Saving Cake for Dessert: How Hearing the LGBTQ Title VII Cases First Can Inform LGBTQ Public Accommodation Cases

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Introduction

Issues involving the constitutional rights of lesbian, gay, bisexual, transgender, and queer (LGBTQ) community members have been argued at the United States Supreme Court four times since 2003.[1] That year, the Court held in *Lawrence v. Texas* that the criminalization of sexual acts performed between consenting adults in private was a violation of liberty rights guaranteed under the Due Process Clause of the Fourteenth Amendment to the United States Constitution.[2] The three cases that followed dealt with the recognition of marriage for same-sex couples and the ensuing benefits attendant to that recognition.[3] In each of these cases, the Court held that consideration of the constitutional rights of LGBTQ persons outweighed opposing arguments related to standing, states' rights, the historical definition of marriage as between a man and a woman, and traditional ways of assigning parentage.[4]

However, in 2018, the Court was asked to consider the constitutional rights of a non-LGBTQ litigant in a case directly involving LGBTQ rights.[5] The issue in *Masterpiece Cakeshop, Ltd. v. Colorado*

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1 *See* Pavan v. Smith, 137 S. Ct. 2075 (2017); Obergefell v. Hodges, 135 S. Ct. 2584 (2015); United States v. Windsor, 570 U.S. 744 (2013); Lawrence v. Texas, 539 U.S. 558 (2003).

2 *Lawrence*, 539 U.S. at 578.

3 *See Pavan*, 137 S. Ct. at 2077; *Obergefell*, 135 S. Ct. at 2593; *Windsor*, 570 U.S. at 749-51.

4 *Pavan*, 137 S. Ct. at 2078-79 (holding that if a state affords a right to heterosexual parents to list a married non-biological parent on a birth certificate, it must also afford that right to homosexual parents); *Obergefell,* 135 S. Ct. at 2604-05 (holding it was a violation of the Due Process Clause of the Fourteenth Amendment to not allow same-sex couples to marry); *Windsor*, 570 U.S. at 774-75 (holding it was a violation of equal protection under the law for the federal government to not recognize same-sex marriage).

5 Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Com'n, 138 S. Ct. 1719, 1723 (2018).

Civil Rights Commission was whether the application of Colorado's public accommodation anti-discrimination statute violated the Free Speech and Free Exercise Clauses of the First Amendment by requiring a baker to design and sell a wedding cake to a same-sex couple when doing so went against the baker's sincerely held religious beliefs.[6] The Court held that certain conduct by members of the Colorado Civil Rights Commission during the administrative hearing of the case violated the Free Exercise Clause.[7] Therefore, the Court decided the case in favor of the baker.[8] However, the Court confined its holding to the particular facts of the case.[9] Although *Masterpiece* provided guidance for future cases involving conflicts between public accommodation anti-discrimination statutes and business owners' sincerely held religious beliefs, the constitutional issue is still unsettled.[10]

Many thought the next Supreme Court decision involving the LGBTQ community would involve an issue similar to *Masterpiece*.

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[6] *Id.*

[7] *Id.* at 1729. This conduct was characterized by the Court as exhibiting "some elements of a clear and impermissible hostility toward . . . sincere religious beliefs[.]" One example occurred during a July 25, 2014 public meeting of the Commission, where one of the commissioners said the following: "I would also like to reiterate what we said in the hearing or the last meeting. Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust, whether it be—I mean, we—we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others." *Id.* (citing Transcript of Record at 11–12, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (2018) (No. 16-111)). In citing this, Justice Kennedy noted that "[t]o describe a man's faith as 'one of the most despicable pieces of rhetoric that people can use' is to disparage his religion in at least two distinct ways: by describing it as despicable, and also by characterizing it as merely rhetorical—something insubstantial and even insincere. The commissioner even went so far as to compare Phillips' invocation of his sincerely held religious beliefs to defenses of slavery and the Holocaust. This sentiment is inappropriate for a Commission charged with the solemn responsibility of fair and neutral enforcement of Colorado's antidiscrimination law—a law that protects against discrimination on the basis of religion as well as sexual orientation." *Id*. at 1729. Another example that troubled the majority involved the Commission's decision about a separate matter. *Id.* at 1730. A customer went to three separate shops to attempt order a cake "with images that conveyed disapproval of same-sex marriage, along with religious text." *Id.* (citing Jack v. Gateaux, Ltd., Charge No. P20140071X, at 4 (Colo. Civil Rights Div. Mar. 24, 2015)). The customer was denied at all three shops. *Id.* On appeal, the Commission found that the three bakeries were correct in refusing to bake the cakes because the words were "derogatory," "deemed hateful," and "discriminatory." *Id.*

[8] *Masterpiece Cakeshop*, 138 S. Ct. at 1731-32.

[9] *Id*.

[10] *Id.* at 1732 ("The outcome of cases like this in other circumstances must await further elaboration in the courts, all in the context of recognizing that these disputes must be resolved with tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market.").

Indeed, when a petition for writ of certiorari was filed with the Court in October of 2018 in *Klein v. Oregon Bureau of Labor and Industries*,[11] general thinking was that this case was on track to settle the issue left unresolved in *Masterpiece*.[12] The Kleins were also cake bakers who declined to design and create a custom wedding cake for a same-sex couple based on their sincerely held religious beliefs in a state where a public accommodation anti-discrimination statute prohibited this conduct.[13] In fact, the Supreme Court considered the Kleins' petition over a period of thirteen conferences until June 17, 2019, when the Court granted certiorari, vacated the judgment, and sent the case back to the Oregon Court of Appeals for reconsideration in light of *Masterpiece*, which was decided over a year earlier.[14]

Why did the Court once again "punt" on this unsettled issue? The answer is likely related to orders the Court issued on April 22, 2019, when it granted certiorari in three cases involving LGBTQ employees.[15] These cases address whether gay and transgender persons fall under the protections provided by Title VII of the Civil Rights Act of 1964.[16] On October 8, 2019, the Court heard the oral arguments for these cases.[17] It appears that the Court carefully considered the merits and issues at stake in the Title VII cases in this "rearrangement" of the order in which all of these cases—and attendant issues—would eventually be addressed.

