<sup>275</sup> *Id.*

<sup>276</sup> *Id.*

<sup>277</sup> *Id.*

<sup>278</sup> *Id.* at 835.

<sup>279</sup> *Id.* at 839–40 (“The Court sees no meaningful difference between sexual orientation discrimination and discrimination ‘because of sex’ [under Title VII].”).

<sup>280</sup> 490 U.S. 228 (1989).

<sup>281</sup> 523 U.S. 75 (1998).

<sup>282</sup> *Scott Med. Health Ctr.*, 217 F. Supp. 3d at 841 (“Forcing an employee to fit into a gendered expectation—whether that expectation involves physical traits, clothing, mannerisms or sexual attraction—constitutes sex stereotyping and, under *Price Waterhouse*, violates Title VII. Simply put, [the telemarketing manager’s] alleged conduct toward Mr. Baxley ‘stemmed from an impermissibly



decision, the court also noted that other federal district courts have reached the same conclusion.<sup>283</sup> Finally, the court cited *Obergefell* to suggest that there is “a growing recognition of the illegality of discrimination on the basis of sexual orientation.”<sup>284</sup>

Similarly, in *Hively v. Ivy Tech Community College Of Indiana*,<sup>285</sup> the en banc Seventh Circuit reversed dismissal of the plaintiff–employee’s complaint alleging a Title VII violation.<sup>286</sup> In doing so, the Seventh Circuit seemingly overruled contrary prior precedent and held that Title VII’s prohibition on sex discrimination extends to discrimination on the basis of sexual orientation.<sup>287</sup> *Hively* involved an openly lesbian adjunct professor at Ivy Tech Community College (Ivy Tech).<sup>288</sup> Ivy Tech denied Kimberly Hively’s application to become a full-time professor at least six times between 2009 and 2014.<sup>289</sup> Additionally, in 2014, Ivy Tech refused to renew Hively’s part-time contract.<sup>290</sup> Alleging that Ivy Tech denied her applications on the basis of her sexual orientation in violation of Title VII, Hively filed a *pro se* complaint against her former employer.<sup>291</sup> The district court dismissed Hively’s complaint with prejudice for failure to state a claim upon which relief may be granted,<sup>292</sup> which a panel of the Seventh Circuit affirmed.<sup>293</sup> The Seventh Circuit then vacated the panel’s decision and granted a rehear-

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cabined view of the proper behavior’ of men. *Price Waterhouse*, 490 U.S. at 236–37.”).

<sup>283</sup> *Id.* at 841–42 (citing *Isaacs v. Felder Servs., LLC*, 143 F. Supp. 3d 1190 (M.D. Ala. 2015); *Videckis v. Pepperdine Univ.*, 150 F. Supp. 3d 1151 (C.D. Cal. 2015); *Terveer v. Billington*, 34 F. Supp. 3d 100 (D.D.C. 2014); *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212 (D. Or. 2002)).

<sup>284</sup> *Scott Med. Health Ctr.*, 217 F. Supp. 3d at 842 (citing *Obergefell v. Hodges*, 135 S. Ct. 2584, 2590 (2015)).

<sup>285</sup> 853 F.3d 339, 352 (7th Cir. 2017) (en banc).

<sup>286</sup> For a more comprehensive overview and analysis of the *Hively* opinion, see Camille Patti, Case Note, *Hively v. Ivy Tech Community College: Losing the Battle but Winning the War for Title VII Sexual Orientation Discrimination Protection*, 26 TUL. J.L. & SEXUALITY 133 (2017). Although the Seventh Circuit noted that *Baldwin v. Foxx* is merely persuasive authority, the court found the EEOC’s rationale to be quite persuasive. See *id.* at 139–40.

<sup>287</sup> *Hively*, 853 F.3d at 341–43, 352 (noting and seemingly overruling *Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc.*, 224 F.3d 701 (7th Cir. 2000) and *Spearman v. Ford Motor Co.*, 231 F.3d 1080 (7th Cir. 2000)).

<sup>288</sup> *Hively*, 853 F.3d at 341.

<sup>289</sup> *Id.*

<sup>290</sup> *Id.*

<sup>291</sup> *Id.*

<sup>292</sup> *Hively v. Ivy Tech Cmty. Coll.*, No. 3:14-cv-1791, 2015 U.S. Dist. LEXIS 25813, at \*6 (N.D. Ind. Mar. 3, 2015).

<sup>293</sup> *Hively v. Ivy Tech Cmty. Coll.*, 830 F.3d 698, 718 (7th Cir. 2016), *rev’d en banc* 853 F.3d 339, 352 (7th Cir. 2017).

ing en banc,<sup>294</sup> at which the full Seventh Circuit held that Hively's Title VII claim may proceed and that Title VII prohibits employment discrimination based on sexual orientation.<sup>295</sup> The court noted that the decision "must be understood against the backdrop of the Supreme Court's decisions"<sup>296</sup> in *Price Waterhouse v. Hopkins*,<sup>297</sup> *Oncale v. Sundowner Offshore Services, Inc.*,<sup>298</sup> *Romer v. Evans*,<sup>299</sup> *Lawrence v. Texas*,<sup>300</sup> *United States v. Windsor*,<sup>301</sup> and *Obergefell v. Hodges*,<sup>302</sup> as well as the EEOC's decision in *Baldwin v. Foxx*.<sup>303</sup> This monumental decision by the en banc Seventh Circuit created a circuit split.<sup>304</sup>

Most recently, in *Zarda v. Altitude Express, Inc.*, the en banc Second Circuit held that the employee–plaintiff's claim of discrimination based on sexual orientation against the employer–defendant is actionable under Title VII.<sup>305</sup> In doing so, the Second Circuit overturned prior precedents that held that discrimination based on sexual orientation is not prohibited by Title VII.<sup>306</sup> The case involved an employer–defendant termi-

<sup>294</sup> Hively v. Ivy Tech Cmty. Coll., No. 15-1720, 2016 U.S. App. LEXIS 20302, at \*1 (7th Cir. Oct. 11, 2016).

