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## One Text, Another Rendering Now: In the Wake of *Hively v. Ivy Tech Cmty. Coll. of Ind.*, the Continuing Struggle to Define Sex Discrimination Under Title VII

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**ONE TEXT, ANOTHER RENDERING NOW: IN  
THE WAKE OF *HIVELY V. IVY TECH CMTY.  
COLL. OF IND.*, THE CONTINUING STRUGGLE  
TO DEFINE SEX DISCRIMINATION UNDER  
TITLE VII**

*Kaitlyn Krall*

“If a problem can't be solved within the frame it was conceived,  
the solution lies in reframing the problem.”<sup>1</sup>

This article centers on the Seventh Circuit decision, *Hively v. Ivy Tech Comm. Coll.*, which became the first U.S. Circuit decision to declare that sexual orientation discrimination is a type of sex discrimination under Title VII of the Civil Rights Act of 1964. The introduction highlights the difficulty in defining sex discrimination and provides an overview of the various approaches taken to try and define it. Part II provides background information on how sex discrimination became a part of Title VII, the development of sex discrimination through the courts, the changes in the Supreme Court's understanding of sexual orientation, and the EEOC's decision to expand sex discrimination. Part III provides the facts surrounding *Hively* and an explanation of its various opinions. Part IV critiques the Seventh Circuit's arguments because, while the decision correctly determines that sexual orientation discrimination is a form of sex discrimination, it fails to provide a new framework in which to make this determination, making it difficult for other courts to apply the decision's rationale. Finally, Part V discusses the impact of *Hively* and posits that, while the decision adds to the increasing number of voices for sexual orientation protection under Title VII, it may ultimately hinder that goal through its limited change in methodology for determining what constitutes sex discrimination.

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<sup>1</sup> BRIAN MCGREEVY, *HEMLOCK GROVE* 107 (2012).

## I. CONSTRUCTING SEX DISCRIMINATION: INTRODUCTION TO TITLE VII AND THE COURTS' APPROACHES TO SEX DISCRIMINATION

Imagine you are an airline stewardess in the 1960s and you just got engaged.<sup>2</sup> On what should be a joyful day, your employer tells you that you will no longer be able to work for the airline because their policy is that only unmarried women can work as a stewardess.<sup>3</sup> At the time, you would not have been able to claim employment discrimination because the employment policy did not “technically” discriminate on the basis of sex as it did not divide men and women into two groups.<sup>4</sup> When stewardesses brought their sex discrimination claims, the airlines argued that being unmarried was a legitimate job requirement because their passengers (mostly male) preferred unmarried stewardesses; moreover, married stewardesses would create administrative burdens due to their home life demands.<sup>5</sup> When this social policy argument failed, in large part because of the rise of the women’s movement, the airlines posited a new theory: the policy

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<sup>2</sup> See generally Cary Franklin, *Inventing the “Traditional Concept” of Sex Discrimination*, 125 HARV. L. REV. 1307, 1348–54 (2012) (explaining battle over whether airline policies that terminated employment when stewardesses married or reached their early thirties constituted actionable discrimination based on sex or benign discrimination based on age and marital status).

<sup>3</sup> See *id.* (explaining basis of hypothetical); see also *id.* at 1353 (quoting statement made by airline representative during EEOC testimony on stewardess issue stating that EEOC “has no authority to act in respect to complaints which are in fact based upon considerations of anything other than race, creed, color, nationality [sic] origin and sex”).

<sup>4</sup> See *supra* note 2 (explaining basis of hypothetical); see also Franklin, *supra* note 2, at 1353 (citing to court decision which held that airline policies did not constitute discrimination because policy did not divide employees into two perfectly sex-differentiated groups).

<sup>5</sup> See Franklin, *supra* note 2, at 1349 (stating that airlines argued that hiring only young, single women as stewardesses was a legitimate business requirement because of passenger preference, of fear that husbands would call office to ask about wives, and that women would be unable to balance home and job).

discriminated based on marital status, not sex, because the policy did not sort men and women according to sex.<sup>6</sup> The courts began to utilize this argument as a possible test for determining sex discrimination.<sup>7</sup> Yet courts quickly stripped the normative analysis in sex discrimination determinations, describing the test as an objective rule that does not require additional value judgments.<sup>8</sup> In doing so, the courts ignored the complexity of sex discrimination and prevented individuals like the stewardesses from bringing successful sex discrimination claims.<sup>9</sup>

Under Title VII of the Civil Rights Act of 1964, it is illegal for an employer to terminate employment or refuse to hire an individual based on the individual's sex.<sup>10</sup> This statute provides a

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<sup>6</sup> *See id.* at 1351–52 (noting that airlines began to change argument to one where policies were age and marital status discrimination).

<sup>7</sup> *See id.* at 1353 (highlighting first federal case that dealt with suit brought by stewardesses wherein court determined that policies did not count as sex discrimination because they did not divide men and women into two different groups but also rested decision on normative reasons); *see also id.* at 1354–55 (explaining the 5th Circuit's decisions to use anti-classification reasoning while also utilizing normative arguments about sex and family roles).

<sup>8</sup> *See id.* at 1353 (explaining that less than a decade after first federal case, Supreme Court no longer rested its decision on normative arguments but rather on objective rule without value judgments).

<sup>9</sup> *See id.* at 1353–54 (arguing that courts used anti-classification approach to mask that determinations were based on social judgment about gender-based regulation); *see id.* at 1335 (noting that no one at EEOC after Title VII was enacted had comparable experience in women's rights nor did employees expect to work in sex discrimination field); *see also id.* at 1338 (citing EEOC Commissioner's statement that "the sex provision of Title VII is mysterious and difficult to understand and control").

<sup>10</sup> *See generally* Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e)–2(a) (2017) ("Employer Practices. It shall be unlawful employment practice for an employer -- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his

needed cause of action for many but gives rise to the question of “what is sex discrimination?”<sup>11</sup> The courts have changed their answer to this question several times but traditionally defined it as discrimination “against women because they are women and against men because they are men.”<sup>12</sup> Sex, the court added, meant biologically female or male.<sup>13</sup> Until recently, the federal courts agreed with this “traditional” definition of sex discrimination and consistently excluded sexual orientation claims, arguing that sexual orientation and sex are two different characteristics.<sup>14</sup>

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status as an employee, because of such individual's race, color, religion, sex, or national origin.”).

<sup>11</sup> See *Sex Discrimination*, BLACK'S LAW DICTIONARY, (10th ed. 2014) (defining sex discrimination as “discrimination based on gender, esp. against women. . . . The terminology is gradually shifting. Increasingly in medicine and sociology, *gender* is distinguished from *sex*. *Gender* refers to the psychological and societal aspects of being male or female; *sex* refers specifically to the physical aspects.”). Compare *Sex*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining sex as “1. The sum of the peculiarities of structure and function that distinguish a male from a female organism; gender; 2. Sexual intercourse”), with AM. PSYCHOL. ASS'N, APA DICTIONARY OF PSYCHOL. (2d ed. 2015) (defining sex as “(1) the traits that distinguish between males and females. Sex refers especially to physical and biological traits, whereas gender refers especially to social or cultural traits, although the distinction between the two terms is not regularly observed; (2) the physiological and psychological processes related to procreation and erotic pleasure.”).

<sup>12</sup> *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984); see also *Franklin*, *supra* note 2, at 1315 (defining the traditional concept of sex discrimination as “the idea that employer conduct is discriminatory only and whenever it bifurcates employees along biological sex lines”).

<sup>13</sup> See *Ulane*, 742 F.2d at 1085 (holding that sex means biologically male or female until Congress decides otherwise). Compare *supra* note 11 (explaining different definitions of sex and gender), with *Hively v. Ivy Tech. Cmty. Coll. of Ind.*, 853 F.3d 339, 353 (7th Cir. 2017) (Posner, J., concurring) (concluding that sex means both gender and sexual orientation).

<sup>14</sup> See *infra* note 76 (discussing precedent in other circuit courts which use “traditional” concept of sex discrimination and hold that sexual orientation claims are not actionable under Title VII). But cf. *Missouri v. Holland*, 252 U.S. 416, 433–34 (1920) (arguing that “[t]he case before us must be considered in the light of our whole experience and note merely in that of

Regardless, the Supreme Court has gradually re-interpreted sex discrimination to include other less “traditional” understandings of sex discrimination.<sup>15</sup> Most notably, in *Price Waterhouse v. Hopkins*, the Supreme Court found that sex stereotyping<sup>16</sup> was a form of sex discrimination because determining that a female employee should not be aggressive is a sex-conscious decision.<sup>17</sup>

The Court’s decision to include sex stereotyping as a form of sex discrimination opened the door to previously barred sexual orientation discrimination<sup>18</sup> claims.<sup>19</sup> Struggling to compartmentalize the two claims, some courts barred any claims with a sexual orientation component, while others attempted to

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what was said a hundred years ago . . . . We must consider what this country has become in deciding what the amendment has reserved.”).

<sup>15</sup> See *infra* notes 58–62 and accompanying text (discussing cases where the Supreme Court found that sex discrimination covered other situations besides “traditional” concept).

<sup>16</sup> See HILARY M. LIPS, *SEX AND GENDER: AN INTRODUCTION* 2 (6th ed. 2017) (defining sex stereotyping as “socially shared beliefs about what qualities can be assigned to individuals based on their membership in the male or female half of the human race.”).

<sup>17</sup> See *Price Waterhouse*, 490 U.S. 228, 250 (1989) (plurality opinion) (asserting that “[i]n saying that gender played a motivating part in an employment decision, we mean that, if we asked the employer at the moment of the decision what its reasons were . . . , one of those reasons would be that the applicant or employee was a woman. In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.”).

<sup>18</sup> See *Sexual Orientation Discrimination*, BLACK’S LAW DICTIONARY, (10th ed. 2014) (defining it as “[d]iscrimination based on a person’s predisposition or inclination to be romantically or sexually attracted to a certain type of person (i.e., heterosexuality, homosexuality, bisexuality, or asexuality), or based on a person’s gender identity (i.e., a person’s internal sense of gender.”).

<sup>19</sup> See *Hively v. Ivy Tech. Cmty. Coll. of Ind.*, 830 F.3d 698, 700 (7th Cir. 2016) (explaining Seventh Circuit’s precedent that sexual orientation discrimination is not actionable under Title VII); see also *id.* at 705 (noting that after *Price Waterhouse* there was a line of cases brought by gay, lesbian, bisexual, and transsexual employees who framed argument in gender non-conformity terms).

parse out facts supporting a sex discrimination claim from those supporting a sexual orientation claim, and then only looking at the sex discrimination claim.<sup>20</sup> However, in doing so, the courts created a bizarre situation where gay persons<sup>21</sup> who “looked gay”<sup>22</sup> could bring successful sex stereotyping claims, while gay persons who were known to be gay but did not exhibit “gay characteristics”<sup>23</sup> could not.<sup>24</sup>

Then in 2017, the Seventh Circuit broke away from its precedent and included sexual orientation discrimination as prohibited under Title VII.<sup>25</sup> In *Hively v. Ivy Tech Cmty. Coll. of Ind.*, where an openly gay woman brought a sex discrimination case against her employer alleging sexual orientation discrimination, the Seventh Circuit held that sexual orientation

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<sup>20</sup> See *infra* notes 69–77 and accompanying text (discussing other circuits’ approaches to sexual orientation in sex discrimination claims).

<sup>21</sup> Throughout my Note, I utilize the term “gay persons” in reference to individuals, both male and female, who are sexually attracted to individuals of his or her respective sexes. See Committee on Lesbian and Gay Concerns American Psychological Association, *Avoiding Heterosexual Bias in Language*, 46 AM. PSYCHOLOGIST 9, 973–74 (1991) (recommending the use of the terms “lesbian, gay, or gay persons” as opposed to “homosexual” because of its connection with negative stereotypes).

<sup>22</sup> See Brian Soucek, *Perceived Homosexuals: Looking Gay Enough for Title VII*, 63 AM. U.L. REV. 715, 717 (2014) (arguing that gay persons are protected when their sexuality is perceivable via the senses as something that can be literally seen or heard). In his article, Brian Soucek utilizes this term to highlight the difference between gay persons who are perceived by others to be gay from those who are known to be gay. Here, individuals who “look gay” are those who have a better chance of bringing a successful gender non-conformity claim.

<sup>23</sup> See *id.* at 748–49 (providing sample of characteristics that courts have determined violate gender stereotypes including hairstyle, way of walking, way of talking, and appearance with most being noticed in connection with idea that individual is not acting manly enough or is acting too feminine).

<sup>24</sup> See *id.* at 716 (explaining that if you look gay at work you may be able to bring a claim, but if employers only know that you are gay, then you are unprotected under Title VII).

<sup>25</sup> For a further discussion of the Seventh Circuit’s precedent see *infra* notes 78–81 and accompanying text; see also *Hively v. Ivy Tech. Cmty. Coll. of Ind.*, 853 F.3d 339, 351 (7th Cir. 2017) (holding that sexual orientation discrimination falls under sex discrimination).

discrimination is sex discrimination under Title VII because sexual orientation discrimination necessarily involves thinking about sex.<sup>26</sup> The majority determined that there are three perspectives that justify, including sexual orientation discrimination under sex discrimination.<sup>27</sup> Although *Hively* expanded sex discrimination to include sexual orientation discrimination and thereby fixed the arbitrary distinction between looking gay and being gay, the four opinions highlight the difficulty that courts still face when interpreting sex discrimination under Title VII.<sup>28</sup>

This Note discusses the development of sex discrimination under Title VII and argues that while the Seventh Circuit correctly held that sexual orientation discrimination is a form of sex discrimination, the court did so using incorrect arguments; rather than adopting a dynamic approach to statutory interpretation that melds gender non-conformity cases with developments in our understanding of sex, gender, and sexual orientation, the court continued to view sex discrimination in the same anti-classification way<sup>29</sup> that was originally used to limit the scope of

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<sup>26</sup> See *Hively v. Ivy Tech. Cmty. Coll. of Ind.*, 853 F.3d 339, 350 (7th Cir. 2017) (stating that “[i]t would require considerable calisthenics to remove the ‘sex’ from ‘sexual orientation.’”); see also *id.* at 341 (providing factual background of case).

<sup>27</sup> See *infra* notes 123–141 and accompanying text for further discussion of majority’s three perspectives on sexual orientation discrimination.

<sup>28</sup> See generally *Hively*, 853 F.3d at 339 (recognizing that there is a majority, two concurring, and dissenting opinion); see also *infra* notes 108–115 and accompanying text (highlighting importance of majority’s interpretive framework); e.g., *infra* notes 142–147 and accompanying text (noting type of interpretation that Judge Posner’s concurrence uses); *infra* notes 160–163 and accompanying text (noting type of interpretation that Judge Flaum’s concurrence uses); *infra* notes 167–172 and accompanying text (noting type of interpretation that Judge Sykes’s dissent uses).