This Article first examines the background, facts, and legal theories of the three Title VII cases scheduled for oral argument. Although the cases are similar, this background sheds light on the

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[11] Klein v. Oregon Bureau of Labor and Indus., 410 P.3d 1051 (Or. 2017), *vacated*, 139 S. Ct. 2713 (2019).

[12] *See* Robert Barnes, *Supreme Court Passes on Case Involving Baker Who Refused to Make Wedding Cake for Same-Sex Couple*, WASH. POST (June 17, 2019), https://www.washingtonpost.com/politics/courts_law/supreme-court-passes-on-new-case-involving-baker-who-refused-to-make-wedding-cake/2019/06/17/f78c5ae0-7a71-11e9-a5b3-34f3edf1351e_story.html.

[13] *Id.*

[14] Petition for Writ of Certiorari, Klein v. Oregon Bureau of Labor and Indus., 139 S. Ct. 2713 (June 17, 2019).

[15] *See* Zarda v. Altitude Express, 883 F.3d 100 (2d Cir. 2018), *cert. granted*, 139 S. Ct. 1599 (2019); EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560 (6th Cir. 2018), *cert. granted in part*, 139 S. Ct. 1599 (2019); Bostock v. Clayton Cty. Bd. of Comm'rs, 723 F. App'x 964 (11th Cir. 2011), *cert. granted*, 139 S. Ct. 1599 (2019).

[16] *Zarda*, 883 F.3d at 107; *R.G. & G.R. Harris Funeral Homes*, 884 F.3d at 566-67; *Bostock,* 723 F. App'x at 964.

[17] *See Granted & Noted List: Cases for Argument in October Term 2019*, U.S. SUPREME COURT, https://www.supremecourt.gov/orders/19grantednotedlist.pdf (last visited Jan. 15, 2020) [hereinafter *October Term 2019*].

application of Title VII to a spectrum of non-conventional sexual identities. This Article then discusses Title VII of the Civil Rights Act of 1964 and contrasts the objectives of anti-discrimination employment laws with anti-discrimination public accommodation laws. Next, the Article considers how recent constitutional jurisprudence regarding liberty interests can inform further interpretations of Title VII.[18] Finally, this Article concludes by noting how future cases involving LGBTQ customers' rights in the public arena will be impacted by the Supreme Court first addressing prospective and current LGBTQ employees' rights in the workplace.

I. THE TITLE VII CASES

The three Title VII cases scheduled for argument at the Supreme Court in October of 2019 are: (1) *Zarda v. Altitude Express*; (2) *Bostock v. Clayton County*; and (3) *Equal Employment Opportunity Commission v. R.G. & G.R. Harris Funeral Homes, Inc*.[19] *Zarda* and *Bostock* involve gay employees who were fired based on their sexual orientation, whereas *Harris Funeral Homes* deals with a transgender employee who was fired based on her sexual identity.[20]

A. Zarda v. Altitude Express

Zarda v. Altitude Express is a Second Circuit case arising out of New York concerning a firing allegedly based on sexual orientation.[21] Donald Zarda was an employee of Altitude Express who took customers on tandem skydives.[22] In a tandem skydive, the instructor is

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18 Religious objections to coverage of LGBTQ employees under Title VII or public accommodation statutes are not analyzed in this paper. These are only addressed in the background and facts of cases herein.

19 *See October Term 2019*, *supra* note 17. In *R.G. & G.R. Harris Funeral Homes, Inc.,* the EEOC (representing Aimee Stephens) followed guidance issued by then-Attorney General Eric Holder during President Barack Obama's administration concluding that Title VII covered transgender persons. *See* OFF. OF THE ATT'Y GEN., MEMORANDUM: REVISED TREATMENT OF TRANSGENDER EMPLOYMENT DISCRIMINATION CLAIMS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 1 (2017). In October 2017, then-Attorney General Jeff Sessions issued a memorandum reversing that position: "Title VII's prohibition on sex discrimination encompasses discrimination between men and women but does not encompass discrimination based on gender identity *per se*, including transgender status." *Id.* at 2.

20 *See Zarda*, 883 F.3d at 107; *R.G. & G.R. Harris Funeral Homes*, 884 F.3d at 566-67; *Bostock*, 723 F. App'x at 964.

21 Zarda v. Altitude Express, 855 F.3d 76, 79 (2d Cir. 2017).

22 *Zarda,* 883 F.3d at 108.

strapped to the back of the customer for safety and supervision while freefalling from a plane.[23] Zarda had a practice of telling female customers he was gay, so that any discomfort she might have about being strapped to a man would be minimized.[24] In one particular case, Zarda disclosed to the female he was jumping with that he was gay.[25] After the dive was over, she told her boyfriend what Zarda told her and the boyfriend later called Altitude Express to complain.[26] Zarda was fired shortly thereafter.[27]

Zarda[28] filed an action against Altitude Express in federal district court and alleged they discriminated against him based on his sexual orientation in violation of Title VII of the Civil Rights Act of 1964.[29] The district court granted Altitude Express's motion for summary judgment based largely on precedent set out in *Simonton v. Runyon*, and Zarda appealed the decision to the Second Circuit.[30] After the Second Circuit affirmed the district court, the court reheard the case *en banc*.[31]

Recognizing that Title VII legal doctrine regarding sexual orientation had evolved, the court discussed two recent circuit court cases

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23 *Id*.