<sup>295</sup> *Hively*, 853 F.3d at 352.

<sup>296</sup> *Id.* at 349–50.

<sup>297</sup> 490 U.S. 228 (1989).

<sup>298</sup> 523 U.S. 75 (1998).

<sup>299</sup> 517 U.S. 620 (1996).

<sup>300</sup> 539 U.S. 558 (2003).

<sup>301</sup> 133 S. Ct. 2675 (2013).

<sup>302</sup> 135 S. Ct. 2584 (2015).

<sup>303</sup> EEOC Appeal No. 0120133080, 2015 WL 4397641 (EEOC July 16, 2015).

<sup>304</sup> *Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339, 341–42 (7th Cir. 2017) (en banc) (citing *Kalich v. AT&T Mobility, LLC*, 679 F.3d 464, 471 (6th Cir. 2012)); *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 290 (3d Cir. 2009); *Dawson v. Bumble & Bumble*, 398 F.3d 211, 217 (2d Cir. 2005); *Medina v. Income Support Div.*, 413 F.3d 1131, 1135 (10th Cir. 2005); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999); *Fredette v. BVP Mgmt. Assocs.*, 112 F.3d 1503, 1510 (11th Cir. 1997); *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 143 (4th Cir. 1996); *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989); *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979).

<sup>305</sup> *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 132 (2d Cir. 2018) (en banc) ("Although sexual orientation discrimination is 'assuredly not the principal evil that Congress was concerned with when it enacted Title VII,' 'statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils.' In the context of Title VII, the statutory prohibition extends to all discrimination 'because of . . . sex' and sexual orientation discrimination is an actionable subset of sex discrimination." (citations omitted)).

<sup>306</sup> *Id.* at 132 (overturning *Dawson v. Bumble & Bumble*, 398 F.3d 211 (2d Cir. 2005) and *Simonton v. Runyon*, 232 F.3d 33 (2d Cir. 2000)). The Second Circuit also noted the cases in its "sister circuits" that were consistent with *Simonton* and *Dawson*. *Id.* at 107 (citing *Kalich v. AT&T Mobility, LLC*, 679 F.3d 464, 471 (6th Cir. 2012); *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 290 (3d Cir. 2009); *Medina v. Income Support Div.*, 413 F.3d 1131, 1135 (10th Cir. 2005); *Hammer v. St. Vincent Hosp. & Health Care Ctr., Inc.*, 224 F.3d 701, 704 (7th Cir. 2000);

nating an employee–plaintiff because of his sexual orientation.<sup>307</sup> Donald Zarda, the employee–plaintiff, served as a skydiving instructor at Altitude Express.<sup>308</sup> Donald Zarda also was a gay man.<sup>309</sup> Zarda often disclosed his homosexuality to the female clients which he would be connected to during the skydive when they were accompanied by their husband or boyfriend.<sup>310</sup> He did so to prevent any awkwardness resulting from his contact with the women during the skydiving.<sup>311</sup> On one occasion, a woman informed her boyfriend of Zarda’s sexuality while discussing their skydives.<sup>312</sup> The boyfriend complained about Zarda’s behavior to Altitude Express.<sup>313</sup> Altitude Express terminated Zarda soon after receiving the complaint.<sup>314</sup> Similar to the full Seventh Circuit in *Hively*,<sup>315</sup> the full Second Circuit noted that the case is heavily influenced by the Supreme Court’s decisions in *Price Waterhouse* and *Oncale*, among others.<sup>316</sup>

Prior to this momentous decision by the full Second Circuit, two recent panels of the Second Circuit held that Title VII does not extend to discrimination based on sexual orientation because they are bound by prior precedent.<sup>317</sup> In one of the panel decisions, Chief Judge Katzmann proposed that the full Second Circuit “revisit” the question concerning Title VII and

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Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 259 (1st Cir. 1999); Wrightson v. Pizza Hut of Am., Inc., 99 F.3d 138, 143 (4th Cir. 1996); Williamson v. A.G. Edwards & Sons, Inc., 876 F.2d 69, 70 (8th Cir. 1989); Blum v. Gulf Oil Corp., 597 F.2d 936, 938 (5th Cir. 1979)).

<sup>307</sup> *Id.* at 109.

<sup>308</sup> *Id.* at 108.

<sup>309</sup> *Id.*

<sup>310</sup> *Id.*

<sup>311</sup> *Id.*

<sup>312</sup> *Id.*

<sup>313</sup> *Id.*

<sup>314</sup> *Id.* at 109.

<sup>315</sup> *Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339, 349–50 (7th Cir. 2017) (en banc).

<sup>316</sup> *Zarda*, 883 F. 3d at 119–21.

