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Protecting the People: Expanding Title VII's Protection Against Sex Discrimination to Sexual Orientation Discrimination

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PROTECTING THE PEOPLE: EXPANDING TITLE VII'S PROTECTION AGAINST SEX DISCRIMINATION TO SEXUAL ORIENTATION DISCRIMINATION

I. Introduction

It is legal in many states to discriminate in the workplace on the basis of sexual orientation.[1] Meanwhile, it is uniformly illegal to discriminate in the workplace on the basis of "race, color, religion, sex, or national origin."[2] Workplace discrimination on the basis of these five traits is illegal because Title VII of the Civil Rights Act of 1964 expressly prohibits such discriminatory behavior.[3] However, workplace discrimination on the basis of sexual orientation is not one of Title VII's enumerated protections.[4] Because "sexual orientation" is not enumerated, the law as it stands today in most states does not protect an employee who has been discriminated against on the basis of her sexual orientation.[5]

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1. *See* Courtney Joslin, *Protection for Lesbian, Gay, Bisexual, and Transgender Employees Under Title VII of the 1964 Civil Rights Act*, Hum. Rts. Mag., https://www.americanbar.org/publications/human_rights_magazine_home/human_rights_vol31_2004/summer2004/irr_hr_summer04_protectlgbt.html (last visited Oct. 16, 2017). *See also State Maps of Laws and Policies*, Human Rights Campaign, https://www.hrc.org/state-maps/employment (last updated June 11, 2018).

2. 42 U.S.C. § 2000e-2(a) (2012). This section of the statute states:

> (a) Employer practices
>
> It shall be an unlawful employment practice for an employer—
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> (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 status as an employee, because of such individual's race, color, religion, sex, or national origin.

Id.

3. *Id.*

4. *See* Darrel R. VanDeusen & Alexander P. Berg, *VanDeusen and Berg on The Developing Law of LGBT Protections under Title VII*, LexisNexis (June 3, 2016), https://www.lexisnexis.com/lexis-practice-advisor/the-journal/b/lpa/archive/2016/06/02/the-developing-law-of-lgbt-protections-under-title-vii.aspx.

5. Based on *expressio unius est exclusion alterius*, a rule of statutory construction that follows the notion that the inclusion of one term in a list of terms signals the exclusion of terms that are not listed.

Fifty-four years after its enactment, courts are still grappling with the reach of Title VII's protected traits. Existing caselaw demonstrates the ambiguity surrounding Title VII and the scope of its prohibited conduct.[6] Within recent years, the federal courts have offered conflicting interpretations of the enumerated term "sex" and its connection to sexual orientation, which has led to a split between two federal appellate courts.[7] The Eleventh Circuit Court of Appeals has held that Title VII's express protection against discrimination on the basis of sex cannot be interpreted broadly to extend to situations where the discrimination occurs on the basis of sexual orientation.[8] However, the Seventh Circuit Court of Appeals has found that Title VII's express protection against sex discrimination extends to such situations.[9]

This Comment argues that other federal courts should adopt the Seventh Circuit's decision to interpret Title VII coverage broadly to include claims of sexual orientation discrimination as a basis for a cause of action. Part II provides background information on (1) Title VII of the Civil Rights Act of 1964, (2) the evolution of Title VII through legislative history and prominent case precedent, and (3) the current split between the Seventh and Eleventh Circuits regarding whether Title VII's protection against sex discrimination in the workplace includes sexual orientation discrimination. Part III offers an analysis of the arguments set forth by the two appellate courts and a proposal to embrace the Seventh Circuit's ruling as the most appropriate reading of Title VII because it best supports evolving Supreme Court jurisprudence. Part IV discusses the impact the Seventh Circuit's approach will have on employees, employers, and overall workplace environments. It continues by recognizing the Seventh Circuit's power to shift the manner in which employment harassment and discrimination claims are dealt with in regards to the lesbian, gay, bisexual, and transgender (LGBTQ) community.[10] Lastly, Part V concludes

6. *See generally* Evans v. Ga. Reg'l Hosp., 850 F.3d 1248 (11th Cir. 2017); Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339 (7th Cir. 2017) (en banc).

7. *See* Catherine Foti, *Will Sexual Orientation Finally Be a Protected Class?*, FORBES (Apr. 10, 2017, 5:49 PM), https://www.forbes.com/sites/insider/2017/04/10/will-sexual-orientation-finally-be-a-protected-class/#3ba6a9465ab9.

8. *Evans*, 850 F.3d at 1255.

9. *Hively*, 853 F.3d at 341.

10. The LGBTQ initialism is continuously expanding to become more inclusive of underrepresented communities. It is said that the initialism has grown to "LGBTQQIAAP," which some argue is still not encompassing enough. *We know what LGBT means but here's what LGBTQQIAAP stands for*, BBC: NEWSBEAT (June 25, 2015), http://www.bbc.co.uk/newsbeat/article/33278165/we-know-what-lgbt-means-but-heres-what-lgbtqqiaap-stands-for. The expansion of the LGBTQ initialism is "culturally and generationally driven" focused on embracing diverse identities and sexualities. Bill Daley, *Why LGBT initialism keeps growing*, CHICAGO

that the legislature should amend Title VII to mirror the Seventh Circuit's interpretation by adopting the extension of the protection against sex discrimination to include sexual orientation discrimination.

II. Background

Historically, courts have struggled to determine the scope of the protected traits enumerated in Title VII. Courts are hesitant to overturn caselaw to extend Title VII's protections to traits not enumerated in the statute.[11] Such complexities have created a split in the federal appellate courts regarding whether the landscape of Title VII should be broadly read to prohibit discrimination on the basis of sexual orientation.[12] Section A discusses the evolution of Title VII through legislative history and prominent caselaw. Section B delves into the recent circuit split between the Eleventh Circuit in *Evans v. Georgia Regional Hospital* and the Seventh Circuit in *Hively v. Ivy Tech Community College*.

A. The Evolution of Title VII

This section chronicles the history behind Title VII. First, this section provides a general overview of the Civil Rights Act of 1964 with respect to Title VII. Second, it analyzes the legislative activity that laid the foundation for Title VII's enactment. Third, it discusses the most relevant and influential cases for the interpretation of the Title VII debate.

1. The Civil Rights Act of 1964

Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating against their employees due to "race, color, religion, sex, or national origin."[13] Title VII operates solely within the employment realm, covering everything from hiring and firing practices to training and compensation.[14] All government agencies, and private business employers overseeing fifteen or more employees, are subject

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Tribune (June 2, 2017, 11:00 AM), https://www.chicagotribune.com/lifestyles/sc-lgbtqia-letters-meaning-family-0606-20170602-story.html.

11. *See, e.g.*, *Evans*, 850 F.3d at 1261 ("Because Congress has not made sexual orientation a protected class, the appropriate venue for pressing the argument raised by the Commission and the dissent is before Congress, not this Court.").

12. Foti, *supra* note 7.

13. 42 U.S.C. § 2000e-2(a) (2012).

14. *Sex-Based Discrimination*, U.S. Equal Emp. Opportunity Commission, https://www.eeoc.gov/laws/types/sex.cfm (last visited Oct. 16, 2017) [hereinafter *Sex-Based Discrimination*].

to the Act's provisions.[15] However, employers that discriminate on the basis of religion, sex, or national origin are not in violation of Title VII where the trait is "a bona fide occupational qualification reasonably necessary to the normal operation of that particular business."[16] This exception is only available where employers can prove that the job duties necessary to an employer's primary business function cannot be successfully performed due to the employee's discriminated trait.[17] The Equal Employment Opportunity Commission (the EEOC) and some state and local Fair Employment Practices Agencies (FEPAs) are responsible for enforcing Title VII.[18]

2. Legislative History

What constitutes "sex" for the purposes of Title VII? Congress has yet to define the term's reach. The 88th Congress enacted Title VII of the Civil Rights Act of 1964 to promote equal employment opportunities for minorities and to provide the EEOC with a basis to investigate complaints concerning workplace discrimination.[19] The term "sex" was added to Title VII's enumerated, protected traits only one day before the statute was approved by the House of Representatives.[20] The term's addition was due to a last-minute suggestion by Judge Howard Smith, a Virginia Democrat, in an attempt to block a vote on the statute.[21] The National Woman's Party, an organization integral to the fight for women's equality at the time,[22] approached Judge Smith and implored him to request the term's addition to the Civil Rights Bill, specifically to Title VII.[23]

Although he vowed that he sincerely supported the fight for gender equality, Judge Smith was a staunch Southerner who vehemently opposed the civil rights movement and racial integration.[24] Judge Smith hoped that the addition of the term "sex" to the statue would prolong

15. 42 U.S.C. § 2000e-2(b) (2012).

16. 42 U.S.C. § 2000e-2(e)(1) (2012).

17. *See generally* Dothard v. Rawlinson, 433 U.S. 321 (1977). Notably, race and color are not enumerated, protected traits that fall within the exception; however, an employer's religious preference is not sufficient to qualify for the bona fide occupational qualification. *See generally* EEOC Comm'n v. Kamehameha Schs./Bishop's Estate, 990 F.2d 458 (9th Cir. 1993).

18. *Fair Employment Practices Agencies (FEPAs) and Dual Filing*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, https://www.eeoc.gov/employees/fepa.cfm (last visited Oct. 16, 2017).

19. 110 CONG. REC. 2577–84 (1964).

20. *Id*.

21. Louis Menand, *How Women Got In On The Civil Rights Act*, NEW YORKER (July 21, 2014), https://www.newyorker.com/magazine/2014/07/21/sex-amendment.

22. *See Our Mission*, NAT'L WOMAN'S PARTY, https://www.nationalwomansparty.org/mission-1 (last visited Oct. 5, 2018).

23. Menand, *supra* note 21.

24. Menand, *supra* note 21.

the statute's deliberations, making it more difficult to pass and ultimately resulting in its demise.[25] However, Judge Smith's efforts to sabotage the statute ironically led to the passing of a more expansive statute.[26] During deliberations on the addition of the term "sex," Judge Smith satirically read aloud a letter he received from a woman that addressed the polar inequalities between men and women.[27] The reading of the letter was met with laughter and comments by other male representatives who joked that, when speaking with their wives, their last words are usually, "Yes, dear."[28] The attitude toward the "sex" amendment turned when Congresswoman Martha Griffiths quipped that "[i]f there had been any necessity to have pointed out that women were a second-class sex, the laughter would have proved it."[29]

Due to the term's unusually late addition, the amendment was given no committee hearing and was hastily agreed to by a head count vote of 168 to 133.[30] The term "sex" is traditionally defined as the biological and physical traits that differentiate males and females.[31] There is nothing in the nine pages of the record concerning the discussion of the amendment that suggests the legislators contemplated the scope of the "sex amendment."[32] The record shows that the only concern contemplated by the legislators with respect to the amendment's addition was the amendment's capacity to protect white women who were competing with men and racial minorities for employment.[33]

Because so little guidance exists as to what constitutes "sex" under Title VII, much uncertainty surrounds the term's reach. There have been several attempts by the legislature to amend Title VII to expand the enumerated term.[34] The first attempt to amend was made in 1975

25. Menand, *supra* note 21.

26. Menand, *supra* note 21.

27. Menand, *supra* note 21.

28. 110 Cong. Rec. 2577 (1964) (statement of Rep. Celler); Menand, *supra* note 21.