24 *Id.*

25 *Id.*

26 *Id.*

27 *Id.* at 108-09.

28 In 2014, four years after filing suit, Zarda was killed while BASE-jumping. Vanessa Chestnut, *Plaintiff at center of landmark gay-rights case never got to witness his own victory*, NBC NEWS (Mar. 3, 2018), https://www.nbcnews.com/feature/nbc-out/donald-zarda-man-center-major-gay-rights-case-never-got-n852846 ("BASE-jumping is an extreme sport where one jumps off a fixed structure or cliff with a parachute or wingsuit. [It is] considered much more dangerous than skydiving from a plane[.]"). His family decided to continue with the lawsuit. *Id.*

29 Zarda v. Altitude Express, 855 F.3d 76, 79 (2d Cir. 2017). Zarda also pled violation of various New York laws; those laws are not germane to this article. *Id.*

30 *See* Zarda v. Altitude Express, 883 F.3d 100 (2d Cir. 2018). In *Simonton*, despite overt discrimination characterized by the court as "morally reprehensible" toward a gay employee of the United States Postal Service, the court held that "[t]he law is well-settled in this circuit and in all others to have reached the question that Simonton has no cause of action under Title VII because Title VII does not prohibit harassment or discrimination because of sexual orientation." Simonton v. Runyon, 232 F.3d 33, 35 (2d Cir. 2000).

31 Zarda v. Altitude Express, Inc., 2017 U.S. App. LEXIS 13127 (2d Cir. 2017). The plaintiff amici listed in the case represent a broad group of interested parties, from major businesses such as Microsoft and Google, to traditional advocacy groups such as the National Center for Lesbian Rights and the GLBTQ Legal Advocates & Defenders, to affinity groups such as the Hispanic National Bar Association and the National Women's Law Center, and to lawmakers such as U.S. Senator Tammy Baldwin and U.S. Representative David Cicilline. *Zarda*, 883 F.3d at 105-06. The number of defendant amici listed is much smaller, and includes the Christian Legal Society and the National Association of Evangelicals. *Id*.

that addressed this issue, one from the Eleventh Circuit and the other from the Seventh Circuit.[32] The *en banc* court in *Zarda* noted that the Eleventh Circuit in *Evans v. Georgia Regional Hospital*[33] held that it was bound by precedent in the 1979 case of *Blum v. Gulf Oil*.[34] Decided nearly forty years earlier, the *Blum* court held, without discussion, that "discharge for homosexuality is not prohibited by Title VII or Section 1981."[35] The *Zarda* court also discussed the Seventh Circuit case *Hively v. Ivy Technical Community College*.[36] The *Zarda* court noted the *Hively* court, sitting *en banc*, considered the recent developments at the Supreme Court level and came to the conclusion that "discrimination on the basis of sexual orientation is a form of sex discrimination."[37] Additionally, the court discussed *Price Waterhouse v. Hopkins*,[38] a Supreme Court case that held nonconformity with gender norms was a form of sexual stereotyping that was impermissible under Title VII.[39] Subsequently, the *Zarda* court held similarly and overruled *Simonton v. Runyon*.[40]

The relevant text of Title VII provides the following:

> It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .[41]

The court in *Zarda* noted "while Title VII should be interpreted broadly to achieve equal employment opportunity,"[42] we are guided by the phrase "because of . . . sex."[43]

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[32] *Id.* at 108.

[33] Evans v. Ga. Reg'l Hosp., 850 F.3d 1248 (11th Cir.), *cert. denied*, 138 S. Ct. 557 (2017).

[34] *Zarda*, 883 F.3d at 108.

[35] Blum v. Gulf Oil Corp., 597 F.2d 936, 938 (5th Cir. 1979).

[36] Hively v. Ivy Tech Cmty. Coll., 853 F.3d 339 (7th Cir. 2017).

[37] Zarda v. Altitude Express, 883 F.3d 100, 108 (2d Cir. 2018) (quoting *Hively*, 853 F.3d at 340-41).

[38] Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

[39] *Id.* at 239-40 ("Congress' intent to forbid employers to take gender into account in making employment decisions appears on the face of the statute . . . . We take these words to mean that gender must be irrelevant to employment decisions.").

[40] *Id.*

[41] 42 U.S.C. § 2000e-2(a)(1) (2018).

[42] *Zarda*, 883 F.3d at 111 (quoting Huntington Branch, N.A.A.C.P. v. Town of Huntington, 844 F.2d 926, 935 (2d Cir. 1988)).

[43] *Id.* at 111-12.

In the *Zarda* court's words, "[a]pplying Title VII to traits that are a function of sex is consistent with the Supreme Court's view that Title VII covers not just 'the principal evil[s] Congress was concerned with when it enacted' the statute in 1964, but also 'reasonably comparable evils' that meet the statutory requirements."[44] The *Zarda* court held that sexual orientation discrimination was a subset of sex discrimination, and that sexual orientation is a function of sex: "[l]ogically, because sexual orientation is a function of sex and sex is a protected characteristic under Title VII, it follows that sexual orientation is also protected."[45]

Finally, the *Zarda* court also looked closely at the role of associational discrimination.[46] Associational discrimination is a Title VII action based on the premise of association, most clearly understood in cases where a white person—an employee—has been fired because of their association with a black person.[47] Several circuits, including the Second Circuit,[48] have recognized associational discrimination. In recognizing this cause of action, courts focused on the race of the employee.[49] The court in *Zarda* extended this prohibition on associational discrimination "to all classes protected by Title VII, including sex."[50] The court held "that sexual orientation discrimination, which is based on an employer's opposition to association between particular sexes and thereby discriminates against an employee based on their own sex, constitutes discrimination because of . . . sex."[51] Four judges

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[44] *Id.* at 112 (quoting Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998)).