<sup>29</sup> See Franklin, *supra* note 2, at 1309 (defining anti-classification in relation to sex discrimination as “divid[ing] men and women into two groups, perfectly differentiated along biological sex lines”); see also Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9, 10 (2003) (stating that the anti-classification “principle holds that the government may not classify



sex discrimination.<sup>30</sup> Part II summarizes the history of Title VII's sex provision, as well as federal courts' and the EEOC's interpretation of sex discrimination.<sup>31</sup> Next, Part III provides the facts of *Hively*, while Part IV recounts *Hively*'s various opinions and approaches to defining sex discrimination.<sup>32</sup> Part V critiques *Hively*'s interpretative methods, and, finally, Part VI notes that, due in part to *Hively*'s arguments, there remains uncertainty for employers and employees, while also creating confusion about how to understand sex discrimination in future cases.<sup>33</sup>

## II. WALKING THE TIGHTROPE: APPROACHES TO SEPARATING SEX AND SEXUAL ORIENTATION DISCRIMINATION

*Hively*'s place in sex discrimination jurisprudence is underpinned by Title VII, historical debate, Supreme Court decisions both on Title VII and on sexual orientation generally, circuit courts' differing opinions, and the EEOC.<sup>34</sup> Historically,

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people either overtly or surreptitiously on the basis of a forbidden category: for example, their race.”).

<sup>30</sup> For further discussion of the *Hively* opinions' struggle with interpretive framework, see *infra* notes 182–221 and accompanying text; see also Franklin, *supra* note 2, at 1316 (asserting that “[t]alk of deference to the legislature and fidelity to tradition replaced discussion of the need to preserve the traditional family and women’s role within in . . . . Courts’ continued adherence to the ‘traditional concept’ of sex discrimination significantly limits Title VII’s scope and insulates from judicial scrutiny various forms of regulation that maintains social stratification.”).

<sup>31</sup> See *infra* notes 34–89 and accompanying text.

<sup>32</sup> See *infra* notes 90–181 and accompanying text for Part III; see *infra* notes 182–232 and accompanying text for Part IV.

<sup>33</sup> See *infra* notes 233–249 and accompanying text for Part V; see *infra* notes 250–257 and accompanying text for Part VI.

<sup>34</sup> For discussion of Title VII and the historical debate surrounding it, see *infra* notes 44–56 and accompanying text. For further discussion of Supreme Court decisions, see *infra* notes 57–67 and accompanying text. For further discussion of circuit court opinions, see *infra* notes 68–81 and accompanying text. For further discussion of EEOC’s viewpoint, see *infra* notes 83–89 and accompanying text.

Title VII did not provide protection for sexual orientation claims.<sup>35</sup> This occurred in large part because of the courts' adoption of an anti-classification approach, which transformed interpreting sex discrimination from a dynamic statutory interpretation<sup>36</sup> approach to a focus on formal logic.<sup>37</sup> The historic interpretation changed when the Supreme Court expanded sex discrimination to include, most notably, sexual harassment and sex stereotyping claims.<sup>38</sup> Regardless of sex discrimination's expanded definition, the circuit courts refused to expand it to sexual orientation discrimination, using various types of interpretive methods such as legislative intent, common meaning at the time of enactment, and logical reasoning to support their decisions.<sup>39</sup> Despite this, gay persons started to bring successful claims under sex stereotyping because employers viewed the employees' mannerisms as being contrary to societal norms about how a person of a particular sex should behave, i.e., a gay man as acting effeminately or a gay woman as acting manly.<sup>40</sup> In response, the EEOC determined that sexual

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<sup>35</sup> See *infra* note 76 for precedent in circuit courts holding that sexual orientation discrimination does not fall under Title VII.

<sup>36</sup> See William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1483 (1987) (defining dynamic statutory interpretation as “the process of understanding a text created in the past and applying it to a present problem.”); see generally *id.* at 1482–97 (positing his cautious model of dynamic statutory interpretation).

<sup>37</sup> See Franklin, *supra* note 2, at 1378–80 (concluding that the traditional concept of sex discrimination is used to limit reach of sex discrimination so that sexual minorities cannot bring claims); see also Balkin & Siegel, *supra* note 29, at 10 (explaining the anti-classification argument); cf. Suzanne Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728 (2011) (discussing how the comparator method limits the definition of discrimination and prevents actual cases of discrimination from succeeding).

<sup>38</sup> For further discussion of Supreme Court decisions expanding sex discrimination, see *infra* notes 57–62 and accompanying text.

<sup>39</sup> For further discussion of how courts have attempted to limit reach of sex discrimination, see *infra* notes 68–77 and accompanying text.

<sup>40</sup> See *infra* note 76 (citing cases where courts try to draw a line between gender non-conformity and sexual orientation discrimination claims).

orientation discrimination does fall under Title VII.<sup>41</sup> In *Hively*, the Seventh Circuit used the EEOC's arguments to find that sexual orientation is protected under Title VII.<sup>42</sup> While a circuit court splitting decision, *Hively* followed suit with a growing trend of district court cases and with the EEOC's opinion on the issue.<sup>43</sup>

### ***A. Looking Back: The Historical Debate on Interpreting Sex Discrimination***

Under Title VII, employers cannot discriminate on the basis of race, color, religion, sex, or national origin.<sup>44</sup> However, when Title VII was enacted, its focus was on race discrimination.<sup>45</sup> In fact, sex as a protected class was added to the bill days before it passed as an attempt to thwart its passing.<sup>46</sup> Thus, there was little

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<sup>41</sup> For further discussion of EEOC's opinions on sexual orientation discrimination, see *infra* notes 82–89 and accompanying text.

<sup>42</sup> See Part IV *infra* notes 99–181 and accompanying text for discussion of *Hively* opinion.

<sup>43</sup> See *Boutillier v. Hartford Pub. Schs.*, 221 F. Supp. 3d 255, 267–68 (D. Conn. 2016) (holding that plaintiff has Title VII claim under associational discrimination and thinks sexual orientation cannot be separated from sex); see, e.g., *U.S. EEOC v. Scott Med. Health Ctr., P.C.*, 217 F. Supp. 3d 834, 839 (W.D. Pa. 2016) (holding that sex discrimination prohibits discrimination based on sexual orientation because when asking question “whether, but for Mr. Baxley’s sex, would he have been subjected to this discrimination or harassment,” the answer is no); *Winstead v. Lafayette Cnty. Bd. Of Comm’rs*, 197 F. Supp. 3d 1334, 1343–46 (N.D. Fla. 2016) (determining that while sexual orientation discrimination is not necessarily sex discrimination under EEOC’s argument that sexual orientation cannot be understood without reference to sex, it is necessarily sex discrimination under gender stereotype discrimination). *But cf. infra* notes 82–89 and accompanying text for EEOC’s reasoning.

<sup>44</sup> See *supra* note 10 (quoting relevant language of Title VII).

<sup>45</sup> See *Franklin*, *supra* note 2, at 1334 (depicting EEOC’s focus on preparing for race discrimination cases, but that EEOC was caught off guard when more than a third of claims were about sex discrimination).

<sup>46</sup> See *id.* at 1317–18 (noting that the proposal to add “sex” to Title VII was made at last minute, and there was very little discussion on the matter); see generally 110 Cong. Rec. 2577 (1964) (noting that when Rep. Smith recommended adding “sex” to Title VII, the legislative debate was almost over which has been understood as a last-ditch attempt to stop bill). The

to no discussion about what sex discrimination claims would entail.<sup>47</sup> Regardless, after Title VII's enactment, there was significant debate regarding what kind of claims fell under sex discrimination.<sup>48</sup> Legislators, women's groups, politicians, and the EEOC all weighed in on what claims sex discrimination covered.<sup>49</sup> At the heart of this debate was the effect these claims would have on traditional sex and family roles.<sup>50</sup> This debate influenced how the EEOC and the courts applied the Title VII sex provision, with the EEOC eventually expanding sex discrimination to protect pregnancy discrimination and protective labor legislation, and with the courts developing jurisprudence that focused on normative judgments and stereotypes rather than an anti-classification approach i.e., determining discrimination based on categories not policy.<sup>51</sup>

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court in *Ulane* emphasized the fact that the term "sex" was added to Title VII one day before the House approved the statute in an attempt to stop it. *See Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984) (describing Title VII's legislative history and how Congress was concerned with race discrimination not sex discrimination).

<sup>47</sup> Compare Franklin, *supra* note 2, at 1318–19 (stating that "[t]he documentary record is meager: one afternoon of debate, no committee reports or legislative hearings."), with *Ulane*, 742 F.2d at 1085–86 (detailing the "total lack of legislative history supporting the sex amendment coupled with the circumstances of the amendment's adoption" as proof that "Congress had a narrow view of sex in mind"), and Eskridge, *supra* note 36, at 1489 (noting that Title VII does not define "discriminate" and that "Title VII was obviously not drafted with a coherent vision of discrimination in mind . . .").

<sup>48</sup> See generally Franklin, *supra* note 2, at 1319–54 (highlighting history of sex discrimination debate including legislator's opinions, airline's opinion, feminist's opinions, and courts' opinions during the years after Title VII's enactment).

<sup>49</sup> See *supra* note 48 and accompanying text for discussion of historical debate; see also Franklin, *supra* note 2, at 1345 (discussing the campaign by National Organization for Women to redefine sex discrimination).

<sup>50</sup> See Franklin, *supra* note 2, at 1322 (noting that legislators who opposed adding sex discrimination were afraid that it would regulate traditional sex and family roles).

<sup>51</sup> See *id.* at 1345 (discussing EEOC's 1972 guidelines which found that pregnancy discrimination was sex discrimination and guidelines which

Despite the ongoing debate into sex stereotypes and social roles, the “traditional” concept of sex discrimination primarily took hold in the Supreme Court case *Gen. Elec. Co. v. Gilbert*, wherein the Court held that pregnancy discrimination was not discrimination under Title VII because it did not divide men and women into separate groups.<sup>52</sup> Under this anti-classification approach, the way to determine if sex discrimination occurred is to test whether the practice separated employees into a male group or a female group, with no overlap.<sup>53</sup> If so, then there was sex discrimination.<sup>54</sup> After the *Gilbert* decision, there was little debate in the courts about how to interpret sex discrimination.<sup>55</sup> However, this “traditional” concept of sex discrimination does not reflect the decades of debate that occurred on what sex discrimination should cover.<sup>56</sup>

### ***B. Inching Forward: Supreme Court Expands Title VII***

Despite largely following the “traditional” anti-classification approach, the Supreme Court expanded the meaning

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found that state protective laws violated Title VII); *see also id.* at 1354–57 (analyzing cases where courts used comparative method but were actually relying on normative judgment and social issues). *Compare* Phillips v. Martin Marietta Corp, 411 F.2d 1, 4 (5th Cir. 1969) (upholding policy that barred mothers, but not fathers, with preschool-age children because of “the differences between the normal relationships of working fathers and working mothers to their preschool-age children.”), *with* Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1198 (7th Cir. 1971) (asserting that Title VII is supposed to prevent discrimination “resulting from sex stereotypes” and to “eliminate...irrational impediments to job opportunities and enjoyment which have plagued women in the past.”).

<sup>52</sup> *General Elec. Co. v. Gilbert*, 429 U.S. 125 at 134 (1976); *see* Franklin, *supra* note 2, at 1353 (citing to *Gilbert*’s holding).

<sup>53</sup> *See supra* note 29 for Franklin’s and Balkin & Siegal’s definition of anti-classification.

<sup>54</sup> For *Gilbert*’s reasoning, *see supra* note 52 and accompanying text.

<sup>55</sup> *See* Franklin, *supra* note 2, at 1311 (noting that the “traditional concept” of sex discrimination “continues to exert a regulative influence over the law” and makes plaintiffs identify comparators).

<sup>56</sup> *See id.* at 1329–47 (summarizing different arguments about what sex discrimination covered).

of sex discrimination to include more than the “traditional” meaning as exemplified in *Ulane v. Eastern Airlines, Inc.*, which held that “it is unlawful to discriminate against women because they are women and against men because they are men,” with sex meaning biologically female or male.<sup>57</sup> The Court determined that sexual harassment, same-sex harassment, and actuarial assumptions on longevity based on sex are all forms of sex discrimination.<sup>58</sup> Regardless of the strict anti-classification approach, in *Price Waterhouse*, the Court found that Title VII prohibits sex stereotyping.<sup>59</sup> There a woman was fired, in part, because of her aggressive characteristics that some of the partners viewed as unfeminine.<sup>60</sup> She was told to dress and act more femininely in order to enhance her chances of promotion.<sup>61</sup> The

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<sup>57</sup> *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984).

<sup>58</sup> *See Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80–82 (1998) (holding that sexual harassment discrimination extends to same-sex harassment and that the harasser does not need to be homosexual, but rather the harasser is motivated by hostility to presence of victim’s sex in workplace); *see also Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989) (plurality opinion) (holding that sex discrimination includes failure to conform to gender stereotypes); *see also Meritor Sav. Bank, FSB v. Vinson* 477 U.S. 57, 73 (1986) (holding that sex discrimination includes sexual harassment); *see also Los Angeles, Dep’t of Water and Power v. Manhart*, 435 U.S. 702, 715 (1978) (holding that sex discrimination reaches discrimination based on actuarial assumptions about a person’s longevity).

<sup>59</sup> *See Price Waterhouse*, 490 U.S. at 250 (plurality opinion) (asserting that “[i]n saying that gender played a motivating part in an employment decision, we mean that, if we asked the employer at the moment of the decision what its reasons were . . . one of those reasons would be that the applicant or employee was a woman. In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.”).

<sup>60</sup> For the facts of *Price Waterhouse*, *see infra* note 61.

<sup>61</sup> *See Price Waterhouse*, 490 U.S. at 235 (plurality opinion) (recounting that one of the partners recommended that she “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry”). Other partners also used gendered language in her evaluations. *See id.* (describing her as “macho” and recommending that she take “a course in charm school”); *see also id.* (suggesting that she

Court found that this type of behavior falls under sex discrimination because “an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.”<sup>62</sup>

### ***C. Getting Closer: Supreme Court’s Understanding of Sexual Orientation in Constitutional Context***

The Supreme Court has also decided sexual orientation issues in other legal contexts, and, in recent years, the Court has expanded gay people’s rights.<sup>63</sup> In *Lawrence v. Texas*, the Court found that a state statute, the Defense Against Marriage Act, criminalizing homosexual intimacy violated the Due Process Clause.<sup>64</sup> In addition, the Court held that the statute violated Due Process because its definition of spouse excluded same-sex partners.<sup>65</sup> Most notably, same-sex couples now have the right to marry.<sup>66</sup> According to the Supreme Court, the laws in these cases

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“overcompensated for being a woman” and criticizing her use of profanity which was viewed as more shocking coming from a lady).

<sup>62</sup> *Id.* at 288. *See also id.* (“An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not.”).