29. 110 Cong. Rec. at 2578 (statement of Rep. Griffiths); Menand, *supra* note 21.

30. 110 Cong. Rec. at 2584.

31. *Definitions Related to Sexual Orientation and Gender Diversity in APA Documents*, Am. Psychol. Ass'n, https://www.apa.org/pi/lgbt/resources/sexuality-definitions.pdf (last visited Oct. 16, 2017) [hereinafter *Definitions*].

32. 110 Cong. Rec. at 2579–80.

33. *Id*. at 2579 (statement of Rep. Griffiths) ("[Y]ou are going to have white men in one bracket, you are going to try to take colored men and colored women and give them equal employment rights, and down at the bottom of the list is going to be a white woman with no rights at all.").

34. *See generally* Joanna L. Grossman, *Based on Sex: The EEOC Rules That Sexual Orientation Discrimination* Is *Sex Discrimination*, Justia (July 21, 2015), https://verdict.justia.com/2015/07/21/based-on-sex-the-eeoc-rules-that-sexual-orientation-discrimination-is-sex-discrimination.

and proposed adding the words "affectional or sexual preference."[35] However, the proposed amendment was not considered by the Judiciary Committee.[36] All legislative attempts since have been similarly futile,[37] allowing the uncertainty to persist in the eyes of the courts.[38]

3. Prominent Case History

Despite the fact that the enacting Congress "may not have envisioned"[39] the sex amendment to extend beyond the protection of white women and the fact that legislative attempts to amend Title VII have been unsuccessful,[40] existing case precedent may be illustrative of an evolving judicial landscape regarding what constitutes "sex" discrimination under Title VII.

In the late 1970s and early 1980s, federal courts were steadfast in their refusal to acknowledge that sex could refer to anything other than a man or a woman.[41] Many courts were firm in their belief that, because "[n]o mention is made of change of sex or of sexual preference in the text of Title VII,"[42] such claims could not be brought unless prompted by Congress.[43] However, in the past twenty years, the U.S. Supreme Court has issued two landmark decisions that have stretched these traditional contours of Title VII's protection against sex discrimination.[44]

The first landmark decision, *Price Waterhouse v. Hopkins*, presented the Supreme Court with the question of whether employ-

35. Civil Rights Amendments, H.R. 166, 94th Cong. (1975). The amendment proposed that the words "affectional or sexual preference" be applied to the contexts of "public accommodations, public education, equal employment opportunities, the sale, rental and financing of housing, and education programs which receive Federal financial assistance." *Id.* However, the prohibition on sex discrimination was only proscribed under Title VII. Such discrimination was not outlawed by any other Title within the Civil Rights Act of 1964. Perhaps the abrupt, extensive expansion of the amendment's applicable contexts was problematic and hindered the amendment's passage in the employment context.

36. *Id. See also* Employment Non-Discrimination Act of 2007, H.R. 110-406, 110th Cong. (1st Sess. 2007).

37. For similar attempts to amend, *see* H.R. 230 99th Cong. (1985); H.R. 427 98th Cong. (1983); H.R. 1454 97th Cong. (1981); H.R. 2074 96th Cong. (1979).

38. Grossman, *supra* note 34.

39. Baldwin v. Foxx, EEOC Appeal No. 0120133080, 13 (EEOC July 15, 2015), https://www.eeoc.gov/decisions/0120133080.pdf. *See also* I. Bennett Capers, Note, *Sex(ual Orientation) and Title VII*, 91 COLUM. L. REV. 1158, 1167 (1991).

40. 110 CONG. REC. 2583 (1964) (statement of Rep. Smith).

41. VanDeusen & Berg, *supra* note 4, at 3.

42. VanDeusen & Berg, *supra* note 4, at 3 (quoting Voyles v. Ralph K. Davies Med. Ctr., 403 F. Supp. 456, 457 (N.D. Cal. 1975), *aff'd,* 570 F.2d 354 (9th Cir. 1978)).

43. Ulane v. Eastern Airlines, Inc., 742 F.2d 1081, 1086 (7th Cir. 1984).

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

ment discrimination on the basis of noncompliance with sex stereotypes qualified under Title VII as sex discrimination.[45] Hopkins, a businesswoman, was criticized by her male colleagues for being "macho" and for failing to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."[46] The Supreme Court ruled that discrimination on the basis of sex stereotyping qualified as 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."[47] The Court notably stated that "gender must be irrelevant to employment decisions."[48] In response to the decision in *Price Waterhouse*, some courts have adopted a broad reading that allows homosexual individuals to bring similar gender stereotyping claims under Title VII if the individuals can "demonstrate that they were treated adversely because they were viewed—based on their appearance, mannerisms, or conduct—as insufficiently 'masculine' or 'feminine.'"[49] Thus, discrimination on the basis that an employee strayed from his or her respective gender expectations is akin to discrimination on the basis of sex.[50]

In the second landmark decision, *Oncale v. Sundowner Offshore Services*, the Supreme Court found that sexual harassment by another individual of the same sex qualifies as sexual harassment under Title VII.[51] In *Oncale*, a male employee was verbally and physically bullied by his male coworkers.[52] The Court reasoned that "nothing in Title VII necessarily bars a claim of discrimination 'because of . . . sex' merely because the plaintiff and the defendant . . . are of the same sex."[53] The decision made it clear that an offender's sex in comparison to that of a victim's is inconsequential because Title VII serves to protect both men and women.[54] Both *Price Waterhouse* and *Oncale* were

45. *Price Waterhouse*, 490 U.S. at 228.

46. *Id*. at 232–35.

47. *Id*. at 250.

48. *Id*. at 240.

49. Baldwin v. Foxx, EEOC Appeal No. 0120133080, 9 (EEOC July 15, 2015), https://www.eeoc.gov/decisions/0120133080.pdf (citing Smith v. City of Salem, Ohio, 378 F.3d 566, 574 (6th Cir. 2004)); *see also* Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 341 (7th Cir. 2017) (en banc); EEOC v. Boh Brothers, 731 F.3d 444, 459–60 (5th Cir. 2013) (en banc)).

50. VanDeusen & Berg, *supra* note 4, at 5–6.

51. 523 U.S. 75, 79 (1998).

52. *Id*. at 77.

53. *Id*. at 79.

54. *Id*.

significant steps towards expanding the definition of "sex" under Title VII.[55]

There are a number of other Supreme Court cases that have contributed to the foundation for a broader reading of Title VII's protections. For instance, the *Oncale* decision was based on the Supreme Court's earlier holding in *Meritor Savings Bank v. Vinson*. In *Meritor Savings Bank*, the Court determined that sexual harassment is actionable under Title VII's protection against sex discrimination.[56]

Although not a case brought pursuant to Title VII, the Supreme Court took a prominent stand in *Loving v. Virginia* by reversing state bans on interracial marriages, stating that such laws violate the Equal Protection Clause.[57] The Court found that discrimination on the basis of association with a different race qualified as race discrimination.[58] Some courts have extended the holding in *Loving* to the employment realm.[59] These courts have reasoned that, when an employer discriminates against an employee for dating or marrying someone of another race, Title VII has been violated on the basis of race discrimination.[60]

Another prominent case that does not directly consider Title VII, but that some courts have recognized may assist in the interpretation of Title VII, is *Obergefell v. Hodges*.[61] In *Obergefell*, the Supreme Court ruled that same-sex couples' right to marry is protected by the Constitution's Due Process Clause and Equal Protection Clause.[62] This decision followed *United States v. Windsor*, in which the Court took a preliminary step toward the holding in *Obergefell* by quashing a statute that confined marriage to heterosexual couples.[63]

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55. Masako Kanazawa, Note, Schwenk *and the Ambiguity in Federal "Sex" Discrimination Jurisprudence: Defining Sex Discrimination Dynamically under Title VII*, 25 SEATTLE U. L. REV. 255, 262 (2001).

56. *See* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 73 (1986).

57. Loving v. Virginia, 388 U.S. 1, 2 (1967).

58. *Id.*

59. *See, e.g.*, Holcomb v. Iona Coll., 521 F.3d 130 (2d Cir. 2008); Drake v. Minn. Mining & Mfg. Co., 134 F.3d 878 (7th Cir. 1998); Parr v. Woodmen of the World Life Ins. Co., 791 F.2d 888 (11th Cir. 1986).

60. *See, e.g.*, *Holcomb*, 521 F.3d at 132; *Drake*, 134 F.3d at 881, 883–84; *Parr*, 791 F.2d at 890–91.

61. Dale Carpenter, *Seventh Circuit holds that Title VII forbids anti-gay job discrimination*, WASH. POST: VOLOKH CONSPIRACY, (Apr. 4, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/04/04/seventh-circuit-holds-that-title-vii-forbids-anti-gay-job-discrimination/?utm_term=.b7ffb504f30c.

62. Obergefell v. Hodges, 135 S. Ct. 2584, 2604–05 (2015).

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

In recent years, the EEOC, which is the primary agency for enforcing Title VII,[64] has publicly announced its support of the view that sexual orientation discrimination qualifies as a subset of sex discrimination.[65] For example, the EEOC, in its capacity to make federal sector appellate decisions, held in *Baldwin v. Foxx* that sex discrimination subsumes sexual orientation discrimination.[66] In so holding, the EEOC rationalized:

> (1) sexual orientation discrimination necessarily involves treating workers less favorably because of their sex because sexual orientation as a concept cannot be understood without reference to sex; (2) sexual orientation discrimination is rooted in non-compliance with sex stereotypes and gender norms, and employment decisions based in such stereotypes and norms have long been found to be prohibited sex discrimination under Title VII; and (3) sexual orientation discrimination punishes workers because of their close personal association with members of a particular sex, such as marital and other personal relationships.[67]

Less than one year after its holding in *Baldwin*, the EEOC filed its first sex discrimination lawsuit based on sexual orientation discrimination under Title VII in *United States EEOC v. Scott Medical Health Center*.[68] The EEOC successfully asserted an argument that mirrored the explanation of its holding in *Baldwin*.[69]

Due to the fact that Congress has refrained from defining the landscape of what constitutes sex discrimination, courts have historically been hesitant to overextend the scope of Title VII's enumerated terms. Nevertheless, federal courts, including the Supreme Court, have set precedent which may lend itself to future expansion of sex discrimination that is prohibited under Title VII.