<sup>317</sup> See *Christiansen v. Omnicom Grp., Inc.*, 852 F.3d 195, 199 (2d Cir. 2017) (citing *Dawson v. Bumble & Bumble*, 398 F.3d 211 (2d Cir. 2005) and *Simonton v. Runyon*, 232 F.3d 33 (2d Cir. 2000)); *Zarda v. Altitude Express*, 855 F.3d 76, 82 (2d Cir. 2017) (citing *Simonton* and *Omnicom*). Both the *Omnicom* and *Zarda* panels, however, noted that gender stereotyping is actionable under Title VII. See *Omnicom*, 852 F.3d at 200–201; *Zarda*, 855 F.3d at 82. Before the *Omnicom* and *Zarda* panels held that Title VII does not extend to discrimination based on sexual orientation, panels of the Second Circuit made similar determinations in *Dawson* and *Simonton*. See *Dawson*, 398 F.3d at 218; *Simonton*, 232 F.3d at 36.

discrimination based on sexual orientation.<sup>318</sup> The Second Circuit then vacated these panel decisions and granted a rehearing en banc to determine whether Title VII prohibits discrimination based on sexual orientation.<sup>319</sup> The Second Circuit, sitting en banc, heard oral arguments for *Zarda* on September 26, 2017.<sup>320</sup> The Second Circuit panel determined that “Zarda may receive a new trial only if Title VII’s prohibition on sex discrimination encompasses discrimination based on sexual orientation—a result foreclosed by *Simonton*.”<sup>321</sup> Although the panel noted that it is bound by controlling precedent, the court intimated that Zarda would be entitled to a new trial if Title VII prohibited employment discrimination based on sexual orientation.<sup>322</sup> It seems likely that Altitude Express will appeal the case to the Supreme Court.

## 2. Evans v. Georgia Regional Hospital

Although some of the Circuit Courts of Appeals have ruled on the issue, the Supreme Court has never expressly decided whether federal workplace protections apply on the basis of sexual orientation and gender identity.<sup>323</sup> In the 2017-2018 Term, the Supreme Court passed on an opportunity to extend Title VII protections to LGBTQ+ individuals.<sup>324</sup> Indeed, the Court refused to grant Jameka Evans’s petition for writ of certiorari after the Eleventh Circuit dismissed her lawsuit claiming employment discrimination on the basis of sexual orientation

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<sup>318</sup> *Omnicom*, 852 F.3d at 202 (Katzmann, C.J., concurring) (noting the “changing legal landscape that has taken shape in the nearly two decades since *Simonton* issued”).

<sup>319</sup> *Zarda v. Altitude Express, Inc.*, No. 15-3775, 2017 U.S. App. LEXIS 13127, at \*6 (2d Cir. May 25, 2017).

<sup>320</sup> See Erin Mulvaney & Andrew Denney, *Gov’t Agencies Spar in Second Circuit Over LGBTQ Rights*, LAW.COM (Sept. 26, 2017, 8:44 PM), <https://www.law.com/sites/almstaff/2017/09/26/govt-agencies-spar-in-second-circuit-over-lgbtq-rights/> [<https://perma.cc/HL3Y-F65S>].

<sup>321</sup> *Zarda*, 855 F.3d at 82.

<sup>322</sup> *Id.* (“In sum, if Title VII protects against sexual-orientation discrimination, then Zarda would be entitled to a new trial.”).

<sup>323</sup> See Kelly M. Peña, *LGBT Discrimination in the Workplace: What Will the Future Hold?*, 92 FLA. BAR J. 35, 36 (2018).

<sup>324</sup> See Andrew Chung, *U.S. High Court Turns Away Dispute Over Gay Worker Protections*, REUTERS (Dec. 11, 2017, 9:36 AM), <https://www.reuters.com/article/us-usa-court-lgbt/u-s-high-court-turns-away-dispute-over-gay-worker-protections-idUSKBN1E51OT> [<https://perma.cc/7TM6-VQLH>] (“The U.S. Supreme Court on Monday refused to hear an appeal by a Georgia security guard who said she was harassed and forced from her job because she is a lesbian, avoiding an opportunity to decide whether a federal law that bans gender-based bias also outlaws discrimination based on sexual orientation.”).

and gender non-conformity.<sup>325</sup> Evans was a gay woman who identified with the male gender, and faced a hostile work environment because of her identity.<sup>326</sup> She alleged that during her tenure as a security officer at Georgia Regional Hospital, she was “denied equal pay or work, harassed, . . . physically assaulted or battered[,] . . . [and] discriminated against on the basis of her sex and targeted for termination for failing to carry herself in a ‘traditional womanly manner.’”<sup>327</sup> Evans further alleges that the hospital punished and retaliated against her after she informed its human resources personnel of the hostility and unfair discrimination she faced.<sup>328</sup>

In her *pro se* complaint, Evans argues that Title VII’s prohibition of employment discrimination on the basis of sex extends to her claims of discrimination based on sexual orientation and gender non-conformity.<sup>329</sup> A magistrate judge recommended dismissing claims with prejudice for failure to plead an actionable claim, which the district court adopted.<sup>330</sup> Reviewing the case *de novo*, the Eleventh Circuit affirmed the district court’s dismissal of Evans’s claim of discrimination based on sexual orientation,<sup>331</sup> but vacated and remanded with instructions to allow Evans leave to amend her claim of discrimination based on gender non-conformity.<sup>332</sup>

The Eleventh Circuit held that the district court correctly dismissed Evans’s sexual orientation claim because Title VII does not extend to discrimination based on sexual orientation.<sup>333</sup> The court cited *Blum v. Gulf Oil Corp.*,<sup>334</sup> which held that Title VII does not prohibit an employer from terminating an employee on the basis of sexual orientation.<sup>335</sup> The Eleventh Circuit also rejected Evans’s argument that *Price Waterhouse* and *Oncale*<sup>336</sup> support extending Title VII to dis-

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<sup>325</sup> See *Evans v. Ga. Reg’l Hosp.*, 850 F.3d 1248, 1250 (11th Cir. 2017), *cert. denied* 138 S. Ct. 557 (2017).