<sup>63</sup> *See Obergefell v. Hodges*, 135 S.Ct. 2584, 2604 (2015) (holding that 14th Amendment protected right to marry as fundamental liberty right); *see, e.g., United States v. Windsor*, 570 U.S. 744, 770 (2013) (finding that the portion of Defense of Marriage Act that excluded same-sex partners from “spouse” definition violated Due Process and Equal Protection Clauses); *Lawrence v. Texas* 539 U.S. 558, 578 (2003) (holding that Texas statute criminalizing homosexual sex violated Due Process Clause).

<sup>64</sup> *Lawrence v. Texas*, 539 U.S. 558, 585 (2003) (holding that “a law branding one class of persons as criminal solely based on the State’s moral disapproval of that class and the conduct associated with that class runs contrary to the values of the Constitution and the Equal Protection Clause, under any standard of review.”).

<sup>65</sup> *See Windsor*, 570 U.S. at 770 (finding that the portion of Defense of Marriage Act that excluded same-sex partners from “spouse” definition violated Due Process and Equal Protection Clauses).

<sup>66</sup> *See Obergefell*, 135 S.Ct. at 2604 (noting that “[t]hese considerations lead to the conclusion that the right to marry is a fundamental right inherent in

created inequality because they prevented same-sex couples from enjoying the same rights as heterosexual couples.<sup>67</sup>

***D. Looking Back: Is Sexual Orientation a Stereotype?:  
Circuit Courts' Confusion Between Stereotypes and  
Sexual Orientation***

Other courts have struggled and continue to struggle with distinguishing between sexual orientation discrimination and sex stereotyping claims.<sup>68</sup> While courts recognize this difficulty, their attempts to draw a line in the sand have created more confusion as to what type of actions are discriminatory.<sup>69</sup> For many courts, the

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the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty.”).

<sup>67</sup> See *id.* at 2604 (stating that “[t]here is no difference between same- and opposite-sex couples with respect to this principle. Yet by virtue of their exclusion from that institution, same-sex couples are denied the constellation of benefits that the States have linked to marriage. This harm results in more than just material burdens. Same-sex couples are consigned to an instability many opposite-sex couples would deem intolerable in their own lives. As the State itself makes marriage all the more precious by the significance it attaches to it, exclusion from that status has the effect of teaching that gays and lesbians are unequal in important respects. It demeans gays and lesbians for the State to lock them out of a central institution of the Nation’s society. Same-sex couples, too, may aspire to the transcendent purposes of marriage and seek fulfillment in its highest meaning.”).

<sup>68</sup> For a further discussion of the confusion courts have experienced in parsing out the two claims, see *infra* notes 69–76 and accompanying text.

<sup>69</sup> See *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 291 (3rd Cir. 2009) (“The line between sexual orientation discrimination and discrimination based on sex can be difficult to draw.”). Courts have tried various ways to tease apart the two concepts. See *Hively v. Ivy Tech. Cmty. Coll. of Ind.*, 830 F.3d 698, 705 (7th Cir. 2016) (noting that some courts disallow claims where sexual orientation and gender non-conformity are together, some bar all claims from gay/lesbian employees, and others try to separate two types of claims to focus only on gender non-conformity allegations), *rev’d and remanded*, 853 F.3d 339 (7th Cir. 2017); accord *Soucek*, *supra* note 22, at 716 (illustrating that courts have created legal landscape where plaintiffs



distinguishing factor is how the claim itself is presented.<sup>70</sup> If a claim provides facts that highlight a person's perceivable gender non-conformity behavior,<sup>71</sup> then it is a sex stereotyping case and the person's sexual orientation is not relevant to the legal argument.<sup>72</sup> Courts have identified characteristics such as how one

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who "look gay" have claims under Title VII while those who are not perceived to be homosexual but are known to be so rarely have claims).

<sup>70</sup> See *infra* notes 72–75 and accompanying text (indicating that claims that highlight sexual orientation facts fail while claims that highlight perceivable sex stereotype facts are more likely to proceed).

<sup>71</sup> See *supra* note 16 for definition of sex stereotyping. Certain courts use the phrase "gender non-conformity" as opposed to "sex stereotyping," but, for the purposes of this note, they indicate the same situation.

<sup>72</sup> Compare *Prowel*, 579 F.3d at 292 ("Prowel was harassed because he did not conform to his employer's vision of how a man should look, speak, and act – rather than harassment based solely on his sexual orientation. To be sure, the District Court correctly noted that the record is replete with evidence of harassment motivated by Prowel's sexual orientation. Thus, it is possible that the harassment Prowel alleges was because of his sexual orientation, not his effeminacy. Nevertheless, this does not vitiate the possibility that Prowel was also harassed for his failure to conform to gender stereotypes."). In *Prowel*, the plaintiff described himself as having "a high voice and did not curse; was very well-groomed; wore what others would consider dressy clothes; was neat; filed his nails instead of ripping them off with a utility knife; crossed his legs and had a tendency to shake his foot 'the way a woman would sit'; walked and carried himself in an effeminate manner; drove a clean car; had a rainbow decal on the trunk of his car; talked about things like art, music, interior design, and decor; and pushed the buttons on the nail encoder with 'pizzazz.'" *Id.* at 287, with *Nichols v. Azteca Rest. Enters.*, 256 F.3d 864, 874 (9th Cir. 2001) ("At its essence, the systematic abuse directed at Sanchez reflected a belief that Sanchez did not act as a man should act. Sanchez was attacked for walking and carrying his tray "like a woman" -- i.e., for having feminine mannerisms. Sanchez was derided for not having sexual intercourse with a waitress who was his friend. Sanchez's male co-workers and one of his supervisors repeatedly reminded Sanchez that he did not conform to their gender-based stereotypes, referring to him as "she" and "her." And, the most vulgar name-calling directed at Sanchez was cast in female terms. We conclude that this verbal abuse was closely linked to gender."), and *Reed v. S. Bend Nights, Inc.*, 128 F. Supp. 3d 996, 998 (E.D. Mich. 2015) (illustrating that certain facts such as that plaintiff's employer thought "being gay was disgusting" and that she did not "feel comfortable with [plaintiff's] sexuality" support non-actionable

talks, walks, and dresses as indicative of non-conforming behavior.<sup>73</sup> On the other hand, if a claim only states that discrimination occurred because of the individual's sexual orientation, then it is a sexual orientation case and not actionable.<sup>74</sup> Some courts even refuse to look at gender non-conformity cases when sexual orientation is a factor because they do not want to try and distinguish the two claims.<sup>75</sup> Despite some courts recognizing

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sexual orientation claim, while facts like “she acted too manly,” “dressed more like a male than a female,” and had a “little more mannish” demeanor support gender non-conformity claim).

<sup>73</sup> See *supra* note 23 for description of gay characteristics. See also *supra* note 72 for facts highlighting gay characteristics.

<sup>74</sup> Compare *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 264 (3d Cir. 2001) (holding that plaintiff can only demonstrate same-sex sexual harassment by showing that harassers were motivated by sexual desire, did not approve of men in the workplace/job, or harassed because of plaintiff's failure to conform to sex stereotypes). Plaintiff's claim only alleged facts that he was discriminated because of his sexual orientation and, thus, the court granted summary judgment for the defendant. *Id.* at 265, and *Hamm v. Weyauwega Milk Prods.*, 332 F.3d 1058, 1065 (7th Cir. 2003) (upholding grant of summary judgment in defendant's favor because “even when construing all facts and drawing all reasonable inferences in Hamm's favor and considering Hamm's coworkers' conduct relating to his job performance in conjunction with their comments regarding his sexual orientation in order to form the fullest picture, Hamm has failed to make a sufficient showing that he was harassed because of his sex.”), with *Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc.*, 224 F.3d 701, 703 (7th Cir. 2000) (affirming magistrate judge's grant of defendant's motion for judgment as a matter of law because plaintiff's sexual harassment claim was about his sexual orientation). The harasser lisped at plaintiff, flipped his wrists, and made gay jokes. *Id.*, and *Johnson v. Hondo, Inc.*, 125 F.3d 408, 412 (7th Cir. 1997) (finding that gay slurs were inadequate to sustain a gender non-conformity claim where plaintiff did not provide evidence that he failed to conform to stereotypes).

<sup>75</sup> See *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 764 (6th Cir. 2006) (dismissing gender non-conformity claim because it recognized that this would open door to sexual orientation claims because “[i]n all likelihood, any discrimination based on sexual orientation would be actionable under a sex stereotyping theory if this claim is allowed to stand, as all homosexuals, by definition, fail to conform to traditional gender norms in their sexual practices.”); *cf. Simonton v. Runyon*, 232 F.3d 33, 37 (2d Cir. 2000)

claims under gender non-conformity, all of the other circuits have held that sexual orientation claims do not fall under Title VII.<sup>76</sup> This difference between the circuit courts' Title VII approaches and the Supreme Court's approach to sexual orientation adds to the confusing legal landscape where "a person can be married on Saturday and then fired on Monday for just that act."<sup>77</sup>

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(holding that plaintiff cannot bring successful gender non-conformity claim because "Simonton does not offer direct comparative evidence about how the alleged harasser treated members of both sexes in [his] mixed-sex workplace, and does not allege a basis for inferring gender-based animus, we are unable to infer that the alleged conduct would not have been directed at a woman.") (internal quotations omitted).

<sup>76</sup> See, e.g., *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999) (holding that it is settled law that Title VII does not protect sexual orientation discrimination); *Dawson v. Bumble & Bumble*, 398 F.3d 211, 217 (2d Cir. 2005) (recognizing that a plaintiff cannot bring sexual orientation discrimination claim under Title VII); *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 293 (stating that the plaintiff's claim was a repackaging of sexual orientation claim which is not allowed under Title VII); *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 143 (4th Cir. 1996) (couching holding in terms of same-sex harassment not sexual orientation discrimination); *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979) (stating that employment discharge because employee is gay is not prohibited under Title VII); *Kalich v. AT&T Mobility, LLC*, 679 F.3d 464, 471 (6th Cir. 2012) (holding that harassment based on sexual orientation is not cognizable claim); *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989) (stating that Title VII does not prohibit discrimination against gay persons); *De Santis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327, 329 (9th Cir. 1979) (concluding that Title VII should not be extended to include sexual preference); *Medina v. Income Support Div.*, 413 F.3d 1131, 1135 (10th Cir. 2005) (holding that Title VII's protections do not extend to cover sexual orientation); *Fredette v. BVP Mgmt. Assocs.*, 112 F.3d 1503, 1510 (11th Cir. 1997) (stating that discrimination because of sexual orientation is not actionable); see also *Evans v. Ga. Reg'l Hosp.*, 850 F.3d 1248, 1257 (11th Cir. 2017) (affirming sexual orientation discrimination case dismissal because of the court's binding precedent).

<sup>77</sup> *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 830 F.3d 698, 714 (7th Cir. 2016), *rev'd and remanded*, 853 F.3d 339 (7th Cir. 2017).

### *E. Seventh Circuit's Reasoning Before Hively*

Before *Hively*, the Seventh Circuit held that Title VII did not provide a remedy for sexual orientation discrimination.<sup>78</sup> However, the Seventh Circuit did recognize the possibility for a gay person to bring a gender non-conformity claim.<sup>79</sup> Regardless, the court did not allow gay persons to “bootstrap” their sexual orientation discrimination claims into sex discrimination claims.<sup>80</sup> Thus, the court held to the “traditional” concept of sex discrimination.<sup>81</sup>

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<sup>78</sup> See *Hamm*, 332 F.3d at 1062 (holding that a gay plaintiff failed to show harassment based on sex and that coworkers’ actions were based on the plaintiff’s work performance and sexual orientation); see, e.g., *Hamner*, 224 F.3d at 707 (holding that a gay plaintiff did not have a claim because harassment was based on sexual orientation); *Spearman v. Ford Motor Co.*, 231 F.3d 1080, 1087 (7th Cir. 2000) (finding that a gay plaintiff did not have sex discrimination case because employer did not treat him differently than female employees).

<sup>79</sup> See *Spearman*, 231 F.3d at 1085 (recognizing that because of *Price Waterhouse*, individuals can bring evidence of stereotyping and harassment but that this evidence must prove sex discrimination); cf. *Doe v. City of Belleville*, 119 F.3d 563 (7th Cir. 1997), (holding that a gay plaintiff had a Title VII claim because “a man who is harassed because his voice is soft, his physique is slight, his hair is long, or because in some other respect he exhibits his masculinity in a way that does not meet his coworker’s idea of how men are supposed to appear and behave, is harassed ‘because of’ his sex.”) cert. granted and vacated, 523 U.S. 1001 (1998).

<sup>80</sup> For factual situations that failed to satisfy gender non-conformity claim, see *supra* note 78.

<sup>81</sup> See *supra* note 78 for Seventh Circuit cases holding to *Ulane* reasoning; see also *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1087 (7th Cir. 1984) (asserting that sex means “biological male or biological female” and that any other definition would have to come from Congress). Thus, the court determined that Congress intended “sex” to be understood as the “traditional concept of sex.” *Id.* at 1085. For an argument that *Hively* itself still conforms to the “traditional” concept, see generally Brian Soucek, *Hively’s Self-Induced Blindness*, 127 YALE L.J.F. 115 (2017) (arguing that all of *Hively* opinions focused on form, remaining blind to sex discrimination substance).

### *F. The EEOC's Response to Courts' Conflicting Views*

A month after *Obergefell v. Hodges*, where the Supreme Court held that the right to marry is a fundamental right, and, thus, same-sex couples could not be deprived of that right, the EEOC decided *Baldwin v. Foxx*, where a federal employee argued that his employer discriminated against him because he is gay.<sup>82</sup> The EEOC recognized the contradictory outcomes in the courts and decided that the distinction between sexual orientation discrimination and sex discrimination does not exist.<sup>83</sup> The EEOC determined that there are at least three ways that sexual orientation discrimination falls under sex discrimination: the comparative method, associational discrimination, and sex stereotypes.<sup>84</sup>

Under the comparative method, an employer discriminates when the treatment of the employee would not have occurred but for the employee's sex.<sup>85</sup> Under associational discrimination,<sup>86</sup> an

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<sup>82</sup> *Obergefell v. Hodges*, 135 S.Ct. 2584, 2602 (2015); *See Baldwin v. Foxx*, 2015 EEO PUB LEXIS 1905, \*3 (E.E.O.C. July 16, 2015) (alleging that the complainant was not selected for position because he is gay); *see also Obergefell*, 135 S.Ct. at 2604–05 (holding that same-sex couples may exercise the right to marry). *See generally* Rebecca Hanner White, *The EEOC, The Courts, and Employment Discrimination Policy: Recognizing the Agency's Leading Role in Statutory Interpretation*, 1995 UTAH L. REV. 51 (1995) (illustrating EEOC's struggle with interpretive authority because Title VII did not provide the EEOC with explicit interpretive authority).