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64. *What You Should Know About EEOC and the Enforcement Protections for LGBT Workers*, U.S. Equal Emp. Opportunity Commission, https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm (last visited Oct. 5, 2018).

65. Jay-Anne B. Casuga, *EEOC Will Hold Ground on Sexual Orientation Protection*, Bloomberg Law (Aug. 3, 2017), https://www.bna.com/eeoc-hold-ground-n73014462739/.

66. Baldwin v. Foxx, EEOC Appeal No. 0120133080, 13 (EEOC July 15, 2015), https://www.eeoc.gov/decisions/0120133080.pdf.

67. Press Release, Equal Emp't Opportunity Comm'n, Federal Court Issues Historic Ruling in EEOC Lawsuit: Civil Rights Act of 1964 Prohibits Sexual Orientation Discrimination (Nov. 7, 2016), https://www1.eeoc.gov//eeoc/newsroom/release/11-9-16.cfm?renderforprint=1.

68. 217 F. Supp. 3d 834, 835 (W.D. Pa. 2016) (holding that "discrimination on the basis of sexual orientation is a subset of sexual stereotyping and thus covered by Title VII's prohibitions on discrimination 'because of sex'").

69. *Id.* at 839.

B. The Current Circuit Split

This section examines the conflicting outcomes in the Eleventh Circuit ruling in *Evans v. Georgia Regional Hospital*, and the Seventh Circuit ruling in *Hively v. Ivy Tech Community College*.[70] Both cases evaluated the same question: whether employment discrimination claims on the basis of sexual orientation can be brought under Title VII.[71] The Eleventh Circuit held that such a protection does not exist within the scope of Title VII, relying heavily on existing precedent as the basis for its finding.[72] On the other hand, the Seventh Circuit, en banc, boldly overturned existing precedent in finding that such a protection does exist under Title VII.[73]

1. Eleventh Circuit's Narrow Reading of Sex Discrimination Under Title VII

Evans involved a lesbian woman, Jameka Evans, who alleged discrimination based on her sexual orientation and gender non-conformity.[74] Evans accused her former employer, Georgia Regional Hospital, her two supervisors, and a Senior Human Resources Manager of discrimination under Title VII.[75] For over a year, Evans worked as a security officer at Georgia Regional Hospital, during which time her supervisors allegedly discriminated against her in several ways, including disrupting her work schedule, promoting less-qualified employees, and tampering with her uniform.[76] Although Evans disclosed her sexuality to one supervisor when directly asked, her sexuality was said to be "evident" due to the manner in which she presented herself as well as other outward indicators that suggested she did not conform to gender stereotypes.[77]

The Eleventh Circuit was concerned with the scope of Title VII's prohibited discriminatory conduct and its application to a class not enumerated in the statute's protected traits. The defendants contended that employment discrimination claims on the basis of sexual

70. See generally Evans v. Ga. Reg'l Hosp., 850 F.3d 1248 (11th Cir. 2017); Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339 (7th Cir. 2017) (en banc).

71. *Evans*, 850 F.3d at 1255; *Hively*, 853 F.3d at 343. *See also* J. Dalton Courson, *Circuits Split on Interpretations of Title VII and Sexual-Orientation-Based Claims*, ABA (Mar. 19, 2018), https://www.americanbar.org/groups/litigation/committees/civil-rights/practice/2018/circuits-split-on-interpretations-of-title-vii-and-sexual-orientation-based-claims/.

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

73. *Hively*, 853 F.3d at 351.

74. *Evans*, 850 F.3d at 1250.

75. *Id*. at 1250–51.

76. *Id*. at 1251.

77. *Id*. (stating that Evans wore a "male uniform, low male haircut, shoes, etc.").

orientation are not actionable under Title VII and, therefore, the court's dismissal of plaintiff's claim sua sponte was proper.[78] Evans argued that sexual orientation discrimination is equivalent to sex discrimination for purposes of Title VII claims and that she was discriminated against for failing to conform to gender stereotypes.[79] Evans's objections were supported by the Lambda Legal Defense and Education Fund, Inc. (Lambda Legal), which filed an amicus curiae brief on her behalf.[80] Lambda Legal argued that "an employee's status as lesbian, gay, bisexual or transgender ('LGBT'), does not defeat a claim based on gender non-conformity."[81]

After considering the arguments made by both parties, a divided panel held that Title VII does not prohibit sexual orientation discrimination.[82] To reach this conclusion, the court examined the applicability of a string of past cases. The court determined that existing precedent in the Eleventh Circuit did not allow the panel to find in favor of allowing sexual orientation discrimination to be prohibited under Title VII, explaining that "binding precedent forecloses such an action."[83]

First, the court addressed its holding in *Blum v. Gulf Oil Corp.*, in which the court stated that "[d]ischarge for homosexuality is not prohibited by Title VII . . . ."[84] The court rejected the EEOC's argument that this statement is not controlling because mere dicta is not binding precedent.[85] The court found that the structure surrounding the language suggested that the statement was not dicta. Instead, the court urged that just because a rationale is an alternative rationale does not make it any less binding on the issue before the court.[86]

Next, the court addressed two Supreme Court decisions, *Price Waterhouse v. Hopkins* and *Oncale v. Sundowner Offshore Services, Inc*.[87] The *Evans* court noted that other circuits may interpret these two cases as supporting sexual orientation discrimination claims under Title VII.[88] However, the court found that neither case compelled a departure from *Blum* because neither was "on point nor contrary to

78. *Id*. at 1256–58.
79. *Id*. at 1253.
80. *Evans*, 850 F.3d at 1252–53.
81. *Id*.
82. *Id*. at 1256–57.
83. *Evans*, 850 F.3d at 1255.
84. *Id*. (citing Blum v. Gulf Oil Corp., 597 F.2d 936, 938 (5th Cir. 1979)).
85. *Id*.
86. *Id. at* 1255–56 (quoting Hitchcock v. Sec'y, Fla. Dep't of Corr., 745 F.3d 476, 485 (11th Cir. 2014) ("[A]n alternative holding is not dicta but instead is binding precedent.")).
87. *Id*. at 1256.
88. *Id*. at 1257.

Blum."[89] Because the Supreme Court decisions in *Price Waterhouse* and *Oncale* were not clearly on point, they did not override the decision the Eleventh Circuit previously made in *Blum*.[90]

Accordingly, the court disregarded Evans's objection in light of *Blum* and a line of cases heard by sister circuits, which all reached the conclusion that Title VII does not prohibit discrimination on the basis of sexual orientation.[91] Thus, Evans's employment discrimination claim under Title VII on the basis of sexual orientation was dismissed, and her claim that she was discriminated against for non-conformance to gender stereotypes was remanded.[92]

Lambda Legal petitioned for the court to rehear the case en banc.[93] Several members of Congress and women's rights groups filed motions for permission to file amicus curiae briefs in support of Evans.[94] However, the Eleventh Circuit recently denied the petition, closing the opportunity to reconsider the 2–1 ruling.[95]

2. *Seventh Circuit's Broad Reading of Sex Discrimination Under Title VII*

By contrast, in a case with similar facts, the Seventh Circuit ruled that "discrimination on the basis of sexual orientation is a form of sex discrimination," and therefore, is a proper cause of action under Title VII.[96] In *Hively v. Ivy Tech Community College*, a lesbian woman, Kimberly Hively, alleged she was being discriminated against by her

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

90. *Id*. (citing Randall v. Scott, 610 F.3d 701, 707 (11th Cir. 2010) ("While an intervening decision of the Supreme Court can overrule the decision of a prior panel of our court, the Supreme Court decision must be clearly on point.")).

91. *See, e.g.*, Vickers v. Fairfield Med. Ctr., 453 F.3d 757, 762 (6th Cir. 2006); Medina v. Income Support Div., 413 F.3d 1131, 1135 (10th Cir. 2005); Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061, 1063–64 (9th Cir. 2002); Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 261 (3d Cir. 2001); Simonton v. Runyon, 232 F.3d 33, 36 (2d Cir. 2000); Hamner v. St. Vincent Hosp. & Health Care, 224 F.3d 701, 704 (7th Cir. 2000), *overruled by* Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339 (7th Cir. 2017); Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 259 (1st Cir. 1999); Wrightson v. Pizza Hut of Am., 99 F.3d 138, 143 (4th Cir. 1996); Williamson v. A.G. Edwards & Sons, Inc., 876 F.2d 69, 70 (8th Cir. 1989).

92. *Evans*, 850 F.3d at 1256–58.

93. Johanna G. Zelman et al., *Eleventh Circuit Sets the Stage for U.S. Supreme Court Certification on Whether Sexual Orientation is Protected by Title VII*, LEXOLOGY (July 11, 2017), https://www.lexology.com/library/detail.aspx?g-DB179c88-2330-4a22-96f9-e42734be7476.

94. Christine Powell, *Lawmakers Want 11th Cir. To Rethink Sex Orientation Ruling*, LAW360 (Apr. 11, 2017, 1:48 PM), https://www.law360.com/articles/911973/lawmakers-want-11th-circ-to-rethink-sex-orientation-ruling.

95. Judy Greenwald, *11th Circuit won't rehear Title VII ruling on sexual orientation*, BUS. INS. (July 7, 2017, 1:57 PM), https://www.businessinsurance.com/article/00010101/NEWS06/912314339/11th-Circuit-won%E2%80%99t-rehear-Title-VII-ruling-on-sexual-orientation.

96. Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 341 (7th Cir. 2017).

employer based on her sexual orientation.[97] Hively was a part-time professor at Ivy Tech Community College for fourteen years.[98] After nine years of being a part-time professor, she applied for a full-time position and was rejected.[99] Hively filed her employment discrimination complaint pursuant to Title VII with the District Court for the Northern District of Indiana.[100] Ivy Tech Community College, the defendant, argued that claims based on sexual orientation discrimination do not support a cause of action under Title VII.[101]

Initially, a Seventh Circuit panel affirmed the district court's dismissal of Hively's case, but admitted it was forced to do so in light of existing precedent. The court also recommended that the case be reheard en banc.[102] Sitting en banc, the Seventh Circuit granted the rehearing and found that employment discrimination claims on the basis of sexual orientation can be brought under Title VII.[103] The court reached this decision "[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 teachings."[104]

The court began by acknowledging that, despite numerous opportunities to do so, Congress has not amended Title VII to expand the classes of protected traits to include sexual orientation.[105] To this, the court responded that it would be "too difficult to draw a reliable inference from these truncated legislative initiatives to rest our opinion on them." Further, the court explained that Congress's decision to use the words "sexual orientation" in the Violence Against Women Act and the Hate Crimes Act does not bar the possibility that sexual orientation may be a subset of sex discrimination for purposes of Title VII.[106]

Next, the court analyzed the Supreme Court's decision in *Oncale* and stated that Title VII's absence of the term "sexual orientation" was inconsequential due to "the fact that the enacting Congress may not have anticipated a particular application of the law cannot stand in

97. *Id*.
98. *Id*.
99. *Id*.
100. *Id*.
101. *Id*.
102. Mark Joseph Stern, *A Thunderbolt From the 7th Circuit*, SLATE (Apr. 5, 2017, 1:47 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2017/04/the_7th_circuit_rules_that_anti_gay_employment_discrimination_is_illegal.html.
103. Hively, 853 F.3d at 343.
104. *Id.*
105. *Id*. at 344.
106. *Id*.

the way of the provisions of the law that are on the books."[107] The court then stated that, from the time the statute was enacted fifty years ago, Title VII has expanded to prohibit more discrimination than what the plain language indicates.[108]

The court then discussed the comparative method of statutory interpretation, which compares how Hively was actually treated by her employer to how Hively would have been treated by her employer when only the variable of her sex is changed.[109] In support, Hively argued that there would be no adverse employment action with her dating a woman if she were a man.[110] The court looked at this comparison "through the lens of gender non-conformity," and stated that "Hively represents the ultimate case of failure to conform to the female stereotype."[111] The discriminatory conduct considers the individual's sex at the time of birth.[112] Therefore, disapproval based on dress or same-sex relationships is a reaction "based on sex."[113]

Hively also argued that, under *Loving v. Virginia*, she had a right to intimate association with another person.[114] Courts have extended this right to the employment discrimination context in that when an employer discriminates against an employee for marrying someone of another race, Title VII is violated on the basis of race discrimination.[115] The court explained that sexual orientation discrimination is similar because, just as the change of one partner's race would change the outcome, the change of one partner's sex would change the outcome.[116]

Lastly, the Seventh Circuit used a "purposivism" approach[117] to interpret today's law in light of the evolving authoritative landscape laid

107. *Id*. at 344–45.

108. *Id*. at 345 ("The Supreme Court has held that the prohibition against sex discrimination reaches sexual harassment in the workplace, see *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 . . . (1986), including same-sex workplace harassment, see *Oncale*; it reaches discrimination based on actuarial assumptions about a person's longevity, see *City of Los Angeles, Dep't of Water and Power v. Manhart*, 435 U.S. 702 . . . (1978); and it reaches discrimination based on a person's failure to conform to a certain set of gender stereotypes, see *Hopkins*.").

109. In applying the comparative method, the court examined "whether the complainant's protected characteristic played a role in the adverse employment decision. The counterfactual we must use is a situation in which Hively is a man, but everything else stays the same: in particular, the sex or gender of the partner." Hively, 853 F.3d at 345.

110. *Id*.

111. *Id*. at 346.

112. *Id*. at 346–47.

113. *Id*. at 347.

114. *Id*. at 347 (citing Loving v. Virginia, 388 U.S. 1, 12 (1967)).

115. *Hively*, 853 F.3d at 347–48.

116. *Id*. at 349.

117. Broadly speaking, the purposivism approach to statutory interpretation aims to determine the legislature's purpose. However, this is not to say that purposivists strive to determine

out by the Supreme Court.[118] Thus, an en banc Seventh Circuit overruled its prior precedent,[119] and ruled that discrimination on the basis of sexual orientation is a sufficient cause of action under Title VII as a subset of sex discrimination.[120]

The Seventh Circuit's en banc ruling stands in stark contrast to that of the Eleventh Circuit. In both cases, employment discrimination claims on the basis of sexual orientation were brought under Title VII. The Eleventh Circuit relied on existing precedent and found that such claims cannot be brought under Title VII.[121] The Seventh Circuit, on the other hand, overruled existing precedent in keeping with the evolving legal landscape and found that such claims can be brought under Title VII.[122] Such diverging opinions have major, but inconsistent, impacts on discrimination within the employment sphere.

III. Analysis

This section examines the distinct reasoning that led to the conflicting holdings of the Eleventh and Seventh Circuits with respect to whether discrimination on the basis of sexual orientation gives rise to a cause of action under Title VII. First, this section analyzes the differences in the Eleventh and Seventh Circuits' holdings. In doing so, this section will consider the opposing statutory interpretations of the Seventh and Eleventh Circuit, evolving caselaw, and policy considerations. Finally, this section argues that the Seventh Circuit's interpretation should be adopted due to its application of existing Su-

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the legislature's *actual* purpose. In identifying the legislature's purpose under the purposivism approach, purposivists remain receptive to policy considerations. The purposivism approach follows the idea that ambiguous words in a statute's text should be resolved by examining the word's semantic use in consideration of the word's "policy context." *See* Richard H. Fallon Jr., *Three Symmetries between Textualist and Purposivist Theories of Stautory Interpretation—and the Irreducible Roles of Values and Judgment within Both*, 99 Cornell L. Rev. 685, 704 (2014) (quoting John F. Manning, *What Divides Textualists From Purposivists?*, 106 Colum. L. Rev. 70, 91 (2006)) ("For purposivists, the relevant context for the interpretation of statutes is what Professor Manning calls their 'policy context,' involving evidence of the demonstrable and likely aims of the presumptively reasonable legislators who enacted a provision in the first place.").

118. David Lat, *A Judicial Battle Royal At The Seventh Circuit — And Judge Posner's Favorite Gays Of All Time*, Above The Law (Apr. 5, 2017, 3:28 PM), https://abovethelaw.com/2017/04/a-judicial-battle-royal-at-the-seventh-circuit-and-judge-posners-favorite-gays-of-all-time/?rf=1.

119. *See* Hamm v. Weyauwega Milk Prods., Inc., 332 F.3d 1058, 1062 (7th Cir. 2003); Spearman v. Ford Motor Co., 231 F.3d 1080, 1085 (7th Cir. 2000); Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc., 224 F.3d 701, 704 (7th Cir. 2000), *overruled by* Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339 (7th Cir. 2017); Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1085 (7th Cir. 1984).

120. *Hively*, 853 F.3d at 351–52.

121. Evans v. Ga. Reg'l Hosp., 850 F.3d 1248, 1255 (11th Cir. 2017).

122. *Hively*, 853 F.3d at 351–52.

preme Court caselaw and appropriate consideration of society's evolving acceptance of same-sex relationships.

A. Hallmark Differences Between the Eleventh and Seventh Circuit Opinions

The Eleventh and Seventh Circuit Courts similarly addressed several topics in their opinions when contemplating whether sexual orientation discrimination is a cause of action under Title VII. This section discusses the central topics and breaks down the arguments with respect to both circuit courts. First, this section examines the manner in which both circuit courts interpreted the language of Title VII and the rationale for its enactment. Second, this section discusses the relevant caselaw both the Eleventh and Seventh Circuits considered in their opinions and assesses the manner in which those cases were applied. Lastly, this section examines several policy considerations that both circuit courts considered in ruling as they did.

1. Opposing Statutory Interpretations in the Seventh and Eleventh Circuits

The Eleventh and Seventh Circuits presented directly opposing views of how Title VII's grant of protection against sex discrimination should be interpreted. The Eleventh Circuit determined that Title VII's enumerated term "sex" does not include protection against sexual orientation discrimination.[123] On the other hand, the Seventh Circuit stated that "sex" should be broadly read to include sexual orientation discrimination.[124] The reason behind these opposing views can be attributed to the courts' differing opinions on the scope of judicial power to interpret such language.[125]

The Eleventh Circuit interpreted Title VII's language as narrowly as possible. The court explained that Congress did not intend for Title VII to protect homosexual individuals[126] because the plain meaning of "sex" as Congress intended it refers to biological and physical traits rather than sexual attraction.[127] Therefore, Title VII cannot now be interpreted in a manner that would allow such protection.[128] In his

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

124. *Hively*, 853 F.3d 339, 351–52 (7th Cir. 2017).

125. *See Hively*, 853 F.3d at 343–46; *Evans*, 850 F.3d at 1256.

126. *Evans*, 850 F.3d at 1261.

127. *Definitions*, *supra* note 31; *Sex-Based Discrimination*, *supra* note 14.

128. Mark Joseph Stern, *11th Circuit Rules Title VII Does Not Prohibit Anti-Gay Discrimination in Deeply Confused Opinion*, SLATE (Mar. 10, 2017, 6:47 PM), http://www.slate.com/blogs/outward/2017/03/10/_11th_circuit_rules_title_vii_does_not_prohibit_anti_gay_discrimination.html.

concurrence, Judge William Pryor, who also authored the majority opinion, stated that "[b]ecause Congress has not made sexual orientation a protected class, the appropriate venue for pressing the argument raised by the Commission and the dissent is before Congress, not this Court."[129]

On the other hand, the Seventh Circuit adopted a broader, more progressive approach in finding that sex discrimination also embodies sexual orientation discrimination.[130] Rather than following the Eleventh Circuit's interpretation of the issue as calling for an unauthorized amendment to Title VII, the Seventh Circuit confronted the issue by reading sex discrimination to include sexual orientation discrimination. Judge Diane Wood, writing for the majority, wrote "[w]e must decide instead what it means to discriminate on the basis of sex, and in particular, whether actions taken on the basis of sexual orientation are a subset of actions taken on the basis of sex."[131] Judge Wood further stated that this "is a pure question of statutory interpretation and thus well within the judiciary's competence."[132] The Seventh Circuit acknowledged that the inclusion of sexual orientation was likely not the intent of the legislature at the time of Title VII's enactment[133] and not an unexpressed yet intrinsic feature of the statute's language.[134] Instead, the Seventh Circuit found that the judiciary has the power to interpret statutes in a way that gives "fresh meaning"[135] to a statute's language.[136] Judge Wood pointed out that just as the meaning of constitutional provisions has been interpreted to reflect cultural shifts, so too, may statutes be interpreted.[137]

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129. *Evans*, 850 F.3d at 1261 (Pryor, J., concurring).

130. *Hively*, 853 F.3d at 351.