<sup>326</sup> *Id.* at 1251.

<sup>327</sup> *Id.*

<sup>328</sup> *Id.* at 1250–52.

<sup>329</sup> *Id.* at 1252.

<sup>330</sup> *Id.*

<sup>331</sup> *Id.* at 1257.

<sup>332</sup> *Id.* at 1255.

<sup>333</sup> *Id.*

<sup>334</sup> 597 F.2d 936, 938 (5th Cir. 1979).

<sup>335</sup> See *Evans*, 850 F.3d at 1255. Although *Blum* is a Fifth Circuit case, the Eleventh Circuit has held that any decision from the former Fifth Circuit preceding September 20, 1981 is binding precedent. See *id.* at 1255 n.4 (citing *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc)).

<sup>336</sup> See *supra* subpart III.B.

crimination based on sexual orientation.<sup>337</sup> Furthermore, although the Eleventh Circuit held that Title VII prohibits discrimination based on gender non-conformity, the court concluded that Evans had yet to plead facts indicating that the hospital punished and retaliated against her based on her gender non-conformity.<sup>338</sup> Nonetheless, the Eleventh Circuit ruled that the district court erred in failing to provide Evans an opportunity to amend her complaint.<sup>339</sup> Evans appealed to the Supreme Court, which denied certiorari.<sup>340</sup>

By denying Evans's petition, the Supreme Court failed to live up to the words engraved on the pediment of its building. If the United States is to truly afford its citizens "equal justice under law," as South Africa does, the Supreme Court should have granted certiorari, reversed the Eleventh Circuit's decision, and extended Title VII to cover gender identity and sexual orientation. Fortunately, the Supreme Court will likely get a second opportunity once the Second Circuit decides the *Zarda* case.<sup>341</sup> One must wonder, however, whether the Supreme Court will grant certiorari for the *Zarda* case since the Court denied certiorari in the *Evans* case.<sup>342</sup> In the absence of a

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<sup>337</sup> *Evans*, 850 F.3d at 1256 ("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*. . . . *Price Waterhouse* and *Oncale* are neither clearly on point nor contrary to *Blum*.").

<sup>338</sup> *Id.* at 1254.

<sup>339</sup> *Id.*

<sup>340</sup> See *Evans v. Ga. Reg'l Hosp.*, 138 S. Ct. 557, 557 (2017) (denying Evans's petition for writ of certiorari).

<sup>341</sup> *Zarda v. Altitude Express, Inc.*, 855 F.3d 76 (2d Cir. 2017), *reh'g en banc granted*, No. 15-3775, 2017 U.S. App. LEXIS 13127, at \*6 (2d Cir. May 25, 2017); *cf.* Ariane de Vogue, *LGBT Employment Cases on Road to Supreme Court*, CNN (Sept. 26, 2017, 6:24 AM), <https://www.cnn.com/2017/09/26/politics/lgbt-employment-case/index.html> [<https://perma.cc/CA2S-Q3G7>] (discussing *Hively*, *Evans*, and *Zarda*).

<sup>342</sup> *Cf.* Patricia N. Jjemba, *Expanding the Scope of Title VII: Will Sexual Orientation Become a New Basis for Employment Discrimination?*, CBA RECORD, September 2017, at 40, 41 ("The plaintiff in *Zarda* may not have been an ideal plaintiff to further the theory of sex discrimination on sexual orientation grounds. . . . The split between circuits already exists, and Ms. Jameka Evans of Atlanta, Georgia may present the right set of facts for the Supreme Court to hear her case." (citation omitted)). *Evans* and *Zarda* deal predominantly with extending the "based on sex" provision in Title VII to cover sexual orientation. But the Supreme Court also has the opportunity to conclude that "based on sex" also includes discrimination based on gender identity, albeit in the context of Title IX. See *Whitaker v. Kenosha Unified Sch. Dist. No. 1*, 858 F.3d 1034, 1039 (7th Cir. 2017) (holding that Title IX's "based on sex" provision prohibits discrimination based on gender-identity), *petition for cert. filed*, No. 17-301, 2018 WL 1147062 (Mar. 5, 2018). The Court was able to dodge a similar question in 2017 after the Trump administration rescinded the Obama Administration's protections for transgender students in public schools. See *Gloucester Cty. Sch. Bd. v. G.G.*, 137 S. Ct. 1239,

Supreme Court ruling extending Title VII protections to LGBTQ+ individuals, Congress must act by passing robust workplace protections for LGBTQ+ citizens.<sup>343</sup>

#### IV

##### PROPOSED PIECES OF LEGISLATION IN CONGRESS

###### A. The Employment Non-Discrimination Act

The Employment Non-Discrimination Act (ENDA) prohibits employment discrimination on the basis of sexual orientation and gender identity.<sup>344</sup> ENDA, in its current form, states:

It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to the compensation, terms, conditions, or privileges of employment of the individual, because of such individual's actual or perceived sexual orientation or gender identity; or (2) to limit, segregate, or classify the employees or applicants for employment of the employer in any way that would deprive or tend to deprive any individual of employment or otherwise adversely affect the status of the individual as an employee, because of such individual's actual or perceived sexual orientation or gender identity.<sup>345</sup>

ENDA's language is nearly identical to that of Title VII.<sup>346</sup> ENDA also prohibits employers from retaliating against any employee who reports an employer for violating ENDA.<sup>347</sup>

After previous defeats and a lack of success, LGBTQ+ advocacy organizations and their allies altered their strategy con-

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1239 (2017) ("Judgment vacated, and case remanded to the . . . Fourth Circuit for further consideration in light of the guidance document issued by the Department of Education and Department of Justice on February 22, 2017."); *see also* Emma Green, *The Trump Administration May Have Doomed Gavin Grimm's Case*, ATLANTIC (Mar. 6, 2017), <https://www.theatlantic.com/politics/archive/2017/03/the-trump-administration-may-have-doomed-gavin-grimm/518676/> [<https://perma.cc/A2P4-WUSZ>] ("The Supreme Court sent an important case concerning a transgender student in Virginia back down to the Fourth Circuit . . . in part because of the Trump administration's new position on the issues involved in the case.").

<sup>343</sup> Cf. Symone D. Shinton, *Married on Saturday, Fired on Monday: The Seventh Circuit Attempts to Navigate LGBT Rights After Obergefell*, 12 SEVENTH CIR. REV. 33, 61 (2016) ("Regardless of how the Seventh Circuit rules in *Hively*, Congress must act to provide protections for LGBT[Q+] employees against this invidious discrimination.").

<sup>344</sup> Employment Non-Discrimination Act of 2013, H.R. 1755, 113th Cong. (2013); Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. (2013). Together, hereinafter referred to as the Employment Non-Discrimination Act.

<sup>345</sup> *Id.*

<sup>346</sup> *See supra* note 201 and accompanying text.

<sup>347</sup> Employment Non-Discrimination Act, *supra* note 344.

cerning federal legislation in the 1970s.<sup>348</sup> Instead of pursuing an amendment to the Civil Rights Act of 1964,<sup>349</sup> they began advocating for “a more politically expedient, standalone bill” focusing exclusively on employment non-discrimination.<sup>350</sup> In 1994, members of Congress first introduced ENDA which they modeled on the Americans with Disabilities Act from just a few years prior.<sup>351</sup> The bill, however, only included protections for LGB individuals.<sup>352</sup> In 2007, Congressman Barney Frank introduced a version of ENDA that also included protections for transgender individuals.<sup>353</sup> The 2013 version of ENDA also includes protections for both sexual orientation and gender identity.<sup>354</sup> Although ENDA passed the Senate in 2013,<sup>355</sup> Speaker John Boehner refused to bring the bill to the floor of the House of Representatives for a vote.<sup>356</sup> LGBTQ+ advocacy organizations and their allies thereafter deserted ENDA and focused their efforts on the Equality Act.<sup>357</sup>

## B. The Equality Act

In 1974, Congresswoman Bella Abzug and Congressman Ed Koch introduced the Equality Act in Congress.<sup>358</sup> Congresswoman Abzug’s bill, however, only extended protections to LGB citizens.<sup>359</sup> And not a single other member of Congress

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<sup>348</sup> See Alex Reed, *Abandoning ENDA*, 51 HARV. J. ON LEGIS. 277, 281–82 (2014) [hereinafter *Abandoning ENDA*].

<sup>349</sup> See *infra* subpart IV.B.

<sup>350</sup> Bornstein & Bench, *supra* note 186, at 48.

<sup>351</sup> *Id.*; see also Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified at 42 U.S.C. § 12101).

<sup>352</sup> Shalyn L. Caulley, Note, *The Next Frontier to LGBT Equality: Securing Workplace-Discrimination Protections*, 2017 U. ILL. L. REV. 909, 929 (2017).

<sup>353</sup> Wasser, *supra* note 199, at 1116.

<sup>354</sup> Employment Non-Discrimination Act, *supra* note 344.

<sup>355</sup> Caulley, *supra* note 352, at 929.

<sup>356</sup> Wasser, *supra* note 199, at 1118.

<sup>357</sup> *Id.*

<sup>358</sup> See Equality Act of 1974, H.R. 14752, 93d Cong. (1974); Alex Reed, *A Pro-Trans Argument for a Transexclusive Employment Non-Discrimination Act*, 50 AM. BUS. L.J. 835, 838 (2013) [hereinafter *Transexclusive Employment Non-Discrimination Act*]; see also David G. Dodge, *The Equality Act Turns 40*, HUFFINGTON POST (May 29, 2014, 6:03 PM), [https://www.huffingtonpost.com/david-g-dodge/the-equality-act-turns-40\\_b\\_5352209.html](https://www.huffingtonpost.com/david-g-dodge/the-equality-act-turns-40_b_5352209.html) [<https://perma.cc/VL49-ELUJ>] (“In May of 1974, New York Representatives Bella Abzug and Ed Koch introduced the ‘Equality Act’ into Congress. . . . It’s unfortunately a bittersweet anniversary; 40 years later—in a year when we’ve seen the first openly gay player drafted to the NFL and same-sex marriage bans are falling across the country on a weekly basis—we still lack federal anti-discrimination protections for LGBTQ[+] people.”).