<sup>83</sup> *See Baldwin* at \*13 (holding that "sexual orientation is inherently a sex-based consideration."). While the EEOC has held this, the Department of Justice, in *Zarda v. Altitude Express, Inc.*, 855 F.3d 76 (2d Cir. 2017), currently holds the opposing viewpoint. *See* Brief for the United States as Amicus Curiae at 1–2, *Zarda v. Altitude Express*, 855 F.3d 76 (2d Cir. 2017) (No. 15-3775), 2017 U.S. 2d Cir. Briefs LEXIS 5 (asserting that it is a settled matter of law that Title VII does not include sexual orientation discrimination).

<sup>84</sup> *See Baldwin* at \*27 (summarizing that an individual can bring sexual orientation claim under three approaches).

<sup>85</sup> *See id.* at \*13 (asserting that when acting based on an individual's sexual orientation, the employer necessarily takes into account an individual's sex

employer discriminates when the treatment is based on the sex of the person with whom the employee associates romantically.<sup>87</sup> Under sex stereotyping, an employer discriminates when the treatment is based on gender assumptions, with sexual orientation being one of those assumptions.<sup>88</sup> Thus, the EEOC held that sexual orientation discrimination is necessarily sex discrimination

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and gives example of comparing lesbian employee having photo of spouse on desk with male employee displaying female spouse photo).

<sup>86</sup> See *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (holding that the state prohibiting interracial marriage violated the principle of equality under 14th Amendment because it “requires that the freedom of choice to marry not be restricted by invidious racial discriminations”). The Supreme Court rejected the idea that the miscegenation laws were not discriminatory because they punish equally both the white and the African American participants in an interracial marriage. See *id.* at 10 (determining that equal application of the statute is not enough to support keeping miscegenation laws because the purpose of Fourteenth Amendment is to “eliminate all official state sources of invidious racial discrimination in the States”). Other circuits have also extended *Loving* to Title VII cases. Compare *Parr v. Woodmen of World Life Ins. Co.*, 791 F.2d 888, 892 (11th Cir. 1986) (holding that a white man married to a black woman who was denied employment had a claim under Title VII because “[i]t would be folly for this court to hold that a plaintiff cannot state a claim under Title VII for discrimination based on an interracial marriage because, had the plaintiff been a member of the spouse’s race, the plaintiff would still not have been hired.”), and *Holcomb v. Iona Coll.*, 521 F.3d 130, 132 (2d Cir. 2008) (determining that a white employee married to a black individual who was fired had claim under Title VII because “an employer may violate *Title VII* if it takes action against an employee because of the employee’s association with a person of another race.”), with *Drake v. Minn. Mining & Mfg. Co.*, 134 F.3d 878, 884 (7th Cir. 1998) (noting that the defendant conceded that an “employee can bring associational discrimination claim under Title VII”).

<sup>87</sup> See *Baldwin v. Foxx*, 2015 EEOPUB LEXIS 1905, \*17 (E.E.O.C. July 16, 2015) (taking someone’s sex into account and treating them differently because the employee associates with someone of same sex).

<sup>88</sup> See *id.* at \*13 (stating that “[d]iscrimination on the basis of sexual orientation is premised on sex-based assumptions, expectations, stereotypes, or norms”); see also *id.* at 22 (quoting *Centola v. Potter*, 183 F. Supp. 2d 403, 410 (D. Mass. 2002) (asserting that sexual orientation discrimination is “often, if not always, motivated by a desire to enforce heterosexually defined gender norms.”)).

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because sexual orientation is inherently a sex-based consideration and that gay/lesbian sexual orientation is the ultimate failure to conform to sex stereotypes.<sup>89</sup>

### III. THROUGH ROSE-COLORED GLASSES: HOW THE VARIOUS OPINIONS IN HIVELY APPROACHED THE INTERPRETATIVE TASK

In 2000, Kimberly Hively started teaching as a part-time, adjunct professor at Ivy Tech Community College in South Bend, Indiana.<sup>90</sup> Between 2009 and 2014, she applied to at least six full-time positions at the college, but failed to receive any of them.<sup>91</sup> In July 2014, the college did not renew her part-time contract.<sup>92</sup> On December 13, 2013, Hively filed a pro se charge with the EEOC, arguing that Ivy Tech refused to hire her for the full-time positions or to renew her contract because of her status as an openly lesbian woman.<sup>93</sup>

After exhausting the procedural requirements available to her through the EEOC, she filed a complaint in the District Court for the Northern District of Indiana.<sup>94</sup> At the district court level,

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<sup>89</sup> See *Baldwin*, at \*13 (holding that “[i]ndeed, we conclude that sexual orientation is inherently a ‘sex-based consideration,’ and an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII.”).

<sup>90</sup> See *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 341 (7th Cir. 2017) (stating Hively’s occupation and time at Ivy Tech Community College).

<sup>91</sup> See *id.* (describing Hively’s attempts to procure full-time position).

<sup>92</sup> See *id.* (stating that “in July 2014, her part-time contract was not renewed.”).

<sup>93</sup> See *id.* (depicting how Hively filed with EEOC). Her pro se charge only stated that she had been discriminated against because of her sexual orientation. See *id.* (citing pro se charge which stated that “I have applied for several positions at IVY TECH, fulltime, in the last 5 years. I believe I am being blocked from fulltime employment without just cause. I believe I am being discriminated against based on my sexual orientation. I believe I have been discriminated against and that my rights under *Title VII of the Civil Rights Act of 1964* were violated.”).

<sup>94</sup> See *id.* (recounting that Hively received a right-to-sue letter from EEOC, which allowed her to sue in federal court). Her complaint provided more facts on which she based her claim. See *Hively v. Ivy Tech Cmty. Coll. of*

Ivy Tech filed a 12(b)(6) motion, arguing that sexual orientation is not a protected class under Title VII.<sup>95</sup> The court granted the motion and dismissed the case with prejudice.<sup>96</sup> Hively appealed, and, although the Seventh Circuit Court of Appeals affirmed, the court provided an in-depth analysis of circuit precedent and the EEOC's opinion in *Baldwin*.<sup>97</sup> After Hively filed a brief requesting a rehearing en banc, a majority of judges in regular active service voted to rehear the case en banc because of this issue's importance and to bring the law into conformity with the Supreme Court's guidance.<sup>98</sup>

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Ind., 830 F.3d 698, 699 (7th Cir. 2016) (stating that the complaint alleged that "although she had the necessary qualifications for full-time employment and had never received a negative evaluation, the college refused to even to interview her for any of the six full-time positions for which she applied between 2009 and 2014 . . ."), *rev'd and remanded*, 853 F.3d 339 (7th Cir. 2017).

<sup>95</sup> See *Hively*, 853 F.3d at 341 (recounting the defendant's argument that "sexual orientation is not a protected class under Title VII" and the district court's decision to grant defendant's motion to dismiss under Fed. R. Civ. Pro. 12(b)(6)); see generally FED. R. CIV. PRO. 12(b)(6) ("failure to state a claim upon which relief can be granted"). In a Rule 12(b)(6) motion, the court must view the facts in the light most favorable to the non-moving party, i.e., Hively. See *Hively*, 853 F.3d at 345 (noting that the court must look at the facts in the light most favorable to Hively).

<sup>96</sup> See *Hively*, 853 F.3d at 341 (noting that "relying on a line of this court's cases exemplified by *Hamner v. St. Vincent Hosp. and Health Care Ctr., Inc.*, 224 F.3d 701 (7th Cir. 2000), the district court granted Ivy Tech's motion and dismissed Hively's case with prejudice.").

<sup>97</sup> See *id.* (affirming the district court's decision); see also *Hively*, 830 F.3d at 709 (holding that while distinguishing between a sex stereotyping claim and a sexual orientation claim is difficult and can lead to contradictory results, the distinction is not impossible). The panel did consider the EEOC's position but was unwilling to overturn precedent. See *id.* at 702–703 (discussing the EEOC's arguments in *Baldwin*). Moreover, the panel believed that only the Supreme Court or new legislation could make sexual orientation a class under Title VII. See *id.* at 718 (determining that the Supreme Court or Congress were the only available avenues of change).

<sup>98</sup> See *Hively*, 853 F.3d at 343 (noting the importance of the issue and recognizing the power of the full court of appeals to overrule earlier decisions); see also Petition for Rehearing and Rehearing En Banc of



The Seventh Circuit Court of Appeals, sitting en banc, reversed the district court's decision and remanded it for further proceedings, holding that discrimination based on sexual orientation is discrimination based on sex as stated in Title VII of the Civil Rights Act of 1964.<sup>99</sup> The four opinions in *Hively* each focused on determining a particular framework for statutory interpretation and then utilized that framework to determine what sex discrimination means.<sup>100</sup> Interestingly, each opinion utilizes a different interpretative approach that leads to a different response to what sex discrimination means.<sup>101</sup> The majority focused on the EEOC's arguments and the Supreme Court's approach to sexual orientation in the legal landscape.<sup>102</sup> Judge Posner, in his concurrence, posited a somewhat radical interpretive approach, wherein the court has the power to update old statutes so as to render them applicable to today's legal issues.<sup>103</sup> Judge Flaum provides a logically clear and simple approach: one cannot think

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Plaintiff at 1, *Hively v. Ivy Tech. Cmty. Coll. of Ind.*, 853 F.3d 339 (7th Cir. 2017) (No. 15-1720) (requesting rehearing en banc).

<sup>99</sup> See *Hively*, 853 F.3d at 351–52 (overruling the previous line of Seventh Circuit cases and holding that it is impossible to discriminate based on sexual orientation without discriminating based on sex); see also *id.* at 345 (stating that under 12(b)(6) motion, the court reviews facts in the light most favorable to the non-moving party).

<sup>100</sup> For discussion of each opinions' interpretative method and its application, see *infra* notes 106–181.

<sup>101</sup> See *Hively*, 853 F.3d at 343 (asserting that the court is not amending statute but rather determining what discrimination based on sex means, which is a question of statutory interpretation). Compare *id.* at 343–44 (determining that when a statute is not plain on its face, the judiciary must look to broader context and recognize that “statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils”); with *id.* at 352 (Posner, J., concurring) (stating that there are three types of interpretation and he uses judicial interpretive updating); and *id.* at 360 (Sykes, J., dissenting) (asserting that the judicial role is to interpret “statutory language as a reasonable person would have understood it at the time of enactment.”).

<sup>102</sup> For further discussion of the majority's argument, see *infra* notes 106–141 and accompanying text.

<sup>103</sup> For further discussion of Judge Posner's concurring opinion, see *infra* notes 142–158 and accompanying text.

about sexual orientation without taking the individual's sex into account.<sup>104</sup> Finally, the dissent focused on precedent and the idea that sex and sexual orientation are distinct categories.<sup>105</sup>

***A. Following in the EEOC's Footsteps: Majority Finds Sexual Orientation in Sex Discrimination***

The majority found that sexual orientation is a type of sex discrimination.<sup>106</sup> It viewed itself as having the authority and responsibility of bringing the Seventh Circuit in line with the Supreme Court's guidance on sexual orientation.<sup>107</sup> The majority opinion, written by Chief Judge Wood, began its analysis by noting that the court was not amending the statute but was rather only interpreting what it means to discriminate because of a person's sex.<sup>108</sup> For the majority, statutory interpretation begins with deciding whether the statute is plain on its face; if so, there is no need to look at secondary sources.<sup>109</sup> If not, one can look to the broader context of the statute, particularly the context at the time

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<sup>104</sup> For further discussion of Judge Flaum's concurring opinion, see *infra* notes 159–166 and accompanying text.

<sup>105</sup> For further discussion of Judge Sykes's dissenting opinion, see *infra* notes 167–181 and accompanying text.

<sup>106</sup> See *Hively*, 853 F.3d at 351 (asserting the “common-sense reality that it is actually impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex, persuade us that the time has come to overrule our previous cases that have endeavored to find and observe that line.”).

<sup>107</sup> See *id.* at 343 (noting that “[i]n light of the importance of the issue, and recognizing the power of the full court to overrule earlier decisions and to bring our law into conformity with the Supreme Court's guidance, a majority of the judges in regular active service voted to rehear this case en banc.”).

<sup>108</sup> See *id.* (asserting that the court was not amending Title VII, but was only interpreting the statute and the meaning of word “sex”).

<sup>109</sup> See *id.* (arguing that “[f]ew people would insist that there is a need to delve into secondary sources if the statute is plain on its face.”).

of enactment.<sup>110</sup> However, for the majority, the context is only uncontroversial when its meaning is consistent with the conventional wisdom at the time about the law's reach.<sup>111</sup> The majority determined that interpretation becomes much more difficult when the statutory language includes multiple interpretations and unintended consequences.<sup>112</sup> Thus, according to the majority, while legislative history can highlight that Congress has rejected certain interpretations, it is notoriously unreliable.<sup>113</sup>

Instead of focusing on legislative intent and the statute's meaning at the time of enactment, the majority relied on the logical reasoning in *Oncale v. Sundowner Offshore Servs., Inc.*, where the Court argued that statutes cover not only what Congress intended but also "reasonably comparable evils."<sup>114</sup> Thus, the *Hively* majority followed this interpretative approach, reasoning that "the fact that enacting Congress may not have anticipated a particular application of the law cannot stand in the way of provisions of the law that are not on the books."<sup>115</sup> In fact, the

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<sup>110</sup> *See id.* (determining that "[e]ven if it is not pellucid, the best source for disambiguation is the broader context of the statute that the legislature – in this case, Congress – passed.")

<sup>111</sup> *See id.* (concluding that interpreting statute is easy when its meaning conforms to context at time of enactment).

<sup>112</sup> *See id.* (arguing that interpreting statute becomes much harder when it extends to situations outside the context at time of enactment).

<sup>113</sup> *See id.* (noting that "[l]egislative history is notoriously malleable. Even worse is the temptation to try to divine the significance of unsuccessful legislative efforts to change the law."); *see also id.* (highlighting that Congress could have decided to not include sexual orientation for various other reasons).

<sup>114</sup> *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75 (1998); *see Hively*, 853 F.3d at 344 (explaining that "[o]ur interpretive task is guided instead by the Supreme Court's approach in the closely related case of *Oncale* . . ."); *see also id.* (quoting *Oncale*, which states that "statutory prohibitions often go beyond the principal evil to cover reasonably comparably evils, and it is ultimately the provisions of our laws rather than the principle concerns of our legislators by which we are governed."). For further discussion of *Oncale*, see *supra* note 58 and accompanying text.