131. *Id*. at 342.

132. *Id*. at 343.

133. *Id*. (Posner, J., concurring).

134. *Id*.

135. *Id.* at 352.

136. *Hively*, 853 F.3d at 353. The concurring opinion reads in relevant part: "Title VII of the Civil Rights Act of 1964, now more than half a century old, invites an interpretation that will update it to the present, a present that differs markedly from the era in which the Act was enacted." *Id.*

137. *Id*. One hallmark constitutional provision that has been interpreted to reflect cultural developments is the Reasonableness Clause of the Fourth Amendment. Technological advancements in police surveillance are a way the Amendment's protection against unreasonable searches and seizures has been reinterpreted to keep up with cultural changes. Carpenter v. United States, 138 S. Ct. 2206, 2223 (2018) (holding the seizure of cell-site location data constitutes a search, acknowledging that technological shifts have altered the traditional concept of privacy); Smith v. Maryland, 442 U.S. 735, 742 (1979) (holding there is no reasonable expectation of privacy in dialed telephone numbers which are given to telephone companies).

Another hallmark constitutional provision that courts have reinterpreted is the Equal Protection Clause of the Fourteenth Amendment. The Amendment was originally directed at prevent-

The Eleventh Circuit viewed the case as requiring an amendment by construction, which is the role of the legislature rather than the judiciary. In contrast, the Seventh Circuit took the opportunity to read sexual orientation into Title VII's existing language.

2. *Evolving Caselaw*

The law has seen much change since the enactment of Title VII in 1964. Title VII jurisprudence has recognized many forms of discrimination that were not originally enumerated in the statute.[138] Despite the Supreme Court's absence from the sex discrimination interpretation debate, the Court has laid a foundation through several prominent decisions that enables courts to interpret sex discrimination.[139] In this respect, the difference between the Eleventh and Seventh Circuit rulings surrounds the question of whether or not two seminal decisions, *Price Waterhouse v. Hopkins* and *Oncale v. Sundowner Offshore Servs., Inc.*, indirectly support a finding of a cause of action based on sexual orientation discrimination under Title VII. The Eleventh Circuit ignored the influence of these cases, arguing that they are not direct authority, instead choosing to strictly adhere to its own case precedent.[140] The Seventh Circuit decided that both cases independently supported the court's ruling that sex discrimination under Title VII encompasses sexual orientation discrimination.[141]

Sticking to its narrow interpretation of Title VII's plain language, the Eleventh Circuit in *Evans* similarly interpreted the influence of ancillary court precedent. The court found that *Price Waterhouse* and *Oncale* do not support a finding that sexual orientation discrimination

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ing discrimination against African Americans; however, it has since been read expansively to protect other races, nationalities, and groups of people. Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886).

To bring the reinterpretation of constitutional provisions in line with the reinterpretation of statutory provisions, Judge Posner in his concurring opinion lists the Sherman Antitrust Act as an example of a statute that has been reinterpreted to reflect the needs of a modernized society. *Hively*, 853 F.3d at 352. He states that the Act was enacted "long before there was a sophisticated understanding of the economics of monopoly and competition." *Id.* Since the Act was enacted in 1980, the law of economics, business practices, and technology has evolved drastically. *Id.* The Act has since been updated through judicial reinterpretation to accommodate effective regulation of a more advanced marketplace. *Id.*

138. *See, e.g.*, 42 U.S.C. § 2000e(k) (1982); Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 82 (1998) (finding that same-sex sexual harassment qualifies as sexual harassment under Title VII); Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 73 (1986) (finding that sexual harassment is actionable under Title VII's prohibition on sex discrimination).

139. *See, e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584 (2015); *Oncale*, 523 U.S. at 75; Price Waterhouse v. Hopkins, 490 U.S. 228 (1989); Loving v. Virginia, 388 U.S. 1 (1967).

140. Evans v. Ga. Reg'l Hosp., 850 F.3d 1248, 1256–57 (11th Cir. 2017).

141. *Hively*, 853 F.3d at 342.

is included in Title VII's protections.[142] The court explained that the decisions "do not squarely address whether sexual orientation discrimination is prohibited by Title VII"[143] and therefore, are inapplicable to the present case. The court acknowledged that other courts may extend their decisions in favor of finding the contrary;[144] however, the Eleventh Circuit explained that it was bound by its own precedent.[145] Therefore, the Eleventh Circuit found it was barred from ruling otherwise.[146]

The precedent the Eleventh Circuit purports to be bound by is *Blum v. Gulf Oil Corp.*,[147] a case from 1979 that the Eleventh Circuit's "predecessor court" decided.[148] The *Blum* court stated in relevant part that the "[d]ischarge for homosexuality is not prohibited by Title VII."[149] However, the *Blum* court failed to provide an analysis to support the contention. The Eleventh Circuit's decision to be strictly bound by *Blum* was the deciding factor in the *Evans* case. Because Supreme Court precedent was "neither clearly on point nor contrary to *Blum*," the Eleventh Circuit deemed itself bound by its existing precedent.[150]

The Seventh Circuit, however, took a step in the other direction.[151] Having not previously addressed the issue, the Seventh Circuit had the ability to overturn the existing Title VII precedent.[152] In concluding that sexual orientation should be read into Title VII's protection against sex discrimination, the court found support in Supreme Court precedent.

First, the court discussed *Price Waterhouse*, in which an employer violated Title VII on the basis of sex stereotyping (or gender nonconformity) when he denied a female employee a promotion because she dressed in a masculine fashion.[153] The Seventh Circuit analogized

142. *Evans*, 850 F.3d at 1256.
143. *Id*.
144. *Id*. at 1257. The opinion reads in relevant part:
> Whether those Supreme Court cases impact other circuit's decisions, many of which were decided after *Price Waterhouse* and *Oncale*, does not change our analysis that *Blum* is binding precedent that has not been overruled by a clearly contrary opinion of the Supreme Court or of this Court sitting en banc.

Id.
145. *Id*. at 1256.
146. *Id*. at 1256–57.
147. 597 F.2d 936 (5th Cir. 1979).
148. *Evans*, 850 F.3d at 1270 (Rosenbaum, J., dissenting in part).
149. *Blum*, 597 F.2d at 938.
150. *Evans*, 850 F.3d at 1256.
151. Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 351 (7th Cir. 2017) (en banc).
152. *Id*.
153. Price Waterhouse v. Hopkins, 490 a 228, 232–35 (1989).

the *Hively* case to *Price Waterhouse* by explaining that discriminating against homosexual individuals for not being attracted to the opposite sex is the same as discriminating against heterosexual individuals for not conforming to the respective sex's stereotype.[154] The Seventh Circuit explained that lesbian women, for example, represent "the ultimate case of failure to conform to the female stereotype."[155] Accordingly, employment decisions that are based on the failure to dress the way one's respective sex is expected to dress is no different from employment decisions that are based on the failure to date or marry a member of the opposite sex.[156] Under the Seventh Circuit's view, both of these employer decisions constitute disapprovals of an individual's behavior based on sex.[157]

Second, the Seventh Circuit relied on *Oncale*, which permitted a cause of action for same-sex harassment.[158] Such an action was neither originally enumerated in Title VII, nor was it evident that Congress had intended to include the protection. However, the Seventh Circuit found this to be inconsequential.[159] The Seventh Circuit stated that "the fact that Congress may not have anticipated a particular application of the law cannot stand in the way of the provisions of the law that are on the books."[160] The Seventh Circuit reasoned that the combination of *Price Waterhouse* and *Oncale* represented the Supreme Court's sanction of a departure from the traditional view of sex discrimination under Title VII.[161]

Third, the Seventh Circuit in *Hively* went further and discussed two hallmark marriage cases, *Loving* and *Obergefell*. Judge Wood first dove into a *Loving* analysis, or "comparative method" analysis, by isolating the one factor in dispute.[162] The Supreme Court in *Obergefell* applied the comparative method analysis to same-sex relationships.[163] Thus, the *Hively* court found it appropriate to apply this analysis to same-sex relationships in the employment context.[164] In *Loving*, the Court dealt with race. Thus, the *Hively* court replaced race with sex, keeping all other factors constant.[165] The court asked whether, "hold-

154. *Hively*, 853 F.3d at 346.
155. *Id*.
156. *Id*.
157. *Id*.
158. *Id.* at 346 (citing Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75 (1998)).
159. *Hively*, 853 F.3d at 345.
160. *Id*.
161. *Id*. at 342–45.
162. *Id*. at 345.
163. *Id*.
164. *Id*.
165. *Hively*, 853 F.3d at 345.

ing all other things constant and changing only her sex, [Hively] would have been treated the same way?"[166] Because the court answered this question in the negative, the court concluded Hively had in fact been discriminated against because of her sex.[167]

3. Policy Considerations

As with most circuit court decisions, both the Eleventh and Seventh Circuits addressed policy considerations as they relate to traditional rules of statutory interpretation. One argument against the inclusion of sexual orientation discrimination as sex discrimination under Title VII is that such an action by the judiciary would be outside the scope of its authority, raising a separation of powers concern. Finding that sexual orientation discrimination is included within sex discrimination would represent an overstepping by the judiciary, crossing the boundary into the territory of legislative authority. This is exactly the argument that the Eleventh Circuit adopted. In his concurrence, Judge Pryor insisted that reading sexual orientation discrimination as sex discrimination would be an abuse of judicial power.[168] Doing so would require amending Title VII, which is within the confines of legislative authority, not judicial authority.[169] Judge Pryor's preferred approach was to tread lightly in interpreting legislation because otherwise the result could be the blurring of separation of powers and the establishment of inappropriate precedent.

The Seventh Circuit gave more consideration to the case's potential social consequences. In his concurrence, Judge Posner recognized that there comes a time when statutes become so outdated that in order to understand the change of a statute's meaning, it must be read with cultural and political shifts in mind.[170] Judge Posner noted that the Supreme Court's decision to legalize same-sex marriage in *Obergefell* reflects the nation's social direction.[171] Furthermore, the Seventh Circuit considered the practicality of its decision in light of *Obergefell*. The court realized that "a person can be married on Saturday and then fired on Monday for just that act."[172] To remedy this inconsistency, the Seventh Circuit disregarded existing precedent and read sexual orientation discrimination into sex discrimination. In doing so, the Seventh Circuit acknowledged that present Title VII jurispru-

166. *Id*.
167. *Id*.
168. Evans v. Ga. Reg'l Hosp., 850 F.3d 1248, 1261 (11th Cir. 2017) (Pryor, J., concurring).
169. *Id*.
170. *Hively*, 853 F.3d at 353 (Posner, J., concurring).
171. *Id.* at 354–55 (Posner, J., concurring).
172. *Id*. at 342.

dence, in combination with the Supreme Court's decision in *Obergefell*, creates "bizarre results" and "a paradoxical legal landscape."[173]

B. The Strength of the Seventh Circuit's Interpretation

This section argues that the Seventh Circuit's interpretation of Title VII is the most appropriate reading of the statutory language based on the court's application of evolving Supreme Court jurisprudence and consideration of society's changing attitude toward same-sex relationships.