<sup>359</sup> See Equality Act of 1974, H.R. 14752 (prohibiting discrimination based on sex, marital status, and sexual orientation in public accommodation, federally assisted programs, and the public sector).



signed onto the bill as a cosponsor.<sup>360</sup> The bill died in committee without a vote.<sup>361</sup> In subsequent Congresses, members of Congress reintroduced the Equality Act or an equivalent bill.<sup>362</sup> While the bills increasingly gained support from cosponsoring members of Congress, the bills died in committee each time.<sup>363</sup> The Equality Act reappeared in July 2015, after LGBTQ+ advocacy organizations and their allies had abandoned their push for ENDA.<sup>364</sup>

The Equality Act is similar, but not identical to ENDA.<sup>365</sup> While ENDA is a stand-alone piece of legislation that applies specifically to LGBTQ+ individuals, the Equality Act serves to add protections for LGBTQ+ individuals by amending existing civil rights laws.<sup>366</sup> Amongst these civil rights laws is the Civil Rights Act of 1964.<sup>367</sup> In the context of employment non-discrimination, the Equality Act would amend Title VII to include sexual orientation and gender identity.<sup>368</sup> The Equality Act thus provides more robust and comprehensive protections for LGBTQ+ individuals—in the employment context and beyond.<sup>369</sup>

The Equality Act and amending Title VII, according to Professor Alex Reed, have other advantages as well. First, the Equality Act and Title VII provide plaintiffs with the ability to contest discrimination on either a disparate treatment theory or a disparate impact theory.<sup>370</sup> ENDA, however, only allows for discrimination claims on the basis of disparate treatment.<sup>371</sup> Second, the Equality Act and Title VII forbid religious

<sup>360</sup> See *Transexclusive Employment Non-Discrimination Act*, *supra* note 358, at 838.

<sup>361</sup> See *id.*

<sup>362</sup> Bornstein & Bench, *supra* note 186, at 48.

<sup>363</sup> *Id.*; see also William C. Sung, Note, *Taking the Fight Back to Title VII: A Case for Redefining “Because of Sex” to Include Gender Stereotypes, Sexual Orientation, and Gender Identity*, 84 S. CAL. L. REV. 487, 495–514 (2011) (recounting the history of the Equality Act and equivalent bills).

<sup>364</sup> Wasser, *supra* note 199, at 1119.

<sup>365</sup> See Equality Act, H.R. 3185, 114th Cong. (2015); Equality Act, S. 1858, 114th Cong. (2015). Together, hereinafter referred to as the Equality Act.

<sup>366</sup> Wasser, *supra* note 199, at 1119.

<sup>367</sup> See *id.*; see generally Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (prohibiting discrimination based on race, color, religion, sex, or national origin in various contexts). The other civil rights laws include: The Fair Housing Act, the Equal Credit Opportunity Act, and the Jury Selection Service Act. See Wasser, *supra* note 199, at 1119.

<sup>368</sup> See Equality Act, *supra* note 365; see also 42 U.S.C. § 2000e-2(a) (2012).

<sup>369</sup> Wasser, *supra* note 199, at 1119.

<sup>370</sup> *Abandoning ENDA*, *supra* note 348, at 280–81 (citing *Ricci v. DeStefano*, 557 U.S. 557, 577–78 (2009)).

<sup>371</sup> *Abandoning ENDA*, *supra* note 348, at 281.

organizations from discriminating on the basis of race, color, national origin, and sex.<sup>372</sup> Amending Title VII to include sexual orientation and gender identity would presumably also prohibit religious organizations from discriminating on these grounds as well.<sup>373</sup> ENDA, on the other hand, allows religious organizations to discriminate on the basis of sexual orientation and gender identity.<sup>374</sup> Finally, the Equality Act and Title VII permit employers to implement temporary affirmative action plans to diversify their workforce.<sup>375</sup> This provision is similar to that of the PEPUDA and EEA.<sup>376</sup> ENDA prohibits using quotas or giving special treatment to individuals based on their sexual orientation or gender identity.<sup>377</sup>

In sum, although ENDA is a step in the right direction, its protections for LGBTQ+ individuals are modest compared to the more comprehensive protections included in the Equality Act and Title VII. Thus, in order to more closely follow South Africa's robust and progressive protections for its LGBTQ+ citizens, the U.S. Congress should pass the Equality Act. Until that time, LGBTQ+ individuals will remain second-class citizens whose employers may discriminate against them at will.

### C. Progress in the Private Sector

Even without federal laws such as ENDA or the Equality Act mandating employment non-discrimination,<sup>378</sup> many companies still provide equal rights and benefits to LGBTQ+ individuals. The Human Rights Campaign's annual Corporate Equality Index (CEI) report scores large businesses based on their "policies, benefits[,] and practices" pertinent to LGBTQ+ employees and their families.<sup>379</sup> The Human Rights Campaign invites Fortune magazine's 1,000 largest publicly traded businesses and American Lawyer magazine's top 200 revenue-grossing law firms to participate, while any private-sector business with 500 or more full-time employees can request to par-

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<sup>372</sup> *Id.*

<sup>373</sup> *Id.*

<sup>374</sup> *Id.*

<sup>375</sup> *Id.*

<sup>376</sup> *See supra* subpart I.C.