<sup>115</sup> *Hively*, 853 F.3d at 345 (asserting that the meaning of "sex" goes beyond what Congress intended and towards full scope of word).

majority noted the Supreme Court had already expanded Title VII to cover discriminatory situations such as sexual harassment, actuarial assumptions about a person's lifespan, and gender non-conformity.<sup>116</sup>

The majority also looked to Supreme Court decisions that deal more generally with sexual orientation discrimination in order to understand the current legal landscape of sexual orientation issues.<sup>117</sup> The majority found that the Supreme Court, in recent years, has consistently protected individuals discriminated against because of their sexual orientation.<sup>118</sup> From these cases, the majority opined that there is a growing trend towards protecting gay persons and recognized that, in doing so, society can provide greater equality.<sup>119</sup>

The majority then analyzed plaintiff Hively's two proposed approaches to including sexual orientation discrimination under sex discrimination: the comparative method and associational

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<sup>116</sup> See *id.* (listing Supreme Court cases that have expanded the types of claims under Title VII). For further discussion of these cases, see *supra* note 58.

<sup>117</sup> See *id.* at 349 (asserting that “[t]oday’s decision must be understood against the backdrop of the Supreme Court’s decisions, not only in the field of employment discrimination, but also in the area of broader discrimination on the basis of sexual orientation.”). See *generally id.* at 349–50 (detailing other sexual orientation Supreme Court cases in Part III of opinion).

<sup>118</sup> Compare *Lawrence v. Texas*, 539 U.S. 558, 585 (2003) (O’Connor, J., concurring) (holding that the Texas criminal statute violated the liberty of the Due Process Clause because it criminalized homosexual intimacy); with *United States v. Windsor*, 570 U.S. 744, 769–70 (2013) (finding that the portion of Defense of Marriage Act that excluded same-sex partners from the “spouse” definition violated the Due Process and Equal Protection Clauses); and *Obergefell v. Hodges*, 135 S.Ct. 2584, 2604 (2015) (holding that the 14th Amendment protected the right to marry as a fundamental liberty right).

<sup>119</sup> See *Hively*, 853 F.3d at 350–51 (quoting *Obergefell* to emphasize the Court’s commitment to sexual orientation equality); see *Obergefell*, 135 S.Ct. at 2604 (“[i]t is now clear that the challenged laws burden the liberty of same-sex couples, and it must be further acknowledged that they abridge central precepts of equality.”).

discrimination.<sup>120</sup> The majority agreed with these approaches and found them to be valid examples of how sexual orientation discrimination can fall under Title VII.<sup>121</sup> In addition, the court evaluated the comparative method with the sex stereotyping reasoning in *Price Waterhouse* and determined that sexual orientation claims can also be brought as sex stereotyping claims.<sup>122</sup>

### i. The Comparative Method

Under the comparative method, the only variable that changes in the scenario is the person's sex to determine if this change creates a change in the employer's actions.<sup>123</sup> Thus, the majority asked whether the college would have treated Hively differently if she was a man, but everything else stayed the same, notably her partner's sex.<sup>124</sup> If so, then the employer was discriminating based on sex.<sup>125</sup> In Hively's case, the court compared Hively as a lesbian with Hively as a heterosexual man and determined that she would not have been fired if she were a

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<sup>120</sup> See *Hively*, 853 F.3d at 345 (noting that "Hively offers two approaches in support of her contention that "sex discrimination" includes discrimination on the basis of sexual orientation.").

<sup>121</sup> See *id.* at 344 (arguing for two approaches); see also *id.* at 345 (concluding that, under the comparative method, the defendant is discriminating against Hively because she is a woman); see also *id.* at 349 (illustrating that the associational discrimination theory also works).

<sup>122</sup> *Id.* at 346 (determining that there is no line between gender non-conformity claims and sexual orientation claims).

<sup>123</sup> See *id.* at 345 (stating that the comparative method is where the court "attempt[s] to isolate the significance of the plaintiff's sex to the employer's decision: has she described a situation in which, holding all other things constant and changing only her sex, she would have been treated the same way?").

<sup>124</sup> See *id.* (noting that the hypothetical would make Hively a male heterosexual).

<sup>125</sup> See *id.* (stating that "Ivy Tech is disadvantaging her *because she is a woman*"). The majority blends together the gender non-conformity issue with the comparative method. See also *id.* at 346 (stating that "Hively represents the ultimate case of failure to conform to the female stereotype").

man.<sup>126</sup> Thus, the majority concluded that “Ivy Tech is disadvantaging her because she is a woman.”<sup>127</sup>

## ii. Gender Non-Conformity

While the majority started with the comparative method, it ended up moving from the comparative method to a more nuanced method that focused on gender non-conformity.<sup>128</sup> According to the majority, there is no difference between a gender non-conformity and a sexual orientation claim.<sup>129</sup> The court noted that attempting to draw a line between the two types of claims has created contradictory and somewhat absurd results in both the district and circuit courts.<sup>130</sup> A lesbian (and gay persons in general) represented the “ultimate case of failure to conform to the female stereotype.”<sup>131</sup> In both the situation where a woman was discriminated against for being too assertive and one where she was discriminated against for being a lesbian, the employer’s behavior necessarily had to take the victim’s biological sex into account.<sup>132</sup> The majority reasoned that being heterosexual is just

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<sup>126</sup> See *id.* at 345–46 (using the comparative method to determine if sex discrimination occurred).

<sup>127</sup> *Id.* at 345 (emphasis omitted).

<sup>128</sup> See *id.* at 346 (deciding that there is no distinction between a gender non-conformity claim and a sexual orientation claim); see, e.g., *id.* (arguing that, in gender non-conformity cases, employers were deciding what behaviors/characteristics were acceptable in the job and that sexual orientation is one such characteristic).

<sup>129</sup> See *supra* note 128 for information on majority’s response to gender non-conformity. For further discussion of gender non-conformity and sexual orientation, see *infra* notes 131–135 and accompanying text.

<sup>130</sup> See *Hively*, 853 F.3d at 350 (noting that to remove sex from sexual orientation creates contradictory results); see *supra* notes 68–77 and accompanying text for a discussion on the differing district court approaches.

<sup>131</sup> *Id.* at 346 (stating that “Hively represents the ultimate case of failure to conform to the female stereotype”).

<sup>132</sup> See *id.* (stating that sexual orientation discrimination is based on assumptions about the correct behavior for someone of particular sex); see also *id.* at 347 (“The discriminatory behavior does not exist without taking

one of the many sex stereotypes, i.e., where an employer assumes that the acceptable behavior of a woman is that she be attracted to men.<sup>133</sup> Even before *Price Waterhouse*, the Supreme Court and the Seventh Circuit had allowed claims where women were discriminated at work for resisting stereotypical roles.<sup>134</sup> Thus, the court concluded that sexual orientation is the ultimate failure to conform to sex stereotypes since the proper behavior is for Hively, as a woman, to be sexually attracted to men.<sup>135</sup>

### iii. Associational Discrimination

The majority found that the associational discrimination approach to sex discrimination also protected against sexual orientation discrimination.<sup>136</sup> Under an associational discrimination approach, the issue is whether the discrimination would occur if Hively's partner's sex was changed.<sup>137</sup> This

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the victim's biological sex . . . into account. Any discomfort, disapproval, or job decision based on the fact that the complainant – woman or man – dresses differently, speaks differently, or dates or marries a same-sex partner, is a reaction purely and simply based on sex.”)

<sup>133</sup> See *id.* at 346 (noting that, in the United States, heterosexuality is norm and, thus, any other sexuality is not normal).

<sup>134</sup> See *id.* (highlighting two circuit court cases where female stereotypical roles were at issue). Compare *Phillips v. Martin Marietta Corp.*, 400 U.S. 543, 544 (1971) (holding that an employer cannot refuse to hire women with pre-school age children who hires men with pre-school age children), with *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971) (striking down the employment regulation that required airline stewardesses to be unmarried).

<sup>135</sup> See *Hively*, 853 F.3d at 346 (stating that sexual orientation discrimination is founded on behavioral assumptions of what is “proper” for someone of particular sex).

<sup>136</sup> See *id.* at 349 (holding that associational discrimination applies to sex discrimination cases and applies in this case).

<sup>137</sup> See *id.* at 347 (stating that “[i]t is now accepted that a person who is discriminated against because of the protected characteristic of one with whom she associates is actually being disadvantaged because of her own traits.”); see also *id.* at 349 (noting that “if we were to change the sex of one partner in a lesbian relationship, the outcome would be different. This

approach comes from *Loving* and its line of cases where interracial couples were discriminated against.<sup>138</sup> While in those cases the claim was constitutional in nature, the majority argued that associational discrimination is also applicable under Title VII.<sup>139</sup> The majority then asserted that, since one can bring a race associational discrimination claim, then one can bring a sex associational discrimination claim because Title VII does not distinguish between the different discriminatory categories; thus, an argument made in race discrimination cases can be applied in sex discrimination cases.<sup>140</sup> Therefore, the majority held that sexual orientation discrimination can be considered a sex associational discrimination claim because “[i]f we were to change the sex of one partner in a lesbian relationship, the outcome would be different” which “reveals that the discrimination rests on distinctions drawn according to sex.”<sup>141</sup>

***B. Get with the Times: Judge Posner’s Concurring Opinion Arguing for Judiciary to Update Statutes***

According to Judge Posner in his concurring opinion, judges should reevaluate the meaning of statutes like Title VII so

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reveals that the discrimination rests on distinctions drawn according to sex.”).

<sup>138</sup> See *id.* at 347 (highlighting the line of cases that extended discrimination protection to both partners). For further discussion of *Loving*, see *supra* note 86.

<sup>139</sup> See *Hively*, 853 F.3d at 347–48 (citing to circuits that have extended race associational discrimination to Title VII cases). For further discussion of cases that extended associational discrimination to Title VII, see *supra* note 86.

<sup>140</sup> See *Hively*, 853 F.3d at 349 (noting that Title VII does not draw distinction between different types of discrimination, and, therefore, the courts can use race arguments in sex context); see also *Price Waterhouse v. Hopkins*, 490 U.S. 228, 244, n.9 (1989) (plurality opinion) (determining that Title VII treats each of the categories exactly the same); cf. *Hively*, 853 F.3d at 349 (asserting that “[i]f we were to change the sex of one partner in a lesbian relationship, the outcome would be different. This reveals that the discrimination rests on distinctions drawn according to sex.”).

<sup>141</sup> *Hively*, 853 F.3d at 349.



that the statutes remain relevant.<sup>142</sup> Judge Posner argued that there are three ways to interpret statutes.<sup>143</sup> The last of these options is “judicial interpretive updating,” which he defined as, when the judiciary gives new meaning to a statute so that the statute has modern significance.<sup>144</sup>

For Judge Posner, judicial interpretive updating only comes into play when a lengthy amount of time has passed since the statute’s enactment.<sup>145</sup> Judge Posner highlighted various other situations where “[s]tatutes and constitutional provisions frequently are interpreted on the basis of present need and present understanding rather than the original meaning.”<sup>146</sup> Judge Posner drew on the interpretative method in *Missouri v. Holland*, where Justice Holmes stated that “[w]e must consider what this country has become in deciding what that amendment has reserved.”<sup>147</sup>

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<sup>142</sup> See *id.* at 355 (Posner, J., concurring) (emphasizing that the failure to adopt judicial updating would render Title VII anachronistic).

<sup>143</sup> See *id.* at 352 (Posner, J., concurring) (indicating that there are three approaches to statutory interpretation: the original meaning of the statute as understood by legislators, unexpressed intent, and the new meaning that applies to today’s situations). The first is the meaning intended by the legislators in connection with how the word is interpreted in everyday language. See *id.* (describing this approach as the most conventional and easy to determine). The second is interpretation by unexpressed intent where, for example, an ordinance states “no vehicles in the park” but it is understood that this does not apply to an ambulance. See *id.* (quoting William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 59–60 (1765) where Blackstone argued that “where words bear either none, or a very absurd signification, if literally understood, we must a little deviate from the received sense of them.”).

<sup>144</sup> See *Hively*, 853 F.3d at 352 (Posner, J., concurring) (alleging that Title VII “invites an interpretation that will update it to the present, a present that differs markedly from the era in which the Act was enacted.”).

<sup>145</sup> See *id.* at 353 (Posner, J., concurring) (emphasizing that this approach “presupposes a lengthy interval between enactment and (re)interpretation.”).

<sup>146</sup> *Id.* at 352 (Posner, J., concurring).

<sup>147</sup> See *Missouri v. Holland*, 252 U.S. 416, 433–34 (1920) (arguing that “[t]he case before us must be considered in the light of our whole experience and note merely in that of what was said a hundred years ago . . . . We must consider what this country has become in deciding what the amendment has reserved.”).

In Judge Posner's opinion, society's understanding of sex has changed dramatically.<sup>148</sup> As he stated, "today 'sex' has a broader meaning than the genitalia you're born with."<sup>149</sup> He then discussed how society's understanding of sexual orientation has changed, noting that, today, we understand that homosexuality<sup>150</sup> is "biological and innate, not a choice."<sup>151</sup> Thus, being discriminated against for being a lesbian and being discriminated against for being a woman are analogous situations because there is no choice.<sup>152</sup> For Judge Posner, there was no difference between the two situations because "homosexuality is nothing worse than failing to fulfill stereotypical gender roles."<sup>153</sup> Judge Posner admitted that this is a loose interpretation of "sex" but views this as justifiable because of the social policy to protect gay persons.<sup>154</sup> Thus, today's use of the word "sex" connotes both gender and sexual orientation.<sup>155</sup> According to Judge Posner, this can be viewed as the natural progression of ideas from sexual harassment to gender non-conformity to sexual orientation.<sup>156</sup> He

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<sup>148</sup> See *Hively*, 853 F.3d at 354 (Posner, J., concurring) (providing a brief history of how society's understanding of sex has changed, notably how sex no longer is just about the biological genitalia with which one is born).

<sup>149</sup> *Id.* (Posner, J., concurring).

<sup>150</sup> I utilize the term "homosexuality" here because Judge Posner used it within his opinion. See *id.* at 355 (Posner, J., concurring) (utilizing the term "homosexuality" to describe lesbian and gay male sexual orientation).

<sup>151</sup> *Id.* at 354 (Posner, J., concurring); see also *id.* (Posner, J., concurring) (noting the developments in the scientific understanding of sexual orientation).

<sup>152</sup> See *id.* at 355–56 (Posner, J., concurring) (arguing that the type of discrimination is analogous).

<sup>153</sup> *Id.* at 355 (Posner, J., concurring).

<sup>154</sup> See *id.* (Posner, J., concurring) (declaring that the broader interpretation of "sex" is necessary because gay persons need to be protected since they are now considered to be "normal in the ways that count").

<sup>155</sup> See *id.* at 353 (Posner, J., concurring) (concluding this to be true).