Recent studies have shown that a record number of people are involved in same-sex relationships.[174] Overall, society has become far more accepting of same-sex relationships.[175] Perhaps the most prominent confirmation of this acceptance is the Supreme Court's decision in 2015 to recognize that same-sex couples have a fundamental right to marriage.[176] Society's reaction to the decision was generally positive.[177] The case legitimizes and protects same-sex relationships; men can now legally marry other men and women can legally marry other women.[178] However, the Eleventh Circuit's recent decision in *Evans* undermines the stability and execution of the Supreme Court's decision in *Obergefell*. Under the Eleventh Circuit's interpretation of Title VII, men and women can be discriminated against at their jobs for marrying a person of the same sex, an act both men and women have a legal right to undertake. Yet, potential claimants will not have any legal recourse available to them to remedy the wrongful discrimination they experienced because the Eleventh Circuit does not recognize sexual orientation discrimination as a basis for a Title VII claim. Circuit splits inherently create inconsistency in the law, and the Eleventh Circuit's recent decision in *Evans* creates an inconsistent and unpredictable legal patchwork of same-sex rights.

In addition to its negative impact on same-sex rights, the Eleventh Circuit's ruling in *Evans* was not well supported. The Eleventh Circuit

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173. *Id*.

174. Jean M. Twenge, *Why We're Having More Same-Sex Relationships Than Ever*, PSYCHOL. TODAY (June 1, 2016), https://www.psychologytoday.com/blog/our-changing-culture/201606/why-were-having-more-same-sex-relationships-ever (citing Jean M. Twenge et al., *Changes in American Adults' Reported Same-Sex Sexual Experiences and Attitudes, 1973–2014*, 45 ARCHIVES SEXUAL BEHAV. 1713 (2016)).

175. *Id*.

176. *See, e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

177. Rachel Brody, *Views You Can Use: Love Wins*, U.S. NEWS (June 26, 2015, 3:45 PM), https://www.usnews.com/opinion/articles/2015/06/26/reactions-to-the-supreme-court-legalizing-gay-marriage.

178. *Id*.

relied on precedent in *Blum*, which was established almost forty years ago.[179] Notably, *Blum* was decided ten years before the Supreme Court decided the landmark same-sex stereotyping case, *Price Waterhouse*.[180] In her dissent, Judge Rosenbaum made an excellent point when she mentioned that *Price Waterhouse's* succeeding decision effectively "abrogated" the precedent established by *Blum*, which the majority relied on.[181] In light of recent caselaw developments, the Eleventh Circuit had an opportunity to redefine same-sex rights. Instead, the court stated this was a job more properly suited for Congress.[182] However, interpreting statutes is well within a circuit court's judicial authority.[183]

It is true that there currently exists no Supreme Court precedent directly on point to provide guidance to the circuit courts. However, the Eleventh Circuit's disregard for Supreme Court same-sex and Title VII jurisprudence is difficult to overlook. The Eleventh Circuit stated that current Supreme Court precedent does not directly decide whether sexual orientation discrimination constitutes a proper cause of action under Title VII.[184] In his concurrence, Judge Pryor further explained that *Price Waterhouse* addressed "behavior, not status."[185] Status alone does not trigger Title VII's protections.[186]

The Supreme Court in *Price Waterhouse*, however, read sex stereotyping into Title VII's cause of action for sex discrimination.[187] The Seventh Circuit makes a stronger argument than the Eleventh Circuit in its finding that when an employee has been discriminated against by an employer based on the employee's failure to conform to gender stereotypes, the employer has discriminated on the basis of sex.[188] The gender stereotype the employer bases the discrimination on is the failure to conform to heteronormativity.[189] Although sexual orientation may be a status, as recognized by the Eleventh Circuit, it may also

179. Evans v. Ga. Reg'l Hosp., 850 F.3d 1248, 1261–65 (11th Cir. 2017) ("'Simply put, *Price Waterhouse* requires us to apply the rule that '[a]n individual cannot be punished because of his or her perceived gender-nonconformity.' Since continued application of *Blum* would allow a woman to be punished precisely because of her perceived gender non-conformity—in this case, sexual attraction to other women—*Price Waterhouse* undermines these cases to the point of abrogation.").

180. *Id.* at 1261 (Rosenbaum, J., dissenting in part).

181. *Id*.

182. *Id*.

183. Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 342 (7th Cir. 2017) (en banc).

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

185. *Id*. at 1259 (Pryor, J., concurring).

186. *Id*. at 1260.

187. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 258 (1989).

188. *Hively*, 853 F.3d at 346.

189. *Id*.

constitute a behavior in that a homosexual individual fails to behave in conformance with a respective gender's stereotype.[190] Among other things, being attracted to, dating, or marrying a member of the same sex can constitute a behavior for purposes of *Price Waterhouse* and its application to sexual orientation discrimination.[191]

Although it can be said that when the 88th Congress enacted Title VII it likely did not intend for sex discrimination to encompass sexual orientation discrimination,[192] Congress likely did not intend for sex discrimination to include same-sex harassment, either.[193] However, the Supreme Court in *Oncale* permitted a cause of action for same-sex harassment under Title VII.[194] The Court stated that statutes must sometimes be interpreted beyond the original intent of the legislature.[195] The Seventh Circuit powerfully explained "the fact that the enacting Congress may not have anticipated a particular application of the law cannot stand in the way of the provisions of the law that are on the books."[196] Congress's failure to anticipate a specific meaning should not prevent the statute from being textually interpreted as such.[197] This view is directly representative of the court's progressive and modern interpretation of Title VII to reflect current societal values, which Judge Posner coined "judicial interpretative updating."[198] In his concurrence, Judge Posner justified his modern take on interpreting statutory language by stating that Congress "shouldn't be blamed for that failure of foresight. *We* understand the words of Title

190. *Evans*, 850 F.3d at 1252 (recognizing sexual orientation as a status); *Hively*, 853 F.3d at 346–47.

191. *Hively*, 853 F.3d at 346–47 (discussing *Price Waterhouse* and employers' use of stereotypes about women to discriminate based on sex).

192. *See supra* notes 22–30 and accompanying text.

193. *See* Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 82 (1998).

194. *Id.*

195. *Hively*, 853 F.3d at 344 (citing *Oncale*, 523 U.S. at 79–80). The opinion reads in relevant part:

> We see no justification in the statutory language or our precedents for a categorical rule excluding same-sex harassment claims from the coverage of Title VII. As some courts have observed, male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed. Title VII prohibits "discriminat[ion] . . . because of . . . sex" in the "terms" or "conditions" of employment. Our holding that this includes sexual harassment must extend to sexual harassment of any kind that meets the statutory requirements.

Id.

196. *Id*. at 345.

197. *Id*.

198. *Id*. at 353.

VII differently not because we're smarter than the statute's framers and ratifiers but because we live in a different era, a different culture."[199] As society evolves, so too must the law that governs it.

The Seventh Circuit's approach does not overstep judicial authority as the Eleventh Circuit posits. The Seventh Circuit reads sexual orientation into same-sex stereotyping, which the Supreme Court has ruled constitutes sex discrimination for the purpose of Title VII.[200] Amending a statute requires the intervention of the legislature.[201] Interpreting a statute's textual language, on the other hand, does not require an amendment and, therefore, does not require the intervention of the legislature.[202] Accordingly, the Seventh Circuit acted well within its authority when it interpreted sex discrimination as encompassing sexual orientation discrimination.[203]

The Seventh Circuit further supported its decision by relying on other Supreme Court precedent, namely *Loving*.[204] The Eleventh Circuit's decision fails to address *Loving* in its entirety. *Loving* was an inter-racial marriage case that supports a comparative method analysis.[205] The Seventh Circuit was correct in extending the comparative method analysis to same-sex relationships within the employment context.[206] Just as the comparative method analysis would be appropriate to apply if the employment discrimination cases involved race, it is similarly appropriate to apply where an employment discrimination case involves sex; like race discrimination, sex discrimination is an enumerated term that is granted protection under Title VII.[207] Accordingly, the Seventh Circuit concluded that, just as in *Loving* where a white man would not have been discriminated against had his wife been white, the plaintiffs in *Evans* and *Hively* would not have been discriminated against had they been heterosexual.[208] For the purpose of Title VII, discrimination on the basis of marrying a person of another race is equivalent to discrimination on the basis of marrying a person of another sex.[209] Therefore, the Seventh Circuit appropriately applied *Loving's* comparative analysis method.

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199. *Id*. at 357 (Posner, J., concurring) (emphasis in original).
200. *Id*. at 346.
201. Leon Friedman, *Overruling the Court*, Am. Prospect (Dec. 19, 2001), http://prospect.org/article/overruling-court.
202. *Id*.; *see also Hively*, 853 F.3d at 343.
203. *Hively*, 853 F.3d at 342.
204. *Id*.
205. Loving v. Virginia, 388 U.S. 1, 11–12 (1967).
206. *Id*. at 12.
207. *Hively*, 853 F.3d at 349.
208. *Id*.
209. *Id*. at 342.

Both the majority and the concurring opinion of the Seventh Circuit heavily emphasized the evolving direction of society's attitude toward same-sex relationships.[210] Ignoring this evolution would be in opposition to the "strong foothold in current popular opinion."[211] The fact that society is learning to embrace non-traditional couples is a reality.[212] The Seventh Circuit noted that it took a substantial amount of time for the judicial system to recognize that both sexual harassment and sex-stereotyping, including same-sex stereotyping, were forms of sex discrimination.[213] Now, the judicial system must address sexual orientation discrimination as a form of same-sex stereotyping.[214] Consequently, sex discrimination should be appropriately expanded to encompass sexual orientation discrimination.

By ensuring that every base was covered, the *Hively* court produced a well-supported and thorough decision that connected all applicable jurisprudence.[215] Where one argument fell short, the court made sure to supplement it with another supporting argument.[216] The fact that sex discrimination has come to be understood as one meaning does not preclude it from being understood to include another meaning.[217]

IV. Impact

Title VII was enacted to give employees protection against discrimination in the employment realm.[218] Prior to the enactment of Title VII, employers had the biased power to legally fire an employee solely based on the employee's race, or to reject an applicant solely based on his or her gender.[219] Title VII's enumerated protections[220] were intended to clarify the forms of protections that employees have

210. *See id*. at 357, 361.