[45] *Id.* at 112-13.

[46] *Id*. at 124.

[47] *See* Holcomb v. Iona C., 521 F.3d 130, 138 (2d Cir. 2008) ("[A]n employer may violate Title VII if it takes action against an employee because of the employee's association with a person of another race.").

[48] *See* Zarda v. Altitude Express, 883 F.3d 100 (2d Cir. 2018) (citing Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 349 (7th Cir. 2017)); Barrett v. Whirlpool Corp., 556 F.3d 502, 512 (6th Cir. 2009); *Holcomb*, 521 F.3d at 139 (2d Cir. 2008); Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick, & GMC Trucks, Inc., 173 F.3d 988, 994–95 (6th Cir. 1999); Deffenbaugh–Williams v. Wal–Mart Stores, Inc., 156 F.3d 581, 589 (5th Cir. 1998), *vacated in part on other grounds*, Williams v. Wal–Mart Stores, Inc., 182 F.3d 333 (5th Cir. 1999) (en banc); Parr v. Woodmen of the World Life Ins. Co., 791 F.2d 888, 892 (11th Cir. 1986)). *But see Zarda*, 883 F.3d 159 n. 28 (Lynch, J., dissenting) (rejecting associational discrimination).

[49] See *Holcomb*, 521 F.3d 130, 139 ("We reject this restrictive reading of Title VII. The reason is simple: where an employee is subjected to adverse action because an employer disapproves of interracial association, the employee suffers discrimination because of the employee's *own* race.").

[50] *Zarda*, 883 F.3d at 124-25.

[51] *Id.* at 128.

joined or concurred in the result with author Chief Judge Katzmann, while three judges dissented.[52]

B. Bostock v. Clayton County, Georgia

The *Bostock v. Clayton County, Georgia*[53] opinion is more perfunctory than the *Zarda* opinion. Gerald Bostock was an employee of Clayton County, Georgia, and assigned to work in Juvenile Court as the Child Welfare Services Coordinator.[54] While employed from 2003 to 2013, Bostock received good evaluations.[55] A program that he supervised received the 2007 Court Appointed Special Advocate ("CASA") Established Program Award of Excellence from Georgia CASA.[56] Bostock was also active in Georgia CASA, serving on its Standards and Policy Committee around 2011 and 2012.[57] However, Bostock, a gay man, started participating in a gay recreational softball league in 2013.[58] Bostock alleged that:

> his participation in the league and his sexual orientation and identity were openly criticized by one or more persons with significant influence on Clayton County's decision-making. For example, in May 2013, during a meeting with the Friends of Clayton County CASA Advisory Board at which Plaintiff's supervisor was present, Plaintiff alleges that at least one individual made disparaging comments about his sexual orientation and identity and participation in the league.[59]

Around this time, Clayton County told Bostock that it would be performing an internal audit on his CASA program funds. Bostock was then terminated by Clayton County in June 2013 for "conduct unbecoming one of its employees."[60] Bostock asserted that he was

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[52] *Id.* at 106-07.

[53] Bostock v. Clayton Cty., No.1:16-CV-1460-ODE, 2017 WL 4456898, (N.D. Ga., July 21, 2017), *aff'd*, 723 F. App'x. 964 (11th Cir. 2018), *cert. granted by* 139 S. Ct. 1599 (2019).

[54] *Bostock*, 2017 WL 4456898, at *1.

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] Bostock v. Clayton Cty., No.1:16-CV-1460-ODE, 2017 WL 4456898, (N.D. Ga., July 21, 2017), *aff'd*, 723 F. App'x. 964 (11th Cir. 2018), *cert. granted by* 139 S. Ct. 1599 (2019).

fired because of his sexual orientation, and that the Clayton County's explanation was a pretext.[61]

Bostock filed charges of discrimination with the Equal Employment Opportunity Commission based on Title VII of the 1964 Civil Rights Act, and stated that he believed he was fired because of his sexual orientation and failure to conform to gender stereotypes.[62] After the magistrate judge recommended dismissal based on a motion by Clayton County, Bostock filed objections to the judge's conclusions of law.[63] Upon a *de novo* review of the report, the United States District Court for the Northern District of Georgia, citing the binding precedent of *Evans v. Georgia Regional Hospital*,[64] held that discrimination based on sexual orientation was not a cognizable claim under Title VII.[65] The court also noted—as had the magistrate judge[66]—that Bostock did not allege any facts supporting a claim of gender stereotype discrimination.[67] Thus, Clayton County's motion to dismiss was granted.[68] Upon appeal to the Eleventh Circuit in May of 2018, the district court's unpublished decision was affirmed per curiam.[69] The court relied on the same reasoning as the district court, citing precedent from thirty-nine years earlier—reaffirmed in *Evans v. Regional Hospital*—that "[d]ischarge for homosexuality is not prohibited by Title VII."[70] The court also noted that "[u]nder our prior panel precedent rule, we cannot overrule a prior panel's holding, regardless of whether we think it was wrong, unless an intervening Supreme Court or Eleventh Circuit en banc decision is issued."[71] A petition for a rehearing *en banc* was denied and there was a vigorous dissent by Judge Robin Rosenbaum and joined by Judge Jill Pryor.[72]

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61 *Id.*

62 *Id*. at *2.

63 *Id.*

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

65 *Bostock*, 2017 WL 4456898, at *2.

66 Bostock v. Clayton Cty., No. 1:16-CV-001460-ODE-WEJ, 2016 U.S. Dist. LEXIS 192898, at *13-15 (N.D. Ga. Nov. 3, 2016).

67 Bostock v. Clayton Cty., No.1:16-CV-1460-ODE, 2017 WL 4456898, *3 (N.D. Ga., July 21, 2017).

68 *Id.*

69 Bostock v. Clayton Cty. Bd. of Comm'rs, 723 F. App'x 964 (11th Cir. 2018).

70 *Id.* (citing Blum v. Gulf Oil Corp., 597 F.2d 936, 938 (5th Cir. 1979)).