<sup>156</sup> See *id.* at 355 (Posner, J., concurring) (depicting how it took time for society to appreciate that sexual harassment was form of sex discrimination, it has taken even longer to view gender non-conformity as sex discrimination, and has taken still longer to realize that sexual orientation is sex discrimination).

was, however, reluctant to rely on the majority's use of *Oncale* and *Loving*, arguing that *Oncale* was still too limiting to allow sexual orientation discrimination, and *Loving* was inapposite because it concerned race and constitutional issues.<sup>157</sup> He concluded by highlighting that the judiciary frequently performs judicial interpretative updating so as to lessen the burden on the legislative branch to update statutes, and that it is the judiciary's role to utilize the social changes, since Title VII's enactment, in order to update the statute to modern times.<sup>158</sup>

**C. "SEX"ual Orientation: Judge Flaum's Concurrence  
Argues Sexual Orientation Necessarily Involves Thinking  
About Person's Sex**

Judge Flaum agreed with the majority's discussion of the comparative method, gender non-conformity, and associational discrimination.<sup>159</sup> However, he approached interpreting "sex" in a different manner.<sup>160</sup> He argued that "discrimination against an employee on the basis of their homosexuality is necessarily, in part, discrimination based on their sex" because homosexuality is the sexual attraction to persons of the same sex.<sup>161</sup> Thus, one has

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<sup>157</sup> See *id.* at 355–56 (Posner, J., concurring) (commenting that *Oncale* does not really help to expand the interpretive framework and *Loving* is a constitutional case on race).

<sup>158</sup> See *id.* at 357 (Posner, J., concurring) (asserting that the courts can update statutes so that the entire burden is not placed on Congress, and recognizing that judges understand the meaning of "sex" differently today because they live in a different time with a different culture).

<sup>159</sup> See *id.* (Flaum, J., concurring) (joining Parts I and II of the majority opinion).

<sup>160</sup> See generally *id.* at 358 (Flaum, J., concurring) (arguing that sex is fundamental to thinking about sexual orientation).

<sup>161</sup> See *id.* (Flaum, J., concurring) (citing to various dictionary definitions of "homosexual" including *Homosexual*, MERRIAM-WEBSTER DICTIONARY ONLINE, <http://www.merriam-webster.com/dictionary/homosexual>; *Homosexual*, BLACK'S LAW DICTIONARY (10th ed. 2014); and *Homosexual*, OXFORD ENGLISH DICTIONARY (5th ed. 1964)). *Homosexual* is also defined as "of, relating to, or characterized by sexual desire for a person of the same

to take into account an individual's sex in order to understand the individual's sexual orientation.<sup>162</sup> Judge Flaum separated the discriminatory action into discrimination because of "(A) the employee's sex, and (B) their sexual attraction to individuals of the same sex."<sup>163</sup>

According to Judge Flaum, since sex is evidentially a factor, the issue is whether Title VII requires the discrimination to occur solely because of sex.<sup>164</sup> The statute itself states that the enumerated trait only has to be a "motivating factor for an employment practice, even though other factors also motivated the practice."<sup>165</sup> Therefore, all that Hively must show to bring a Title VII claim is that the discrimination occurred because she is a woman who is sexually attracted to women.<sup>166</sup>

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*sex. Homosexual*, BLACK'S LAW DICTIONARY (10th ed. 2014) (emphasis added).

<sup>162</sup> See *Hively*, 853 F.3d at 358 (Flaum, J., concurring) (asserting that "[o]ne cannot consider a person's homosexuality without also accounting for their sex: doing so would render 'same' and 'own' meaningless.").

<sup>163</sup> *Id.* (Flaum, J., concurring).

<sup>164</sup> See *id.* (Flaum, J., concurring) (raising the question "[d]oes Title VII's text require a plaintiff to show that an employer discriminated against them *solely* 'because of' an enumerated trait?").

<sup>165</sup> Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(m) (2017) (stating that there is an unlawful employment practice when sex is "a motivating factor for any employment practice, even though other factors also motivated the practice"); see also *Price Waterhouse v. Hopkins*, 490 U.S. 228, 241-42 (1989) (determining that 'because of' does not mean 'solely because of,' and, thus, there can be mixture of legitimate and illegitimate reasons for employment practice).

<sup>166</sup> See *Hively*, 853 F.3d at 359 (Flaum, J., concurring) (holding that this is all the employee must show to bring a claim).

***D. I Know Sex When I See It: Judge Sykes's Categorical Approach to Sex and Sexual Orientation***

Like the majority, the dissent viewed the issue as one of statutory interpretation.<sup>167</sup> However, Judge Sykes believed the appropriate interpretive mode was to ask how a “reasonable person would have understood it when it was adopted.”<sup>168</sup> Therefore, the judiciary could not instill new meaning into the statute or update it to current conditions.<sup>169</sup> In addition, precluding sexual orientation from sex discrimination has been broadly accepted in the federal courts for many years.<sup>170</sup> Moreover, Congress has refused to include sexual orientation in Title VII, while adding it into other statutes.<sup>171</sup> While there is debate in the public sphere, Judge Sykes believed that this debate has no place in statutory interpretation, which is an objective inquiry.<sup>172</sup>

Using the comparative method, the dissent argued that the correct comparator is a gay male not a heterosexual one.<sup>173</sup> Under

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<sup>167</sup> *See id.* at 360 (Sykes, J., dissenting) (noting the “question before the en banc court is one of statutory interpretation.”).

<sup>168</sup> *Id.* (Sykes, J., dissenting); *see also id.* at 362 (Sykes, J., dissenting) (asserting that the original public meaning decides statutory meaning and asks the rhetorical question of “[i]s it even remotely plausible that in 1964, when *Title VII* was adopted, a reasonable persons competent in the English language would have understood that a law banning employment discrimination ‘because of sex’ also banned discrimination because of sexual orientation? The answer is no, of course not.”). She adopted this position in large part because of the Constitution’s requirement of bicameralism and presentment. *See id.* at 360 (Sykes, J., dissenting) (emphasizing that statutory modification by the judiciary circumvents bicameralism and presentment, and claiming that this is why the textualist approach is best).

<sup>169</sup> *Id.* at 360 (Sykes, J., dissenting).

<sup>170</sup> *Id.* at 361 (Sykes, J., dissenting).

<sup>171</sup> *See id.* at 363–64 (Sykes, J., dissenting) (highlighting other statutes that do mention sexual orientation discrimination so as to argue that Congress did not intend to protect sexual orientation in Title VII).

<sup>172</sup> *See id.* at 361 (Sykes, J., dissenting) (remarking that society’s understanding of gay rights has changed dramatically since Title VII was adopted).

<sup>173</sup> *Id.* at 366–67 (Sykes, J., dissenting).

the majority's comparator, both sex and sexual orientation change, not just the sex variable; thus, in Hively's scenario, she not only becomes a man but also a heterosexual.<sup>174</sup> For Judge Sykes, sexual orientation and sex are two distinct categories that are unrelated to each other.<sup>175</sup>

Under the associational discrimination approach, the dissent argued that the miscegenation laws' purpose was to support white supremacy.<sup>176</sup> Since sexual orientation discrimination does not aim to maintain the superiority of one sex, the discrimination is not inherently sexist.<sup>177</sup> Thus, the *Loving* line of cases does not support merging sex and sexual orientation.<sup>178</sup>

For the gender non-conformity approach, Judge Sykes asserted that *Price Waterhouse* did not create a separate theory to prove sex discrimination.<sup>179</sup> Rather, sex stereotyping can be evidence of sex discrimination, but there must still be proof that the employer relied on the employee's sex.<sup>180</sup> For the dissent, sexual orientation is not a sex-specific stereotype, and, thus, is unrelated to sex stereotyping.<sup>181</sup>

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<sup>174</sup> *Id.* at 345. *But cf. id.* at 365 (Sykes, J., dissenting) (emphasizing that comparative method is a technique for evaluating evidence of plaintiff's allegation, not for evaluating legal questions).

<sup>175</sup> *Id.* at 363 (Sykes, J., dissenting); *see id.* at 365 (stating that "[s]exism . . . homophobia are separate kinds of prejudice that classify people in distinct ways based on different immutable characteristics.").

<sup>176</sup> *See id.* at 368 (Sykes, J., dissenting) (arguing that antimiscegenation laws are "premised on invidious ideas about white superiority and use racial classifications toward the end of racial purity and white supremacy . . . . No one argues that sexual-orientation discrimination aims to promote or perpetuate the supremacy of one sex.").

<sup>177</sup> *Id.* (Sykes, J., dissenting).

<sup>178</sup> *Id.* (Sykes, J., dissenting).

<sup>179</sup> *Id.* at 369 (Sykes, J., dissenting).

<sup>180</sup> *See id.* (Sykes, J., dissenting) (quoting *Price Waterhouse* wherein court stated that employer had to actually rely on gender when doing employment practice).

<sup>181</sup> *See id.* at 370 (Sykes, J., dissenting) (emphasizing that "[s]exual orientation discrimination does not classify people according to invidious or idiosyncratic *male* or *female* stereotypes. It does not spring from a sex-specific bias at all.").

#### IV. OURS IS NOT TO REASON WHY: CRITIQUING *HIVELY*'S ANTI-CLASSIFICATION APPROACH AS PROMOTING RATHER THAN PREVENTING SEX DISCRIMINATION

Instead of encouraging the dynamic interpretation that occurred before *Gilbert*, *Hively* clung to the “traditional” concept, preventing the much-needed discussion of how to interpret sex discrimination in today’s social context from occurring.<sup>182</sup> Under the anti-classification approach, the courts lost the dynamic approach based on social policy and gender stereotypes.<sup>183</sup> Moreover, they forgot how important the struggle to understand sex discrimination was to promoting changes in the normative roles of men and women.<sup>184</sup>

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<sup>182</sup> See Franklin, *supra* note 2, at 1366–70 (describing how even though *Gilbert* was overruled by Congress amending Title VII to include pregnancy discrimination, the *Gilbert* test lives on).

<sup>183</sup> See *id.* at 1316 (asserting that, in *Gilbert*, “[t]alk of deference to the legislature and fidelity to tradition replaced discussion of the need to preserve the traditional family and women’s role within it.”); see also Soucek, *supra* note 81, at 116 (arguing that *Hively* decision resulted in “a gender-blind approach to equality closer to that of the conservative anti-classificationists on the Supreme Court than to the Justices who have thus far voted for LGBT rights.”).

<sup>184</sup> See Franklin, *supra* note 2, at 1348 (noting that this approach emerged during the debate about airline stewardess employment practices); see also *id.* at 1313–14 (summarizing argument that sex discrimination’s meaning was uncertain during 60s and 70s and multiple entities voiced various opinions on issue). Compare *id.* at 1352 (noting that airlines used anti-classification approach to limit the reach of sex discrimination so that they could regulate the age and marital status of stewardesses, but the approach was couched in homemaking and childrearing terms not formal logic), with *id.* at 1356 (citing the EEOC’s determination that airline policies were discriminatory because they were based on assumptions about married women that limited women’s access to the workplace). But see *id.* at 1359 (highlighting that *Gilbert* rejected analysis based on normative considerations and determined that it was bound to traditional concept since the court is interpreter not creator of law).

By forgetting that history, the *Hively* opinion attempted to fit sexual orientation into the anti-classification form.<sup>185</sup> In doing so, it created a logically inconsistent reasoning wherein the court produced the outcome it wanted, i.e., sexual orientation discrimination under sex discrimination, but used the formalist framework.<sup>186</sup> Thus, *Hively* is not as groundbreaking as originally thought because all of the opinions utilized the same anti-classification framework that historically prevented sex discrimination claims that failed the comparator test from being brought, including sexual orientation discrimination claims.<sup>187</sup>

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<sup>185</sup> See Soucek, *supra* note 81, at 115 (arguing that *Hively* opinions “show how little judges’ views on statutory interpretation matter when they are blind to substance” and noting that the opinions fail to cite to one gender theorist, gay rights advocate, etc.); see also Franklin, *supra* note 2 at 1312 (determining that the anti-classification approach to sex discrimination, i.e., the “traditional concept” of sex discrimination is a legal fiction that does not represent the interpretive history of the term).

<sup>186</sup> See Soucek, *supra* note 81, at 118 (showing that the majority’s comparative method fails to satisfy formal logic because it is unclear who the comparator should be and a heterosexual male comparator does not separate groups by sex). See generally *id.* at 115 (depicting how *Hively* opinions used the anti-classification approach, and yet failed to meet its logical requirements). For further discussion of how the majority relies on but ultimately fails the comparator test, see *infra* notes 191–203 and accompanying text. See also Soucek, *supra* note 81, at 118–19 (noting that the gender non-conformity argument also fails the formal logic approach because both men and women violate heterosexual norms). For further discussion of gender non-conformity issues in *Hively*, see *infra* notes 207–221 and accompanying text. See also *id.* at 119 (highlighting that the associational discrimination approach is really just a type of comparator argument and thus also fails the anti-classification argument). For further discussion of associational discrimination approach in *Hively*, see *infra* notes 204–206 and accompanying text.

<sup>187</sup> See Soucek, *supra* note 81, at 116 (concluding that the *Hively* opinions are blind to sex discrimination’s normative principles and that they promulgate the anti-classification approach); see also Goldberg, *supra* note 37, at 733–39 (noting that the use of comparator test has constricted the idea of discrimination and explains three discrimination theories that have not gained “jurisprudential traction because the problems they identify cannot, in effect, be seen by courts”); cf. Soucek, *supra* note 22, at 768–70 (detailing rhetoric of blindness in antidiscrimination law and how only



**A. Using the Gilbert Hermeneutic Approach: Comparative and Associational Discrimination Methods**

In attempting to conform to the anti-classification approach, the Seventh Circuit tried to produce a result that promotes our society's changing views on sex, gender, and sexual orientation, while also trying to base that result in formal logic.<sup>188</sup> Couching the decision within the traditionally accepted framework of interpretation allowed the court to retain judicial legitimacy through the use of formal logic that identifies clear and definable categories, while avoiding a result based on complex sociological judgments.<sup>189</sup> The court's attempt to force a new result out of an old framework creates logical fallacies, as seen with the comparator and associational discrimination method.<sup>190</sup>

The comparative method is the straight application of the "traditional" concept of sex discrimination, i.e., the anti-classification approach.<sup>191</sup> This method attempts to separate individuals into mutually exclusive male/female groups.<sup>192</sup> The

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protecting perceivable gay persons strengthens the conception that gay persons are "different").

<sup>188</sup> See Soucek, *supra* note 81, at 116 (concluding that, while *Hively's* result is a success for LGBT rights, its reasoning failed to note important changes in scholarship and advocacy that led to court's decision); see also *infra* notes 191–206 and accompanying text for discussion of *Hively's* use of anti-classification approach.

<sup>189</sup> Goldberg, *supra* note 37, at 740.

<sup>190</sup> See *infra* notes 191–206 and accompanying text for argument that *Hively* approaches create logically inconsistent results.

<sup>191</sup> Compare Franklin, *supra* note 2, at 1311 (arguing that, under the traditional concept of sex discrimination, "[c]ourts hold that only by demonstrating that such comparators were not subject to the same adverse treatment can plaintiffs prove it was their biological sex that triggered the alleged discrimination."), with Eskridge, *supra* note 36, at 1479 (highlighting that the traditional statutory interpretative approach focuses on Congressional intent at time of enactment and that "[p]revailing approaches to statutory interpretation treat statutes as static texts.").