211. *Id.* at 361.

212. Twenge, *supra* note 174.

213. *Hively*, 853 F.3d at 355.

214. *Id*. *See also supra* text accompanying notes 156–159 (discussing sexual orientation discrimination as same-sex stereotyping).

215. Alison Frankel, *The shrewdness of Judge Wood's opinion in LGBT workplace bias case*, Thomson Reuters (Apr. 5, 2017, 2:37 PM), https://www.reuters.com/article/otc-lgbt/the-shrewdness-of-judge-woods-opinion-in-lgbt-workplace-bias-case-idUSKBN1772MI.

216. *Id*.

217. *Id*.

218. *The Civil Rights Act of 1964 and the Equal Employment Opportunity Commission*, Nat'l Archives, https://www.archives.gov/education/lessons/civil-rights-act (last visited Jan. 2, 2018).

219. Dawn Rosenberg McKay, *Title VII of the Civil Rights Act of 1964*, Balance Careers, https://www.thebalance.com/title-vii-of-the-civil-rights-act-of-1964-525697 (last updated Feb. 24, 2018).

220. Title VII forbids discrimination on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2 (2012).

against their employers.[221] However, as time has shown, the clarifications have incongruously spurred doubt. The scope of Title VII's protections are unclear. This section discusses the drawbacks created by inconsistency in the law. First, this section uses the influence of the Seventh Circuit's holding in *Hively* as a platform to explain the importance of uniformity in federal appellate court decisions. Second, it discusses the economic consequences of employment discrimination. Third, this section examines society's evolving attitude towards sexual orientation and explains why Title VII should be amended to parallel social attitudes.

A. The Importance of Uniformity

The Seventh Circuit's holding is already gaining traction among the other federal appellate courts. Most recently, the Second Circuit adopted the Seventh Circuit's approach to interpreting Title VII broadly to include claims of sexual orientation discrimination as a basis for a cause of action.[222] In *Zarda v. Altitude Express*, Zarda, a skydiving instructor, claimed he was fired due to his sexuality.[223] Zarda had disclosed his sexuality to a female client on a skydiving excursion and, after discovering the information Zarda had disclosed, the client's boyfriend reported Zarda to Zarda's employer, Altitude Express.[224] Altitude Express argued that Zarda was actually fired in response to complaints of inappropriate behavior.[225] Hearing the case for the first time, the Second Circuit rejected sexual orientation discrimination as a cause of action under Title VII, explaining that "a three-judge panel of this Court lacks the power to overturn Circuit precedent."[226] Rehearing the case en banc, the Second Circuit held that "Title VII prohibits discrimination on the basis of sexual orientation as discrimination 'because of . . . sex.'"[227] The Second Circuit overturned a line of precedential cases that, at the time they were de-

221. *See* Lightner v. City of Wilmington, 545 F.3d 260, 264 (4th Cir. 2008) ("Title VII prohibits discrimination on the basis of specifically enumerated grounds: 'race, color, religion, sex, or national origin.' . . . Its purpose to eliminate these invidious forms of discrimination is clear.").

222. Alan Feuer & Benjamin Weiser, *Civil Rights Act Protects Gay Workers, Appeals Court Rules*, N.Y. Times (Feb. 26, 2018), https://www.nytimes.com/2018/02/26/nyregion/gender-discrimination-civil-rights-lawsuit-zarda.html.

223. Zarda v. Altitude Express, Inc., 855 F.3d 76, 79 (2d Cir. 2017) *rev'd*, Zarda v. Altitude Express, Inc., 883 F.3d 100 (2d Cir. 2018) (en banc).

224. *Id*. at 80.

225. *Id*.

226. *Id*. (citing Simonton v. Runyon, 232 F.3d 33, 36 (2d Cir. 2000); Dawson v. Bumble & Bumble, 398 F.3d 211, 217–19 (2d Cir. 2005) (reaffirming *Simonton*)).

227. Zarda v. Altitude Express, Inc., 883 F.3d 100, 108 (2d Cir. 2018) (en banc).

cided, reflected the view of other federal courts and the EEOC.[228] However, these views have since evolved.[229]

The Second Circuit's opinion mirrored the approach taken by the Seventh Circuit. The Second Circuit acknowledged that although Congress may not have anticipated "sex" to encompass claims of sexual orientation discrimination when enacting Title VII, it does not follow that courts cannot "give effect to the broad language that Congress used."[230] The Second Circuit's opinion emphasized the evolution of the judicial landscape set forth by the Supreme Court in seminal cases like *Price Waterhouse*[231] and *Oncale*,[232] and it applied the comparative test to interpret the nexus between sex discrimination and sexual orientation discrimination.[233] After conducting the same analysis as the Seventh Circuit, the Second Circuit similarly concluded that sex discrimination encompasses sexual orientation discrimination.[234] The Second Circuit's holding in *Zarda* widened the existing split among the federal appellate courts and made clear the immediate influence of the Seventh Circuit's holding in *Hively*.[235]

It can be argued that expanding the scope of Title VII will lead to an increase in the number of cases filed in federal court; establishing a new cause of action under Title VII will permit individuals to file lawsuits against conduct not previously prohibited by law. Federal court dockets are already congested,[236] and this results in decreased efficiency and delays in obtaining relief.[237] However, these arguments are inadequate bases to reject claims of sexual orientation discrimination altogether. With such logic, aversion to increased caseload will foreclose the possibility of instituting a new cause of action.

In reality, these disagreements underwrite a bigger picture. Failure to concretely define "sex" generates uncertainty in employment practices. While heterosexual employees are protected from employment

228. *Id*. at 114–15.
229. *Id*.
230. *Id*. at 115.
231. *Id*. at 117.
232. *Id*. at 115.
233. *Zarda*, 883 F.3d at 116.
234. *Id.* at 119.
235. Eversheds Sutherland LLP, *Circuit split grows–Second Circuit expands protection under Title VII based on sexual orientation*, JD SUPRA (Mar. 1, 2018), https://www.jdsupra.com/legalnews/circuit-split-grows-second-circuit-57441/.
236. *See, e.g.*, *Federal Court Management Statistics*, U.S. COURTS 35 (2018), http://www.uscourts.gov/sites/default/files/data_tables/fcms_na_distprofile0630.2018.pdf (reporting that as of June 2018, more than one of every five (22.9%) civil cases pending in United States District Courts were over three years old).
237. *See, e.g.*, MEC Resources, LLC v. Apple, Inc., 269 F. Supp. 3d 218, 227 (D. Del. 2017) (noting a "busy docket" as the reason for transferring the case to another court).

discrimination, the contradictory holdings of *Evans* and *Hively* have made it possible for some homosexual employees to "be exposed to discrimination at work just because they're gay."[238] Whether there exists an applicable law to remedy employment discrimination based on sexual orientation merely depends on one's physical location within the United States.[239] Currently, seventeen states do not have any law that prohibits employment discrimination on the basis of sexual orientation.[240] Moreover, around half of the country's LGBTQ population is located in the states where employment discrimination based on sexual orientation is not prohibited by any state law.[241] This means that around half of the LGBTQ population in the United States does not have a defense to discrimination on the basis of their sexual orientation in the workplace.[242] Such inconsistency in the law is problematic and calls for uniformity.

B. Economic Considerations

The importance of this issue is not limited to political considerations. Discrimination on the basis of sexual orientation has direct economic consequences.[243] The uncertainty surrounding Title VII's protections regarding sexual orientation discrimination presents a serious risk to the economic security of LGBTQ employees. About four percent of the national workforce, or eight million people, identifies as LGBTQ.[244] About one out of every four employees that openly

238. Alan Feuer, *Justice Department Says Rights Law Doesn't Protect Gays*, N.Y. TIMES (July 27, 2017), http://www.nytimes.com/2017/07/27/nyregion/justice-department-gays-workplace.html.

239. Evans Gibbs, *What's Happening With Sexual Orientation Discrimination In The Workplace?*, ABOVE THE LAW (Nov. 13, 2017, 3:15 PM), https://abovethelaw.com/2017/11/whats-happening-with-sexual-orientation-discrimination-in-the-workplace/. *See also Introduction to the Federal Court System*, U.S. DEP'T JUST., https://www.justice.gov/usao/justice-101/federal-courts (last visited Dec. 26, 2017).

240. *State Maps of Laws & Policies*, HUM. RTS. CAMPAIGN, https://www.hrc.org/state-maps/employment (last updated June 11, 2018). Twenty-one states and the District of Columbia have laws prohibiting discrimination based on sexual orientation and gender identity. *Id.* One state prohibits discrimination based on sexual orientation only. *Id.* Six states prohibit discrimination based on sexual orientation and gender identity, but only against public employees. *Id.* Five states prohibit discrimination on the basis of sexual orientation, but only against public employees. *Id.*

241. *Non-Discrimination Laws*, MOVEMENT ADVANCEMENT PROJECT, http://www.lgbtmap.org/equality-maps/non_discrimination_laws (last updated Aug. 18, 2018).

242. *Id*.

243. CHRISTY MALLORY ET AL., THE ECONOMIC IMPACT OF STIGMA AND DISCRIMINATION AGAINST LGBT PEOPLE IN GEORGIA 25 (2017), http://williamsinstitute.law.ucla.edu/wp-content/uploads/Economic-Impact-of-Discrimination-and-Stigma-against-LGBT-People-in-Georgia-FINAL-4.pdf.

244. CHRISTY MALLORY & M.V. LEE BADGETT, ADMINISTRATIVE IMPACT OF ADDING SEXUAL ORIENTATION AND GENDER IDENTITY TO TEXAS'S EMPLOYMENT NON-DISCRIMINATION

identify as LGBTQ report that their employer has mistreated them because of their sexual orientation,[245] and as a result, about one out of every ten LGBTQ employees quits.[246] This "job instability and high turnover" frequently "result[s] in greater unemployment and poverty rates for gay and transgender people."[247] Unemployment and overall economic insecurity is prominent in the LGBTQ community due to a number of factors.[248] These factors include: invisibility in public policy considerations, which means that LGBTQ needs are disregarded by society; sexual orientation discrimination in the workplace, which often results in lower wages for LGBTQ employees; and the gender wage gap, which means the absence of a male earner in female same-sex relationships makes such relationships more susceptible to poverty.[249] In fact, in 2009, male homosexuals had higher poverty rates than their heterosexual counterparts.[250] Additionally, adult lesbian women are consistently twice as likely to live in poverty than their heterosexual counterparts[251] with twenty-four percent of adult lesbian women living below the federal poverty line.[252] Providing federal pro-

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LAW 1 (2012), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Mallory_Badgett_TX_Workplace_Dec-2012.pdf. However, this statistic may underestimate the actual percentage of employees who identify as LGBTQ because employees are not required to disclose their sexual orientation to employers and "[f]orty-six percent of LGBTQ workers say they are closeted at work." DEENA FIDAS & LIZ COOPER, A WORKPLACE DIVIDED: UNDERSTANDING THE CLIMATE FOR LGBTQ WORKERS NATIONWIDE 6 (2018), https://assets2.hrc.org/files/assets/resources/AWorkplaceDivided-2018.pdf?_ga=2.116055045.281973929.1539983470-1343015097.1539289197.