71 *Id.* at 965.

72 Bostock v. Clayton County Bd. of Comm'rs, 894 F.3d 1335, 1336-38 (11th Cir. 2018) (Rosenbaum, J., dissenting) ("The issue this case raises—whether Title VII protects gay and lesbian individuals from discrimination because their sexual preferences do not conform to their

C. Equal Employment Opportunity Commission v. R.G. & G.R. Harris Funeral Homes, Inc.

The Title VII action involving a transgender employee, *Equal Employment Opportunity Commission v. R.G. & G.R. Harris Funeral Homes, Inc.*, is a Sixth Circuit case from Michigan.[73] Plaintiff Aimee Stephens, assigned male at birth, worked at R.G. & G.R. Harris Funeral Homes, Inc. ("Funeral Home").[74] When she first started working for Funeral Home in 2007, she presented as a male and was known as Anthony Stephens.[75] She worked for Funeral Home for six years, first starting out as an apprentice before being promoted a year later to a Funeral Director and Embalmer.[76] Funeral Home is 95.4% owned by Thomas Rost, who stated that he had been a Christian for over sixty-five years.[77] Funeral Home is not affiliated with a church and serves clients of any faith.[78] Being a member of a faith community was not a requirement to work for Funeral Home.[79]

In July 2013, Stephens told Rost in a letter that she intended to transition from male to female.[80] In the letter, Stephens stated that she would start living and presenting as female when she returned from her vacation.[81] This was a step she needed to complete for one year before having gender confirmation surgery.[82] Two weeks later, as she prepared to leave for vacation, Rost fired her.[83] He offered her a severance package, stating "this is not going to work out."[84] Rost later

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employers' views of whom individuals of their respective genders should love—is indisputably en-banc-worthy. Indeed, within the last fifteen months, two of our sister Circuits [in *Zarda* and *Hively*] have found the issue of such extraordinary importance that they have each addressed it en banc . . . . I cannot explain why a majority of our Court is content to rely on the precedential equivalent of an Edsel with a missing engine, when it comes to an issue that affects so many people . . . . Particularly considering the amount of the public affected by this issue, the legitimacy of the law demands we explain ourselves." *Id*.

73 EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560 (6th Cir. 2018), *cert. granted in part*, 139 S. Ct. 1599 (2019).

74 *Id.* at 567.

75 *Id.*

76 *Id*.

77 *Id.* at 567-68.

78 *Id*. at 568.

79 EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 568 (6th Cir. 2018).

80 *Id.*

81 *Id.* at 569.

82 *Id*. at 568-69.

83 *Id.* at 569.

84 *Id.*

testified that he fired Stephens because "he was no longer going to represent himself as a man. He wanted to dress as a woman."[85] Rost "sincerely believe[d] that the Bible teaches that a person's sex is an immutable God-given gift . . . ."[86] He also believed that he would be violating one of God's commandments if he permitted one of his employees to deny his or her sex while representing Funeral Home, or if he let a male funeral director dress like a female funeral director.[87]

After being fired, Stephens filed a sex-discrimination charge with the Equal Employment Opportunity Commission (EEOC) against Funeral Home.[88] Following its investigation, the EEOC issued a letter of determination that stated there was reasonable cause to believe that Funeral Home fired Stephens because of her sex and gender identity in violation of Title VII.[89] After failing to resolve the matter through an alternative dispute process, the EEOC filed a complaint against Funeral Home in federal district court.[90]

The district court found that although being transgender was not a protected trait under Title VII, Stephens had a claim against Funeral Home because she was terminated for failing to conform to "sex- or gender-based preferences, expectations, or stereotypes."[91] However, the court ultimately granted Funeral Home's motion for summary judgment because it found that the Religious Freedom Restoration Act (RFRA) barred the EEOC from bringing a charge against Funeral Home.[92] The court found this would:

> [S]ubstantially burden Rost and the Funeral Home's religious exercise and the EEOC had failed to demonstrate that enforcing Title VII was the least restrictive way to achieve its presumably compelling interest

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85 EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 569 (6th Cir. 2018).

86 *Id.*

87 *Id*. A secondary issue in this case was that Funeral Home provided male funeral directors with free suits and ties, replacing them as necessary, while offering no clothing or clothing allowance to female employees. *Id.* at 566. After this suit was filed, Funeral Home began providing female employees with a clothing allowance, but Funeral Home stated they had not provided suits for female funeral directors because they had not had a female funeral director in decades. *Id*. at 568.

88 *Id.* at 569.

89 *Id.*

90 *Id.*

91 EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 569 (6th Cir. 2018).

92 *Id.* at 570.

> "in ensuring that Stephens is not subject to gender stereotypes in the workplace in terms of required clothing at the Funeral [H]ome."[93]

The EEOC appealed to the Sixth Circuit Court of Appeals, and Stephens was permitted to intervene by the court.[94]

The Sixth Circuit noted that the district court was correct in determining "that Stephens was fired because of her failure to conform to sex stereotypes, in violation of Title VII."[95] The court cited *Smith v. City of Salem* while so affirming:

> [I]n *Smith*, we held that a transgender plaintiff (born male) who suffered adverse employment consequences after "he began to express a more feminine appearance and manner on a regular basis" could file an employment discrimination suit under Title VII . . . because such "discrimination would not [have] occur[red] but for the victim's sex."[96]

However, the court held that the district court erred "in finding that Stephens could not alternatively pursue a claim that she was discriminated against on the basis of her transgender and transitioning status."[97] The court gave two reasons for doing so. First, the court stated that "it is analytically impossible to fire an employee based on that employee's status as a transgender person without being motivated, at least in part, by the employee's sex . . . ."[98] The court also analogized to *Schroer v. Billington*,[99] where an employer fired an employee because the employee converted from Christianity to Judaism.[100] The *Schroer* court found that the discrimination against the employee was "because of religion"—even though the employer did not feel "any animus against either Christianity or Judaism"—because discrimination "because of religion" includes discrimination "because of a change of religion."[101] The court analogized that similarly, in the case at bar, the discrimination occurred against an employee because

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93 *Id*.