<sup>192</sup> See *supra* notes 123–127 and accompanying text for a discussion of majority's comparative method. Compare *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 345 (7th Cir. 2017) (depicting the comparative method as holding all other variables equal except sex), with Franklin, *supra*

majority believed that the correct comparator to a lesbian was a heterosexual male.<sup>193</sup> In doing so, Ivy Tech's sexual orientation discrimination does separate Hively into the female group, and, thus, sex discrimination occurred.<sup>194</sup>

However, in the end, Judge Sykes is the only judge whose reasoning accurately corresponds to the conclusion.<sup>195</sup> The dissent argued that the correct comparator to a lesbian is a gay male because only the person's sex can change.<sup>196</sup> For Judge Sykes, the formal logic approach dictates that there is only sex discrimination if the discriminatory practice separates employees along biological sex lines.<sup>197</sup> Since sexual orientation is a sex-neutral trait, men and women are not separated into two separate groups, and, therefore, sex discrimination has not occurred.<sup>198</sup> The dissent's comparator falls more squarely within how courts have used the anti-classification approach, especially since it reinforces traditional concepts of sex.<sup>199</sup>

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note 2, at 1311 (noting that plaintiffs needed to produce opposite comparators, i.e., "individuals who are similarly situated to themselves in all salient respects aside from biological sex" in order to bring a successful sex discrimination claim).

<sup>193</sup> See *supra* note 126 and accompanying text (stating that the correct comparator is a heterosexual male).

<sup>194</sup> See *supra* note 127 and accompanying text (asserting that the discriminatory action did separate on the basis of sex).

<sup>195</sup> Compare *supra* notes 173–175 and accompanying text (determining, according to dissent, that the correct comparator is a gay man not heterosexual one), with Franklin, *supra* note 2, at 1363 (announcing that the traditional concept of sex discrimination applies only to situations where practices divide men and women into exclusive groups and that *Gilbert* "constructed a history and a pedigree for this idea, suggesting that courts had no choice but to interpret Title VII's prohibitions of sex discrimination in a narrow, formalistic, manner if they wished to remain faithful to the American legal tradition.").

<sup>196</sup> See *supra* note 173 and accompanying text.

<sup>197</sup> For further discussion of the dissent's argument, see *supra* notes 167–181 and accompanying text.

<sup>198</sup> *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 370 (7th Cir. 2017) (Sykes, J., dissenting).

<sup>199</sup> See Franklin, *supra* note 2, at 1380 (concluding that the traditional concept of sex discrimination continues to serve its original purpose, i.e.,

Regardless, there is nothing to suggest that the majority's comparator is not equally valid.<sup>200</sup> Rather, the majority failed to provide an argument for why a heterosexual man was a more apt comparator than a gay man.<sup>201</sup> Instead of explaining its reasoning, the majority immediately shifted to discussing gender-nonconformity.<sup>202</sup> Thus, under the anti-classification approach, as understood in *Gilbert*, sexual orientation discrimination is not sex discrimination, and the majority did not provide any explanation as to why the comparator's sexual orientation should change.<sup>203</sup>

Under the associational discrimination theory, the majority made a very similar argument to the comparative method because it still separated the partners into mutually exclusive sex-specific groups.<sup>204</sup> Consequently, the logic is the same as under the comparator method but with the added dimension that the partner, not the employee, is a member of the protected class.<sup>205</sup> So, just as

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limiting sex discrimination's reach, but that the loss of normative arguments prevents ongoing debate into sex discrimination's interpretation). *Compare supra* notes 173–175 and accompanying text (determining, according to the dissent, that the correct comparator is a gay man not heterosexual one), *with* *General Elec. Co. v. Gilbert*, 429 U.S. 125, 136 (1976) (arguing that there is no applicable comparator for there is “no question of excluding a disease or disability comparable in all other respects to covered diseases or disabilities and yet confined to the members of one race or sex.”).

<sup>200</sup> Soucek, *supra* note 81, at 118.

<sup>201</sup> See *Hively*, 853 F.3d at 345 (concluding that the comparator is a heterosexual man without explaining why sex and sexual orientation may change). For Soucek's thoughts on determining the comparator, see *supra* note 200 and accompanying text.

<sup>202</sup> See *Hively*, 853 F.3d at 346 (shifting to gender non-conformity perspective while still discussing the comparative method); see also Soucek, *supra* note 81, at 118–19 (alleging that the majority includes two more reasons for including sexual orientation discrimination because the comparative method lacks weight).

<sup>203</sup> For further discussion of this conclusion, see *supra* notes 191–202.

<sup>204</sup> See Soucek, *supra* note 81, at 119 (emphasizing that the associational discrimination approach still requires a comparator that divides employees into two mutually exclusive groups along sex lines). See generally *supra* notes 136–141 for majority's approach to associational discrimination.

<sup>205</sup> Soucek, *supra* note 81, at 119. Under race associational discrimination, the white partner in an interracial marriage is discriminated against for having an African-American partner. Thus, it is discriminatory against the

with the comparative method, the comparator could either be a gay or heterosexual man, which still leaves the problem of who is the correct comparator.<sup>206</sup>

***B. Taking the Plunge: Sex Stereotyping/Gender Non-Conformity Approach as Potential New Framework***

To truly protect against sexual orientation discrimination, the court needed to discuss the development in societal conceptions of sexual orientation to a point where scholars now recognize the inherent connections between sexual orientation discrimination and sex discrimination.<sup>207</sup> The majority almost took the leap to view sex discrimination from a social logic perspective as opposed to a formal logic approach but failed to take the ultimate steps.<sup>208</sup> Following the dynamic statutory interpretation methodology, the majority recognized the need to look at the textual and historical aspects of the Title VII but found those perspectives did not provide a clear answer to defining sex discrimination.<sup>209</sup> The final step the court should have taken is to move towards an evolutive perspective wherein the court analyzes the statute in light of “its present context, especially the ways in

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white partner because, if he was black, then the discriminatory practice would not have occurred. *Cf. id.* (explaining that if partner had been black rather than white, then discrimination would not have occurred because it would not be interracial marriage).

<sup>206</sup> Compare *supra* notes 123–127 and accompanying text (discussing the majority’s comparator), with *supra* notes 173–175 and accompanying text (discussing the dissent’s comparator).

<sup>207</sup> Compare Soucek, *supra* note 81, at 121 (emphasizing that *Hively* mentioned no gender or queer theory scholarship which highlights the connection between sexual orientation discrimination and the subordination of women), with Franklin, *supra* note 2, at 1379–80 (noting it is legal fiction to think that Title VII could only be interpreted via the anti-classification approach and that any other approach would be judicial activism since anti-classification approach was used in order to reinforce traditional gender norms and sexual conventions).

<sup>208</sup> Soucek, *supra* note 81, at 125–26.

<sup>209</sup> See *supra* notes 108–113 and accompanying text (recounting the *Hively* majority’s reasoning).

which the societal and legal environment of the statute has materially changed over time.”<sup>210</sup> While the court almost took this final step in discussing gender non-conformity, the court still included the comparator and associational discrimination approaches as possible ways to include sexual orientation discrimination.<sup>211</sup> Moreover, the majority’s discussion of gender non-conformity was conclusory and decidedly lacking in analysis to back up the conclusions.<sup>212</sup>

The majority asserted that being a lesbian is the “ultimate case of failure to conform to the female stereotype,” and decided to erase the line between gender non-conformity and sexual orientation claims.<sup>213</sup> However, the court framed the female stereotype as “be straight,” which is a sex-neutral trait.<sup>214</sup> Thus, on its face, both gay men and lesbians can violate the gender norm of “be straight,” indicating that the trait would fail the comparator approach.<sup>215</sup> Instead of changing the framework to a dynamic approach, the majority chose to manipulate the anti-classification

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<sup>210</sup> Eskridge, *supra* note 36, at 1483.

<sup>211</sup> See *supra* notes 123–127 and notes 136–141 and accompanying text (determining that the comparator and associational discrimination approaches found sexual orientation discrimination was sex discrimination).

<sup>212</sup> See *supra* notes 128–135 and accompanying text for majority’s discussion of gender non-conformity. *But see* Soucek, *supra* note 81, at 116 (noting that the majority is blind to substance, i.e. gender and queer theory scholarship, which has led the majority to conclude that sexual orientation discrimination is a part of sex discrimination).

<sup>213</sup> *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 346 (7th Cir. 2017). For majority’s discussion of gender non-conformity, see *supra* notes 128–135 and accompanying text.

<sup>214</sup> *Hively*, 853 F.3d at 346; see also Soucek, *supra* note 81, at 118–19 (arguing that, since heterosexuality is a stereotype that can apply to both men and women, it is not a sex-specific trait); cf. *Hively*, 853 F.3d at 370 (Sykes, J., dissenting) (determining that “[s]exual orientation discrimination does not classify people according to invidious or idiosyncratic *male* or *female* stereotypes. It does not spring from a sex-specific bias at all.”).

<sup>215</sup> For discussion of how heterosexuality is not sex-specific, see *supra* note 214; see also note 29 for the definition of the anti-classification approach.

approach so that it worked with the majority's desire to include sexual orientation as sex discrimination.<sup>216</sup>

Judge Posner exhibited a willingness to change how courts approached sex discrimination but failed to provide sex discrimination with the necessary foundation in social logic.<sup>217</sup> He analogized Title VII with the Sherman Anti-Trust Act, which has been interpreted so as to conform with the relevant economic theories.<sup>218</sup> He used this analogy to promote updating Title VII but did not provide any guidance on what the new framework would be.<sup>219</sup> Instead of discussing possible frameworks grounded in gender and queer theory, he concluded that society now understands that gay persons are “normal in the ways that count.”<sup>220</sup> While his judicial interpretive updating could have brought social and normative arguments into interpreting sex discrimination, his reasoning, like that of the majority, concluded

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<sup>216</sup> See Soucek *supra* note 81, at 125 (arguing that the *Hively* opinions make the same errors as the textualist/originalist approach because it “fails to observe fully the social realities that give Title VII’s words their meaning.”); *cf.* Eskridge, *supra* note 36, at 1482 (arguing that “[i]nterpretation is not static, but dynamic. Interpretation is not an archeological discovery, but a dialectical creation. Interpretation is not mere exegesis to pinpoint historical meaning, but hermeneutics to apply that meaning to current problems and circumstances.”).

<sup>217</sup> See Soucek, *supra* note 81, at 126 (describing Judge Posner’s opinion as “candid and provocative,” but maintaining that it also exhibits “a blindness to the sex-specific ways that gender stereotypes involving sexual orientation actually operate in the contemporary world.”).

<sup>218</sup> *Hively*, 853 F.3d at 352 (Posner, J., concurring).

<sup>219</sup> See Soucek, *supra* note 81, at 128 (arguing that Judge Posner’s Title VII updated interpretation stems from his own change in attitude to sexual orientation).

<sup>220</sup> Compare *Hively*, 853 F.3d at 355 (Posner, J., concurring) (concluding that gay persons “play an essential role” in country and there is social interest in protecting them), with Soucek, *supra* note 81, at 127–28 (arguing that Judge Posner relies on his own personal changes in understanding sexual orientation as opposed to relying on scholars who study “the dynamics of sexual orientation, gender-based stereotyping, and subordination”).

that sexual orientation falls under sex discrimination but failed to tell us why.<sup>221</sup>

With judicial interpretive updating, Judge Posner needed to take the final step and provide his method with substance.<sup>222</sup> By engaging with social science theories on sex, gender, and sexual orientation, the court could take *Price Waterhouse* to its next natural progression: viewing sexual orientation discrimination as a form of sex stereotyping.<sup>223</sup> As one commentator on *Price Waterhouse* noted, the Court easily saw the connection between sex discrimination and the statements calling the female partner “too macho.”<sup>224</sup> What the Court failed to realize was why that link was easy to make.<sup>225</sup> It was easy to make because the justices

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<sup>221</sup> See Soucek, *supra* note 81, at 128 (commenting that Judge Posner did not stick to his analogy and should have looked “to those who have spent their careers studying the dynamics of sexual orientation, gender-based stereotyping, and subordination. But these are sources that Judge Posner, like his fellow judges in *Hively*, chose not to see.”).

<sup>222</sup> See Soucek, *supra* note 81, at 127–28 (arguing that Judge Posner utilizes his own autobiographical experiences to make conclusion that sexual orientation and sex are connected instead of utilizing sources that study “the dynamics of sexual orientation, gender-based stereotyping, and subordination”). Compare *Hively*, 853 F.3d at 353 (Posner, J., concurring) (noting that homosexuality was not a concern of legislatures at time of Title VII’s enactment and providing anecdotal evidence of his personal experiences stating that “[h]ad I been asked then whether I had ever met a male homosexual, I would have answered: probably not; had I been asked whether I had ever met a lesbian I would have answered ‘only in the pages of *A la recherche du temps perdu*’”), with Franklin, *supra* note 2, at 1379 (noting that Judge Posner did not think sex discrimination should expand to sexual orientation discrimination and that he did not think that Title VII creates “a federally protected right for male workers to wear nail polish and dresses and speak in falsetto and mince about in high heels” (quoting language from *Hamm v. Weyauwega Milk Prods., Inc.*, 332 F.3d 1058, 1066 (7th Cir. 2003))).

<sup>223</sup> See Soucek, *supra* note 81, at 128 (concluding that all of the judges in *Hively* chose not to engage with these types of sources).

<sup>224</sup> Goldberg, *supra* note 37, at 787.

<sup>225</sup> See *id.* (arguing that “there is nothing inherent in harassing acts and stereotyping statements in general that makes their underlying discriminatory intent fundamentally easier to unmask than the discriminatory intent that might underlie other types of adverse treatment.”)

shared a common context on the social meaning of those statements.<sup>226</sup> Therefore, what courts, including the Seventh Circuit, need to do is start delving into how our nation's conceptions on sex and sexual orientation have developed and changed.<sup>227</sup> By engaging in a sociological inquiry, the court can add substance to sex discrimination that provides an actual rationale for their decisions as opposed to conclusory statements that sexual orientation discrimination falls under sex discrimination.<sup>228</sup> Courts, understandably, are wary of engaging in this sort of inquiry because of charges that the courts are formulating their social views into legal rules.<sup>229</sup> One way to combat this judicial legitimacy issue is for courts to rely on experts in the fields of sex, gender, and sexual orientation to provide them with an updated social context.<sup>230</sup> While experts can create more power imbalances in court due to their high costs, their strategic use as advocates for viewing sexual orientation discrimination as a form of sex discrimination can shift courts' reliance on

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Instead, it is agreement (or presumed agreement) on the social meaning of those acts and statements, when considered through a contextual lens, that renders the cases easy for courts to decide.”)