<sup>377</sup> *Abandoning ENDA, supra* note 348, at 281.

<sup>378</sup> *See supra* subparts II.A–B.

<sup>379</sup> HUMAN RTS. CAMPAIGN FOUND., CORPORATE EQUALITY INDEX 2017: RATING WORKPLACES ON LESBIAN, GAY, BISEXUAL AND TRANSGENDER EQUALITY 2 (2017) [hereinafter CEI 2017], [https://assets.hrc.org//files/assets/resources/CEI-2017-Final.pdf?\\_ga=2.248875847.1322983219.1509835382-537092078.1506700197](https://assets.hrc.org//files/assets/resources/CEI-2017-Final.pdf?_ga=2.248875847.1322983219.1509835382-537092078.1506700197) [<https://perma.cc/G9JP-KJ2B>].

icipate.<sup>380</sup> The 2017 CEI report shows that 515 major businesses earned a perfect score.<sup>381</sup> The report also found that 92 percent of Fortune 500 businesses include sexual orientation in their United States non-discrimination policies, while 82 percent include gender identity.<sup>382</sup> Generally, businesses with top CEI scores receive positive media attention,<sup>383</sup> while those with low scores receive negative or disparaging media attention.<sup>384</sup> Indeed, “businesses know that LGBTQ[+] equality isn’t just the right thing to do, it makes them stronger in our global economy.”<sup>385</sup> In the absence of action by Congress or the Supreme Court, the private sector should continue to lead the way by prioritizing non-discrimination policies for employees, including those who identify as LGBTQ+.<sup>386</sup> These policies are not only beneficial for “form[ing] a more perfect Union”<sup>387</sup> but also for business.<sup>388</sup>

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<sup>380</sup> *Id.* at 8.

<sup>381</sup> A total of 887 of the nation’s largest businesses participated in the CEI report. Thus, nearly 60% of the businesses in the “CEI universe” earned a perfect score. *See id.* at 4, 9.

<sup>382</sup> The CEI report considers the policies and practices of both Fortune 500 participants and non-responders. A total of 327 of the Fortune 500 business participated in the CEI report. The participating Fortune 500 businesses earned an average rating of 91, while 199 of the 327 businesses earned a perfect score. *See id.* at 6.

<sup>383</sup> *See, e.g.,* Curtis M. Wong, *Here Are the Best Places to Work if You’re LGBT in 2016*, HUFFINGTON POST (Nov. 18, 2015, 5:04 PM), [https://www.huffingtonpost.com/entry/corporate-equality-index\\_us\\_564cdd76e4b00b7997f8cac9](https://www.huffingtonpost.com/entry/corporate-equality-index_us_564cdd76e4b00b7997f8cac9) [<https://perma.cc/7DWP-BY2Y>] (“Civic-minded consumers will have new incentive to frequent Starbucks, Hallmark and Nordstrom this holiday, as all three received top rankings on the Human Rights Campaign’s annual Corporate Equality Index . . . .”); Susan Adams, *The Best Big American Companies for LGBT Employees*, FORBES (Dec. 9, 2011, 3:29 PM), <https://www.forbes.com/sites/susanadams/2011/12/09/the-best-big-american-companies-for-lgbt-employees/> [<https://perma.cc/97ZP-2SR3>] (“Chevron, Bank of America and AT&T all got top marks as the best workplaces for lesbian, gay, bisexual and transgender (LGBT) employees, according to a survey released yesterday by the Human Rights Campaign . . . .”).

<sup>384</sup> *See, e.g.,* Amanda Chatel, *7 Companies That Don’t Support Gay Rights*, HUFFINGTON POST (Oct. 16, 2013, 5:08 PM), [https://www.huffingtonpost.com/2013/10/16/anti-gay-companies\\_n\\_4110344.html](https://www.huffingtonpost.com/2013/10/16/anti-gay-companies_n_4110344.html) [<https://perma.cc/4YT2-82ML>] (“The United States Department of Labor may have ruled that all businesses in every state must provide benefit coverage for same-sex marriages, but that doesn’t mean it’s going to put an end to homophobia. Here are 8 companies that prove this to be true.”).

<sup>385</sup> CEI 2017, *supra* note 379, at 2.

<sup>386</sup> *Cf.* Lisa Fackler, *In Gay Rights, Private Sector is ‘Unlikely Hero,’ Survey Finds*, LA TIMES (Aug. 14, 2002), <http://articles.latimes.com/2002/aug/14/nation/na-gays14> [<https://perma.cc/AW82-RBU9>] (“Private industry is leading the way in ending discrimination against [LGBTQ+] employees . . . .”).

<sup>387</sup> U.S. CONST. pmb1.