94 *Id.* Several amicus briefs were also filed in the case. *Id.*

95 *Id*. at 571.

96 *Id.* at 572; Smith v. City of Salem, 378 F.3d 566, 573 (6th Cir. 2004). The Court in *Smith* relied on *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). *Smith*, 378 F.3d at 573.

97 EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 571 (6th Cir. 2018).

98 *Id*. at 575 (citing Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339 (7th Cir. 2017)).

99 Schroer v. Billington, 577 F. Supp. 2d 293 (D.D.C. 2008).

100 *R.G. & G.R. Harris Funeral Homes*, 884 F.3d at 575.

101 *Id.* (citing *Schroer*, 577 F. Supp. 2d. at 306).

of "a change in their sex."[102] Second, the court stated that to discriminate against transgender persons "necessarily implicates Title VII's proscriptions against sex stereotyping."[103] The court noted that in *Smith*, it recognized "a transgender person is someone who 'fails to act and/or identify with his or her gender'—i.e., someone who is inherently "gender non-conforming.'"[104] The court went on to make this connection:

> Thus, an employer cannot discriminate on the basis of transgender status without imposing its stereotypical notions of how sexual organs and gender identity ought to align. There is no way to disaggregate discrimination on the basis of transgender status from discrimination on the basis of gender non-conformity, and we see no reason to try.[105]

Funeral Home argued that *Vickers v. Fairfield Medical Center*, a Sixth Circuit case from 2006, should be controlling in not allowing a Title VII cause of action for Stephens.[106] The court explained that the court in *Vickers* held that "a plaintiff cannot pursue a claim for impermissible sex stereotyping on the ground that his perceived sexual orientation fails to conform to gender norms unless he alleges that he was discriminated against for failing to 'conform to traditional gender stereotypes in any observable way at work.'"[107] Funeral Home believed that *Vickers* would allow Stephens's sex-stereotyping claim regarding her "appearance or mannerisms on the job," but not her status as a transgender person.[108] The court rejected this, stating that *Vickers* dealt with a different legal question—a question regarding a person's sexual orientation, not his or her sexual identity.[109] The court

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[102] *Id.* at 576 ("The Funeral Home argue[d] that Schroer's analogy is 'structurally flawed' because, unlike religion, a person's sex cannot be changed; it is, instead, a biologically immutable trait."). The court declined to decide that issue. *Id.*

[103] *Id.* (citing Smith v. City of Salem, 378 F.3d 566, 573 (6th Cir. 2004)).

[104] *Id.* (quoting *Smith*, 378 F.3d at 575).

[105] EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 576-77 (6th Cir. 2018). The courts in both *G.G. v. Gloucester Cty. Sch. Bd.*, 654 F. App'x 606 (4th Cir. 2016), and *Dodds v. United States Dep't of Educ.*, 845 F.3d 217 (6th Cir. 2016), cited *Smith* in prohibiting sex stereotyping of persons based on their gender non-conformity; in each case, the plaintiff was transgender. *See* Glenn v. Brumby, 663 F.3d 1312, 1316 (11th Cir. 2011) (citing *Smith,* 378 F.3d at 566).

[106] *R.G. & G.R. Harris Funeral Homes*, 884 F.3d at 579.

[107] *Id*. (quoting Vickers v. Fairfield Med. Ctr., 453 F.3d 757, 764 (6th Cir. 2006)).

[108] *Id.*

[109] *Id.*

also distinguished *Vickers* in that it dealt with gender stereotypes at work, whereas *Smith* made clear that gender nonconformance outside of work may also be considered.[110]

Finally, the court considered whether Funeral Home had a legal defense that would preclude the enforcement of Title VII in this matter.[111] One such defense that the district court found could apply was in the RFRA.[112] The RFRA applies when the government is one of the parties in the action.[113] The court discussed the purpose behind the RFRA, which is to preclude the government from "substantially burdening a person's exercise of religion, even if this burden results from a rule of general applicability."[114] To allow the burden, the government must demonstrate "that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."[115] Thus, this is a burden-shifting process. First, the non-governmental party needs to show that there exists a substantial burden on his or her religious exercise with this generally applicable law.[116] In response, the government has to show that applying the law to the non-governmental party serves a compelling governmental interest, and that this burden is the least restrictive means of furthering that interest.[117]

The court held that Funeral Home failed to identify any way in which continuing to employ Stephens would substantially burden Funeral Home's ability to serve persons who were mourning at its services.[118] Rost argued that the operation of the funeral home itself constituted "religious exercise because he felt compelled to serve grieving people."[119] He felt customers of Funeral Home would be "disturbed" or "distracted" by Stephens while attending services at Funeral

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110 *Id.* at 580.

111 *Id.* at 581. The court first discussed whether the "ministerial exception" to Title VII applied in this case, and determined it did not. *Id*. at 581-83.

112 EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 201 F. Supp. 3d 837, 841 (E.D. Mich. 2016).

113 EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 583 (6th Cir. 2018). The court first dealt with the question of whether allowing a non-government actor (Stephens) to intervene barred a RFRA defense, holding it did not. *Id*. at 584.

114 *Id.*

115 42 U.S.C. § 2000bb–1 (2018).