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

<sup>227</sup> See Soucek, *supra* note 81, at 116 (highlighting that the *Hively* opinions do not mention any antidiscrimination or gender theorist, legal historian, or gay rights advocate, which ends up creating an opinion that offers “an originalism without history, a dynamic interpretation that lacks a limiting principle, and a textualism largely disengaged from the values Title VII’s text is best understood to promote”); see also Eskridge, *supra* note 36, at 1482–83 (positing that judges should recognize that interpretation is applying meaning to a current context and that, while textual and historical perspectives are important factors, how the social and legal environment has changed over time is also a factor).

<sup>228</sup> See Soucek, *supra* note 81, at 128 (determining that advocates need to highlight gender policing that links sexual orientation discrimination with sex discrimination); *cf.* Goldberg, *supra* note 37, at 740 (proposing that courts have favored the comparator approach because of judicial legitimacy issues, and, thus, courts refuse to make sociologically oriented inquiries).

<sup>229</sup> Goldberg, *supra* note 37, at 793.

<sup>230</sup> See *id.* at 797 (suggesting that using experts would legitimize court decisions and help courts themselves update their ability to discern discrimination).



comparators to a reliance on social science data.<sup>231</sup> In doing so, experts could periodically update the courts with developments in social science, but this would no longer be necessary for every case because courts would rely on the social science data.<sup>232</sup>

#### V. CURIUSER AND CURIUSER: *HIVELY'S IMPACT ON THE SEXUAL ORIENTATION DEBATE*

While *Hively* represents a shift in the sex discrimination debate, the conflicting opinions from both the judicial and executive branch create confusion for employers and employees about discrimination in the work place and uncertainty for the courts about how to identify sex discrimination.<sup>233</sup> *Hively* provided an answer to the issue of sexual orientation discrimination but did not provide an adequate framework in which to analyze future cases, creating future difficulty for the courts in how to apply the holding in other sexual orientation cases.<sup>234</sup> Moreover, sticking to the anti-classification framework

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<sup>231</sup> See generally *id.* at 798–800 (conceding some issues with using experts, but also recognizing potential middle ground where experts are necessary sporadically in order to update the judiciary on social science developments).

<sup>232</sup> Cf. *id.* at 800 (explaining how family responsibilities discrimination (FRD) advocates used experts, popular culture, and social science data to ease courts into seeing the link between family responsibilities and sex in order to reach point where link “can be seen easily and without any special training”).

<sup>233</sup> Blair Druhan Bullock, *What to Do with the Federal Government's Internally Inconsistent Interpretations of Title VII*, LEXOLOGY (Aug. 17, 2017), <https://www.lexology.com/library/detail.aspx?g=db7c183b-0f4b-46a7-8455-2abd064c4ed2>. See generally White, *supra* note 82 (illustrating the EEOC's struggle with interpretive authority and how the courts and executive branch enter into interpretive debate).

<sup>234</sup> See *supra* notes 182–221 and accompanying text for discussion of *Hively's* framework and its limitations. Compare Jessica Mason Pieklo, *Roberts Court Kicks the Can on Employment Discrimination Based on Sexual Orientation*, REWIRE (Dec. 12, 2017), <https://rewire.news/article/2017/12/12/roberts-court-kicks-can-employment-discrimination-sexual-orientation/> (reporting that Supreme Court declined to hear case of employment discrimination against lesbian and noting that

may prevent new potential types of sex discrimination claims from emerging.<sup>235</sup> Thus, courts will continue to use the traditional anti-classification framework that will prevent new understandings of sex discrimination from taking hold in the legal context.<sup>236</sup> In

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lower courts are split on sexual orientation discrimination), with Alison Frankel, *How Trump's DOJ's About-Face on LGBT Workplace Bias Could Backfire at SCOTUS*, REUTERS (Sept. 11, 2017), <https://uk.reuters.com/article/us-otc-lgbt/how-trump-dojs-about-face-on-lgbt-workplace-bias-could-backfire-at-scotus-idUKKCN1BM2DD> (reporting that LGBT group Lambda Legal hopes the Supreme Court will take up the issue because both the EEOC and Department of Justice enforce Title VII), Joanna L. Grossman & Anthony Michael Kreis, *Unsolicited Opinion: The Department of Justice Files Brief Urging Court to Block Rights for LGBT Employees*, JUSTIA (Aug. 1, 2017), <https://verdict.justia.com/2017/08/01/unsolicited-opinion-department-justice-files-brief-urging-court-block-rights-lgbt-employees> (reporting that Attorney General Sessions filed brief for *Zarda* arguing against sexual orientation claims under Title VII), Erin Mulvaney, *Government Agencies to Clash in Upcoming Case on Sexual Orientation*, THE NATIONAL LAW JOURNAL (Sept. 21, 2017), <http://www.nationallawjournal.com/id=1202798551263/Government-Agencies-To-Clash-In-Upcoming-Case-On-Sexual-Orientation> (noting that 2d Circuit will hear from both the EEOC and Department of Justice in *Zarda*), Brian Tashman, *6 Questions for Trump's EEOC Nominees: Will LGBT, Disability, and Women's Rights Be Protected?*, ACLU (Sept. 18, 2017), <https://www.aclu.org/blog/lgbt-rights/6-questions-trumps-eec-nominees-will-lgbt-disability-and-womens-rights-be> (recommending that senators ask nominees about whether sexual orientation discrimination is a form of sex discrimination).

<sup>235</sup> See Goldberg, *supra* note 37, at 812 (concluding that the comparator methodology “has foreclosed most discrimination claims and, further, shrunk the very idea of discrimination, both truncating traditional discrimination jurisprudence and all but guaranteeing that second-generation discrimination theories will not translate into law”).

<sup>236</sup> See Franklin, *supra* note 2, at 1315 (arguing that the Supreme Court adopted the anti-classification concept of sex discrimination which limited its scope and insulated from courts other employment regulations that maintained social stratification); cf. Allison E. Maue, *11th Circuit: Sexual Orientation is Not Actionable Under Title VII*, THE NATIONAL LAW REVIEW (March 30, 2017), <https://www.natlawreview.com/article/11th-circuit-sexual-orientation-discrimination-not-actionable-under-title-vii> (reporting

turn, discriminated individuals, under non-traditional types of sex discrimination, will have a low probability of success in court and the very meaning of sex discrimination will remain narrow and static.<sup>237</sup>

Regardless, with some courts protecting against sexual orientation discrimination, some states enacting their own sexual orientation discrimination laws, and the potential for the Supreme Court to weigh in on the issue, employers should start implementing employment practices that advocate against sexual orientation discrimination.<sup>238</sup> Various commentators suggest that employers should be proactive and adopt a “common denominator” approach, where employers provide all employees the same protections with specific policies addressing how employees should report discrimination and harassment.<sup>239</sup> Moreover, employees who wish to bring a valid sexual orientation

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that the 11th Circuit in *Evans v. Ga. Regional Hospital* held that sexual orientation is not actionable under Title VII because of binding precedent).

<sup>237</sup> Goldberg, *supra* note 37, at 734.

<sup>238</sup> See Druhan Bullock, *supra* note 233 (noting the different positions from the EEOC, DOJ, and courts while also highlighting that at least 20 states currently prohibit sexual orientation discrimination through state statutes).

<sup>239</sup> See Allison Waterfield, *Gender Transitioning in the Workplace: Employer Obligations and Best Practices*, BLOOMBERG BNA L. & EMP. BLOG (Dec. 13, 2017), <https://www.bna.com/gender-transitioning-workplace-b73014472559/> (recommending that employers give gender transitioning policies full weight as opposed to suggestions, respect privacy and confidentiality, work with employees on transition plans, create adequate recordkeeping documents, and designate someone as point of contact); see also Allison L. Goico & Hayley Geiler, *Supreme Court Leaves The Issue of Sexual Orientation Discrimination Unresolved*, THE NATIONAL LAW REVIEW (Dec. 12, 2017), <https://www.natlawreview.com/article/supreme-court-leaves-issue-sexual-orientation-discrimination-unresolved> (advising employers to stay up-to-date on applicable laws and to maintain policies that prohibit sexual orientation discrimination including mechanisms for reporting and investigation); cf. EEOC, *What You Should Know About EEOC and the Enforcement Protections or LGBT Workers*, EEOC NEWSROOM, [https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement\\_protections\\_lgbt\\_workers.cfm#training](https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm#training) (last visited April 7, 2018) (providing information on the relevant law as well as training, outreach, and resources for employers).

discrimination case should first look to see if their state has a separate statute covering sexual orientation discrimination.<sup>240</sup> If not, they should consider filing with the EEOC who will investigate the case and determine if there is cause to file the lawsuit.<sup>241</sup> However, the EEOC's position, while influential, is not entitled to deference in the federal courts.<sup>242</sup> As such, whether an employee is able to sustain a valid sex discrimination claim is dependent upon the circuit in which the complaint is filed.<sup>243</sup>

Using *Hively* as momentum, individuals are trying to overturn precedent in other circuits and are attempting to have the Supreme Court weigh in on the issue.<sup>244</sup> Notably, the Second Circuit in *Zarda v. Altitude Express*, where a skydiving instructor brought a Title VII claim against his employer alleging that he was fired because he was gay, recently became the second circuit court to determine that sexual orientation discrimination is a subset of sex discrimination.<sup>245</sup> Nonetheless, the Supreme Court has ultimately refused to hear arguments on the matter.<sup>246</sup> However, if

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<sup>240</sup> See EEOC, *supra* note 239 (explaining the process for protecting against sexual orientation discrimination including applicable laws and how the EEOC enforces Title VII).

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

<sup>242</sup> See Druhan Bullock, *supra* note 233 (explaining that federal courts are not required to follow EEOC's opinion and that federal courts are bound by their respective precedent).

<sup>243</sup> *Id.*

<sup>244</sup> See generally *Zarda v. Altitude Express, Inc.*, 855 F.3d 76 (2d Cir. 2017) (deciding that sexual orientation discrimination is not a form of sex discrimination because of precedent), *vacat'd & remanded*, 2018 WL 1040820 (2d Cir. Feb. 26, 2018).

<sup>245</sup> *Zarda*, 2018 WL 1040820, at \*20 (2d Cir. Feb. 26, 2018); see also Laura Lawless Robertson, *Title VII Bars Sexual Orientation Discrimination, Says US Second Circuit Court of Appeals*, THE NATIONAL LAW REVIEW (Feb. 26, 2018), <https://www.employmentlawworldview.com/title-vii-bars-sexual-orientation-discrimination-says-second-circuit-court-of-appeals-us/> (reporting on the 2nd Circuit's decision and explaining the court's three reasonings: (1) sex is necessarily factor of sexual orientation, (2) sexual orientation discrimination is based on gendered assumptions, and (3) sexual orientation discrimination is a form of associational discrimination).

<sup>246</sup> See Chris Johnson, *Supreme Court won't hear case seeking Title VII protection for gays*, WASH. BLADE (Dec. 11, 2017),

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other circuits continue to follow in the Seventh Circuit's footsteps, there will be an increasing need for the Supreme Court to step in.<sup>247</sup> Otherwise, employers will remain unsure of how to adequately comply with Title VII, especially for employers that operate within multiple jurisdictions.<sup>248</sup> With employers and employees unsure about the validity of their claims, courts and the EEOC will probable experience increased litigation.<sup>249</sup>

## VI. WHERE ARE WE NOW: STEPS TOWARDS UNDERSTANDING SEX DISCRIMINATION

Sex discrimination started off as a forum in which to debate concepts of sex, gender, and stereotypes, but the Supreme Court quickly cut off that debate, opting for a clear-cut "objective" approach, effectively silencing any development in what sex discrimination covered.<sup>250</sup> Regardless, the Supreme Court slowly added additional types of claims to sex discrimination.<sup>251</sup> In adding gender non-conformity as a potential avenue for sex discrimination, the Court opened the door to sexual orientation

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<http://www.washingtonblade.com/2017/12/11/supreme-court-wont-hear-case-seeking-title-vii-protection-for-gays/> (explaining that the Supreme Court denied writ of certiorari after the 11th Circuit held that sexual orientation did not fall under Title VII).

<sup>247</sup> See Robertson, *supra* note 245 (positing that the Supreme Court may be more open to hearing the issue now that three circuits have weighed in on the matter); see also Louis L. Chodoff et al., *The Split Deepens: 2nd Circuit Holds that Title VII Bans Sexual Orientation Discrimination*, THE NATIONAL LAW REVIEW (Feb. 28, 2018), <https://www.natlawreview.com/article/split-deepens-2nd-circuit-holds-title-vii-bans-sexual-orientation-discrimination> (arguing that the Supreme Court has more incentive to weigh in on the issue).

<sup>248</sup> See Robertson, *supra* note 245 (highlighting that employers need to review local laws to ensure their policies comport with them); see also *supra* note 239 (providing advice on what employers should do).

<sup>249</sup> See *supra* note 241 and accompanying text for discussion of what employees should do.

<sup>250</sup> See *supra* notes 44–56 and accompanying text for discussion of Title VII's historical debate on sex discrimination.

<sup>251</sup> See *supra* notes 57–62 and accompanying text for discussion of Supreme Court decisions on sex discrimination.

discrimination claims.<sup>252</sup> However, courts were quick to shut that door because these claims were in contention with how courts have traditionally approached sex discrimination.<sup>253</sup> The Seventh Circuit was the first circuit court to decide that sexual orientation discrimination was a form of sex discrimination, but the court still held onto the formalist approach that prevented developments in courts' understanding of what sex discrimination means.<sup>254</sup> Rather, the court should have relied on the gender non-conformity method and coupled it with developments in social science and in our nation's understanding of how sex and sexual orientation are connected.<sup>255</sup> In doing so, the court would have been able to provide a much more persuasive reasoning for their decision.<sup>256</sup> A reasoning that would supply other courts, including the Supreme Court, with the necessary arguments to hold that sexual orientation discrimination is, in fact, a form of sex discrimination.<sup>257</sup>

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<sup>252</sup> See *supra* notes 68–77 and accompanying text for discussion of how lower courts struggled with separating gender nonconformity and sexual orientation discrimination.

<sup>253</sup> See *supra* note 75 and accompanying text for discussion of courts refusing to listen to gender non-conformity cases if they involved a sexual orientation component.

<sup>254</sup> See *supra* notes 90–181 and accompanying text for discussion of *Hively* decision; see also *supra* notes 182–206 and accompanying text for discussion of how majority held onto the formalist approach.

<sup>255</sup> See *supra* notes 207–232 and accompanying text for argument that social science and the gender non-conformity method create a method that aligns with sexual orientation discrimination as a form of sex discrimination.

<sup>256</sup> See *supra* notes 222–232 and accompanying text for argument that court's analysis would have been more persuasive if it utilized different framework.

<sup>257</sup> See *supra* notes 233–249 and accompanying text for discussion of *Hively*'s impact on future cases.