<sup>388</sup> *Cf.* Amber Phillips, *How LGBT Activists Win in States Like Georgia: Emphasize Economics, Not Just Equality*, WASH. POST (Mar. 28, 2016), <https://www.washingtonpost.com/news/the-fix/wp/2016/03/28/how-lgbt-activists-beat>

Moreover, some commentators have proposed using a certification mark to indicate that a company or employer has committed to the “exact substantive duties of ENDA.”<sup>389</sup> The certification mark, which takes the form of a symbol with an “FE”<sup>390</sup> inside a circle, announces to customers and employees that the company or employer is committed to employment non-discrimination on the basis of sexual orientation and gender identity.<sup>391</sup> Employers and corporations gain the right to use the mark only if they sign a licensing agreement agreeing to follow the provisions of ENDA.<sup>392</sup> The commentators note that the certification mark is merely an “incremental strategy in the struggle for equality.”<sup>393</sup>

The commentators also contend that the strategy will have other beneficial effects.<sup>394</sup> Privatizing ENDA using the certification mark has three additional benefits: (1) amelioration, (2) demonstration, and (3) realignment.<sup>395</sup> First, in states that do not have robust workplace protections for LGBTQ+ individuals, privatizing ENDA provides an ameliorative private right of action and legal remedy to unprotected workers who are discriminated against based on their sexual orientation or gender identity.<sup>396</sup> Second, companies and employers adopting the mark will demonstrate to lawmakers the prudence of adopting ENDA or the state equivalent as well as inform them about the operational and litigation-related implications of the law.<sup>397</sup> Third, the adoption of the mark by a significant number of companies and employers may produce new opportunities ei-

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back-unfriendly-laws-emphasize-economics-not-just-equality/?utm\_term=.421515b50acb [https://perma.cc/D2DV-7AAD] (“There’s a clear economic argument for businesses to jump into [the] contentious social issue [of LGBTQ+ rights]. . . . Corporations are acutely aware of their image among the coveted 18-34-year-old category.”).

<sup>389</sup> Ian Ayres & Jennifer Gerarda Brown, *Mark(et)ing Nondiscrimination: Privatizing ENDA with a Certification Mark*, 104 MICH. L. REV. 1639, 1641 (2006). Certification marks can be quite influential in the marketplace. See, e.g., Roger D. Wynne, *The Emperor’s New Eco-Logos?: A Critical Review of the Scientific Certification Systems Environmental Report Card and the Green Seal Certification Mark Programs*, 14 VA. ENVTL. L.J. 51, 57 (1994) (“[The Green Seal’s] Certification Mark could be an effective tool for influencing the purchase decisions of green and latent green consumers, and thus for stimulating some changes from manufacturers eager to expand or protect market share.”).

<sup>390</sup> “FE” stands for “Fair Employment.”

<sup>391</sup> Ayres & Brown, *supra* note 389, at 1641.

<sup>392</sup> *Id.*

<sup>393</sup> *Id.*

<sup>394</sup> See *id.* at 1641–42.

<sup>395</sup> *Id.* at 1647.

<sup>396</sup> *Id.*

<sup>397</sup> *Id.* at 1648.

ther to compromise in Congress or state legislatures or to serve as a “wedge issue” to pressure politicians to support ENDA.<sup>398</sup> The proposal to privatize ENDA, however, can just as easily be applied to the Equality Act in the context of employment discrimination and workplace protections.

#### CONCLUSION

In conclusion, South African non-discrimination and equal protection law and jurisprudence should serve as a model for the United States. The South African Constitution, South African Constitutional Court cases, and laws passed by the South African Parliament all mandate that LGBTQ+ South Africans be treated equally to their heterosexual counterparts. Discrimination against LGBTQ+ South Africans is expressly forbidden—including in the employment context. The United States still lacks comprehensive federal employment non-discrimination laws or workplace protections for LGBTQ+ individuals. Extending Title VII—either via court decision or by passing the Equality Act—will provide robust workplace protections on the basis of sexual orientation and gender identity. This approach is the most effective way to close the gap between South African non-discrimination and equal protection law and jurisprudence and that of the United States. In the meantime, South Africa will be the proverbial “city upon a hill,”<sup>399</sup> and the United States will continue to abdicate its moral responsibility.

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<sup>398</sup> *Id.* at 1650.

<sup>399</sup> John Winthrop, *A Model of Christian Charity*, WINTHROP SOC'Y, [https://www.winthropsociety.com/doc\\_charity.php](https://www.winthropsociety.com/doc_charity.php) [https://perma.cc/TVB9-RFAF] (presenting a thesis written on board the ship *Arbella* in 1630); *see also* John F. Kennedy, President-Elect, United States of America, Address at the General Court of Massachusetts (Jan. 9, 1961) (“I have been guided by the standard John Winthrop set before his shipmates on the flagship *Arbella* three hundred and thirty-one years ago. . . . ‘We must always consider,’ he said, ‘that we shall be a *city upon a hill*—the eyes of all people are upon us.’” (emphasis added)); Ronald Reagan, President, United States of America, “A Vision for America” Election Eve Address (Nov. 3, 1980) (“I have quoted John Winthrop’s words more than once upon the campaign trail this year—for I believe that Americans in 1980 are every bit as committed to that vision of a shining ‘*city on a hill*,’ as were those long ago settlers . . . .” (emphasis added)); Barack Obama, U.S. Senator, Commencement Address at the University of Massachusetts, Boston (June 2, 2006) (“As the earliest settlers arrived on the shores of Boston and Salem and Plymouth, they dreamed of building a *City upon a Hill*. . . . I see students that have come here from over 100 different countries, believing like those first settlers that they too could find a home in this *City on a Hill*—that they too could find success in the unlikeliest of places.” (emphasis added)); Mitt Romney, Address at the Hinckley Institute of Politics at the University of Utah (Mar. 3, 2016) (“[Donald Trump’s] domestic policies would lead to recession. His foreign policies would make America and the world less safe. He has neither the temperament nor the judge-

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ment to be president. And his personal qualities would mean that America would cease to be a shining *city on a hill*." (emphasis added).