116 *R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d at 583.

117 *See id.*

118 *Id.* at 586.

119 *Id.* at 585.

Home.[120] In response, even accepting the sincerity of Rost's religious beliefs, the court explained that "a religious claimant cannot rely on customers' presumed biases to establish a substantial burden under RFRA."[121] The court also explained that Rost's compelled compliance with Title VII did not amount to an endorsement of Stephens's view.[122]

Although the court did not need to reach the issue of whether the EEOC demonstrated that the enforcement of Title VII was the least restrictive means of furthering a compelling government interest, it nonetheless did so by noting that the EEOC "has a compelling interest in the elimination of workplace discrimination, including sex discrimination."[123] The court pointed out that the Supreme Court has recognized that compelling interests can override religious beliefs—even those that are protected by the Free Exercise Clause.[124] Finally, the court held that the enforcement of Title VII itself was actually "the least restrictive way to further EEOC's interest in eradicating discrimination based on sex stereotypes from the workplace."[125]

II. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

Early Supreme Court cases interpreting Title VII resulted in revisions to its original legislation.[126] For example, in the 1971 case of *Griggs v. Duke Power Company*, the Court expanded acts of employment discrimination from those found "intentional"—remedied ini-

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120 *Id.* at 586.

121 *Id.*

122 *See* EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 588 (6th Cir. 2018); *see also* Rumsfeld v. Forum for Acad. & Institutional Rights, Inc., 547 U.S. 47, 65 (2006) (explaining that nothing about law school recruiting amounts to an endorsement by the school of any speech by recruiters).

123 *See R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d at 590-91 ("Failing to enforce Title VII against the Funeral Home means the EEOC would be allowing a particular person—Stephens—to suffer discrimination, and such an outcome is directly contrary to the EEOC's compelling interest in combating discrimination in the workforce.").

124 *Id.* at 592 (citing Cutter v. Wilkinson, 544 U.S. 709, 722 (2005)).

125 *Id.* at 594. The court also discussed "least restrictive means" and "compelling interest" analogies with regard to Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, (2014) and its progeny. *Id.* at 594-95.

126 *See* Serena J. Hoy, *Interpreting Equal Protection: Congress, the Court, and the Civil Rights Acts*, 16 J.L. & POL. 381, 415 (2000) ("Subsequent amendments to Title VII, such as the Pregnancy Discrimination Act of 1978 and the Civil Rights Act of 1991, are better understood . . . as clarifications of Congress's understanding of the original statute, prompted by what were perceived to be the Court's misinterpretations.").

tially with "voluntary compliance" or "conciliation"—to those that had a "disparate impact."[127] Later, in 1973, the Court further elaborated on the order and allocation of proof in a Title VII case when employment discrimination was being challenged in *McDonnell Douglas Corporation. v. Green*.[128]

In 1974, the Court summed up the early history of Title VII nicely in *Alexander v. Gardner-Denver Company*.[129] Noting that Congress enacted Title VII in 1964, the Court explained this enactment was "to assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex, or national origin."[130] The Court explained that the preferred means for meeting this goal of equality was cooperation and voluntary compliance:[131]

> To this end, Congress created the Equal Employment Opportunity Commission and established a procedure whereby existing state and local equal employment opportunity agencies, as well as the Commission, would have an opportunity to settle disputes through conference, conciliation, and persuasion before the aggrieved party was permitted to file a lawsuit. In the Equal Employment Opportunity Act of 1972 [ ], Congress amended Title VII to provide the Commission with further authority to investigate individual charges of discrimination, to promote voluntary compliance with the requirements of Title VII, and to institute civil actions against employers or unions named in a discrimination charge.[132]

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127 *See* 42 U.S.C. § 2000e-2(k) (2018); Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971); *see also* Johnson v. Seaboard Air Line R. Co., 405 F.2d 645, 650 (4th Cir. 1968) (describing the amendment to Title VII).

128 McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973), *holding modified by* Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993) ("The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications . . . . The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection.").

129 Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974).

130 *Id*. at 44 (citing *McDonnell Douglas Corp.*, 411 U.S. at 800); *Griggs*, 401 U.S. at 429-30.

131 *Id.* at 44.

132 *Id.*

The Court summarized by stating that Title VII did not provide the EEOC with direct powers of enforcement—it could not adjudicate claims or impose administrative sanctions—but that the "final responsibility for enforcement of Title VII [was] vested with federal courts."[133] The Act authorized courts to issue injunctive relief and order appropriate affirmative action to remedy the effects of unlawful employment practices.[134] Even if the EEOC finds no reasonable cause to believe that Title VII has been violated, the courts still retain these broad powers, and the private right of action remains.[135]

Interestingly, in concluding the policy discussion in *Alexander*, the Court stated that "[i]n such cases, the private litigant not only redresses his own injury but also vindicates the important congressional policy against discriminatory employment practices."[136] The Court then cited several cases to support this statement, including *Newman v. Piggie Park Enterprises, Inc.*[137]

The evolution of Title VII of the Civil Rights Acts did not end after *Alexander*. On the contrary, the cases cited most frequently to support the argument that LGBTQ persons should be included in the definition of "sex" under Title VII are *Price Waterhouse v. Hopkins*[138] and *Oncale v. Sundowner Offshore Services, Inc*.[139] While *Price Waterhouse* dealt with sexual stereotyping, in *Oncale* the Court held that male-on-male sexual harassment was actionable under Title VII.[140] Authored by Justice Antonin Scalia, the Court, in acknowledging this broad construction, noted "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it

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133 *Id.*

134 *Id.* (citing 42 U.S.C. §§ 20000-e5 (f)–(g) (2018)).