245. *A Survey of LGBT Americans*, PEW RES. CTR. (June 13, 2013), http://www.pewsocialtrends.org/2013/06/13/a-survey-of-lgbt-americans/#fn-17196-1 ("21% [of LGBT adults] say they have been treated unfairly by an employer.").

246. *2017 Workplace Equality Fact Sheet*, OUT & EQUAL, http://outandequal.org/2017-workplace-equality-fact-sheet/ (last visited Nov. 8, 2018) ("Nearly one in 10 LGBT employees have left a job because the environment was unwelcoming.").

247. Crosby Burns & Jeff Krehely, *Gay and Transgender People Face High Rates of Workplace Discrimination and Harassment*, CTR. FOR AM. PROGRESS (June 2, 2011, 9:00 AM), https://www.americanprogress.org/issues/lgbt/news/2011/06/02/9872/gay-and-transgender-people-face-high-rates-of-workplace-discrimination-and-harassment/.

248. *New Report on LGBTQ Poverty Shows Need for More Resources and Research*, NAT'L LGBTQ TASK FORCE (May 1, 2018), http://www.thetaskforce.org/povertyreport/ ("[I]ndicators of economic disparity including food insecurity, housing instability, low-wage earning potential, and unemployment and under-employment are all heightened for LGBTQ communities.").

249. Alyssa Schneebaum & M. V. Lee Badgett, *Poverty in U.S. Lesbian and Gay Couple Households*, FEMINIST ECON. (Apr. 4, 2018), https://www.tandfonline.com/doi/pdf/10.1080/13545701.2018.1441533?needAccess=true.

250. MOVEMENT ADVANCEMENT PROJECT & SERVICES AND ADVOCATES FOR GAY, LESBIAN, BISEXUAL, AND TRANSGENDER ELDERS, IMPROVING THE LIVES OF LGBT OLDER ADULTS 11–12 (2010), https://www.lgbtmap.org/file/improving-the-lives-of-lgbt-older-adults.pdf.

251. *Id.*

252. Nico Sifra Quintana, *Poverty in the LGBT Community*, CTR. FOR AM. PROGRESS (July 1, 2009, 9:00 AM), https://www.americanprogress.org/wp-content/uploads/issues/2009/07/pdf/lgbt_poverty.pdf.

tections against employment discrimination on the basis of sexual orientation would boost LGBTQ individuals' ability to gain economic equality.[253]

The economic consequences of employment discrimination are not limited to the individual.[254] The economic consequences of sexual orientation discrimination can also be felt by the employer company, the company's market, and the overall economy. First, discrimination fosters an intolerable workplace environment that causes mistreated employees to quit, which produces substantial turnover costs for the company.[255] Employee turnover as a result of workplace discrimination costs the nation an average of $64 billion per year.[256] These costs could instead be expended more productively by directing these funds toward advancing the company's operations rather than toward handling internal discrimination affairs. Second, tolerating discriminatory practices prevents well-qualified individuals from working in positions for which they are most qualified.[257] In turn, propelling incompatible or unqualified candidates puts companies at a competitive disadvantage by diminishing chances of reaching optimal productivity.[258] Third, a hostile work environment thwarts an employee's ability to efficiently perform the functions of the job by distracting the employee from her responsibilities, thereby reducing a company's overall productivity.[259] However, a study conducted in 2013 revealed that 96% of the top fifty Fortune 500 companies that implemented prodiversity policies found that their company's overall profitability increased.[260] In addition, a separate study conducted in 2010 that measured reactions in the market to companies' implementation of pro-

253. *Id.*

254. AMY KLOBUCHAR, THE ECONOMIC CONSEQUENCES OF DISCRIMINATION BASED ON SEXUAL ORIENTATION AND GENDER IDENTITY 2–3 (2013), https://www.jec.senate.gov/public/_cache/files/82ab1377-99ee-41bc-a99a-fced35ca578c/enda—-final-11.5.13.pdf.

255. Harry Bradford, *Workplace Discrimination Costs Businesses $64 Billion Every Year*, HUFFINGTON POST (Mar. 23, 2012, 8:43 AM), https://www.huffingtonpost.com/2012/03/23/workplace-discrimination-costs-businesses-cap_n_1373835.html (last updated Dec. 6, 2017).

256. KLOBUCHAR, *supra* note 254 (citing *Corporate Leavers Survey*, SMASH (Jan. 7, 2007), https://www.smash.org/corporate-leavers-survey/).

257. KLOBUCHAR, *supra* note 254.

258. KLOBUCHAR, *supra* note 254.

259. KLOBUCHAR, *supra* note 254.

260. KLOBUCHAR, *supra* note 254 (citing Tim Cook, *Workplace Equality is Good for Business*, WALL ST. J. (Nov. 3, 2013, 6:44 PM), https://www.wsj.com/articles/workplace-equality-is-good-for-business-1383522254 ("[embracing people's individuality] turns out to be great for the creativity that drives our business. We've found that when people feel valued for who they are, they have the comfort and confidence to do the best work of their lives.")); BRAD SEARS & CHRISTY MALLORY, ECONOMIC MOTIVES FOR ADOPTING LGBT-RELATED WORKPLACE POLICIES 2, 5–7 (2011), http://williamsinstitute.law.ucla.edu/wp-content/uploads/Mallory-Sears-Corp-Statements-Oct2011.pdf.

diversity policies found that the stock prices of companies that implemented pro-diversity policies exceeded those of similar companies that lacked pro-diversity policies.[261] The study explained that the stock market success may be attributable to a more "satisfied, committed, motivated, and productive workforce that may increase an organization's potential for profitability and sustained performance."[262]

C. Social Considerations

Society's attitudes toward traditional concepts are changing. When enacting Title VII, Congress considered the types of discrimination it thought were most serious given the socio-political climate of the time.[263] When Title VII was enacted in the 1960s, the right to marry someone of the same sex was not recognized as a national issue.[264] The Catholic Church publicly opposed gay marriage, and many believed that allowing same-sex marriages would undermine the institution of marriage.[265] However, the Supreme Court's decision to recognize a fundamental right to marriage for same-sex couples in *Obergefell v. Hodges* is demonstrative of society's evolving acceptance of same-sex relationships.[266] Gallup's annual Values and Beliefs 2017 survey reported that the percentage of Americans believing gay and lesbian relationships are "morally acceptable" rose from 40% in 2001 to 63% in 2017.[267] Congress has amended Title VII several times since its enactment in 1964; supplemental legislation has led to prohibitions on discrimination on the basis of pregnancy,[268] disability,[269] and

261. Peng Wang & Joshua L. Schwarz, *Stock Price Reactions to GLBT Nondiscrimination Policies*, 49 HUM. RES. MGMT. 195, 209 (2010), https://onlinelibrary.wiley.com/doi/epdf/10.1002/hrm.20341.

262. *Id.*

263. H.R. REP. NO. 88-914, pt. 3, at 2018 (1963) ("It is, however, possible and necessary for the Congress to enact legislation which prohibits and provides the means of terminating the most serious types of discrimination.").

264. David Masci, *A Contentious Debate: Same-Sex Marriage in the U.S.*, PEW RES. CTR. (July 9, 2009), http://www.pewforum.org/2009/07/09/a-contentious-debate-same-sex-marriage-in-the-us/.

265. *Id*.

266. *See* discussion *supra* Part III.A.

267. Jeffrey M. Jones, *Americans Hold Record Liberal Views on Most Moral Issues*, GALLUP (May 11, 2017), http://news.gallup.com/poll/210542/americans-hold-record-liberal-views-moral-issues.aspx. In fact, Americans were reported as having record-breaking liberal views on a majority of the issues surveyed. *Id.*

268. *See* Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (1982). The Act reads in relevant part:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under

age[270]—none of which were originally enumerated, protected classes under Title VII.

Despite this progressiveness, many homosexual individuals are left without recourse when terminated from their employment as a result of discrimination in the workplace. Accordingly, it is necessary that Title VII's enumerated term "sex" be clarified and expanded.

V. Conclusion

It is illegal to discriminate against an employee based on race, religion, national origin, age, disability, or sex. Protection against these forms of discrimination is embedded in Title VII. However, concern has surrounded the vague landscape of Title VII's protections, specifically the protection against sex discrimination. In particular, debate surrounds the question of whether or not discrimination on the basis of an employee's sexual orientation is within the scope of Title VII's protection against sex discrimination. Consequently, federal courts have struggled to apply a uniform interpretation of Title VII's protections.

Given today's social climate and the direction of Supreme Court precedent, it is time for a decisive interpretation of Title VII's protection against sex discrimination. Though Congress did not consider sexual orientation when enumerating sex as a prohibited basis for discrimination under Title VII, existing precedent is demonstrative of an evolving judicial movement directed toward Title VII's protection against sex discrimination encompassing sexual orientation discrimi-

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> fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2002e-2(h) of this title shall be interpreted to permit otherwise.

Id.

269. *See* Americans with Disabilities Act of 1990, 42 U.S.C. § 12112. The Act reads in relevant part:

> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

Id.

270. *See* Age Discrimination in Employment Act of 1964, 29 U.S.C. § 623 (1967). The Act reads in relevant part:

> It shall be unlawful for an employer-(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age; (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or (3) to reduce the wage rate of any employee in order to comply with this chapter.

Id.

nation. The judiciary's acceptance of sexual orientation protections reflects society's evolving mentality.

Adopting the Seventh Circuit's decision to expand the scope of Title VII to include protection against discrimination on the basis of sexual orientation will support uniformity in employment practices and a more successful economy in the face of an evolving society. Uniformity throughout the federal court system will ensure that employment practices are not allowed to assess an employee's performance based on sexual orientation. Closing this legislative gap would be a step in the direction toward equal protection against discrimination for all in the workplace.

Coco Arima