135 Alexander v. Gardner-Denver Co., 415 U.S. 36, 45 (1974) ("Congress gave private individuals a significant role in the enforcement process of Title VII. Individual grievants usually initiate the Commission's investigatory and conciliatory procedures. And although the 1972 amendment to Title VII empowers the Commission to bring its own actions, the private right of action remains an essential means of obtaining judicial enforcement of Title VII.").

136 *Id.* at 45.

137 *Id.* (citing Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968)). *Piggie Park* was a public accommodation case under Title II of the Civil Rights Act of 1964 where the restaurant owner wanted to discriminate based on religious objection. *Piggie Park Enterprises*, 390 U.S. at 402 n. 5.

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

139 Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75 (1998).

140 *Id.* at 82.

is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."[141]

It appears that Congress did not consider the coverage of LGBTQ persons under the Civil Rights Act of 1964 when it was initially passed.[142] However, the continued evolution and refinement of both the wording of the Act and its interpretation signifies that the Act was not to remain a static document.

Legal arguments that lesbian, gay, and bisexual persons should be covered under Title VII differ slightly from arguments that transgender persons should. Lesbian, gay, and bisexual persons, transgender persons, and queer or gender non-conforming persons argue sexual stereotyping under *Price Waterhouse*.[143] However, lesbian, gay, and bisexual persons also argue that "sexual orientation" should be recognized as an extension of "sex" in the Title VII statute.[144] Transgender persons have a different argument with the wording of "sex" in the language of Title VII, in that they argue that they should be recognized as the gender—sex—they identify with.[145] However, at their essence, these arguments rest on the right to freely express sexual identity without fear of employment discrimination.

III. OBJECTIVES OF ANTI-DISCRIMINATION EMPLOYMENT AND PUBLIC ACCOMMODATION LAWS

A. *Employment—Title VII*

When the Supreme Court first addressed discrimination in the context of Title VII race-based cases, it considered the objectives of Title VII.[146] As it did in the 1960s and early 1970s, the Court finds itself once again addressing a new form of discrimination—this time

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141 *Id.* at 79.

142 Katherine Turk, *The Supreme Court must extend the Civil Rights Act's protections to LGBTQ employees*, WASH. POST, (Oct. 8, 2019), https://www.washingtonpost.com/outlook/2019/10/08/supreme-court-must-extend-civil-rights-acts-protections-lgbtq-employees/.

143 *See Price Waterhouse,* 490 U.S. at 228.

144 *See* De Santis v. Pac. Tel. & Tel. Co., 608 F.2d 327, 329 (9th Cir. 1979) (arguing that "sex" includes protections for sexual orientation).

145 Fabian v. Hosp. of Cent. Conn., 172 F. Supp. 3d 509, 515 (D. Conn. 2016) (arguing that sex discrimination includes discrimination based on gender identity).

146 Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971) ("What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.").

purely intentional—in the context of Title VII cases. Like the Court did half a century ago, it will again examine the objectives of Title VII—this time in the context of LGBTQ-based cases—in deciding whether this intentional discrimination should be allowed.

In the early years after the passage of Title VII, the Court would often opine on the purpose of the legislation. As in *Griggs v. Duke Power* Company, it was generally articulated in this manner: "What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of . . . impermissible classification."[147]

In *Griggs*, the Court stated another objective of Title VII: "[d]iscriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed."[148] In other words, discrimination *against* one group leads to preference *for* another group. The Court is making clear that this is not allowed.

In 1973, the Court in *McDonnell Douglas Corporation v. Green* expounded again on the original purpose behind Title VII: "The language of Title VII makes plain the purpose of Congress to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens."[149] Focusing further on Title VII's racial origin, the Court noted:

> There are societal as well as personal interests on both sides of this equation. The broad, overriding interest, shared by employer, employee, and consumer, is efficient and trustworthy workmanship assured through fair and racially neutral employment and personnel decisions. In the implementation of such decisions, it is abundantly clear that Title VII tolerates no racial discrimination, subtle or otherwise.[150]

B. *Employment—States*

In the absence of definitive protections under Title VII of the Civil Rights Act of 1964, many states already have employment dis-

147 *Id.* at 431.

148 *Id.*

149 McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1973).

150 *Id.* at 801.

crimination protections in the workplace for LGBTQ persons.[151] There are currently twenty-three states that protect employees—prospective and current—from discrimination on the basis of gender identity.[152] Twenty-three different states offer such protections on the basis of sexual orientation.[153] There are also numerous cities and towns across the country that offer these classifications of protection.[154]

Equality and inclusion are the major reasons states and communities pass employment non-discrimination ordinances.[155] Those governments want to make it clear that their residents should not be subject to discrimination based on their LGBTQ status. Another reason for these ordinances is based on an objective factor: economics. This argument was made by Richard Florida, author of *The Rise of the Creative Class*:

> Cities that enact LGBTQ-inclusive laws are better positioned to attract the next generation of top talent and the businesses that employ them. Millennials are the most diverse and educated generation of our workforce, and they value openness and connectedness at unprecedented rates. Highly-skilled workers, business leaders, and young people desire a home that embraces their whole selves and fosters opportunities to collaborate with people of varied perspectives and walks of life. Diversity and inclusion are, therefore, cornerstones for attracting and retaining residents, top talent, and industry.[156]

Additionally, there is a growing body of research that "has shown that cities that have vibrant gay and lesbian communities have higher

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151 *See Sex and Gender Discrimination in the Workplace*, NAT'L CONF. OF STATE LEGS., http://www.ncsl.org/research/labor-and-employment/-gender-and-sex-discrimination.aspx (last visited Jan. 24, 2020).

152 *See id.* The number comes from the chart on this page which shows the law from every state.

153 *Id.* Interestingly, many of the state laws outlawing discrimination on the basis of "sexual orientation" also allow an exemption: ". . . unless this discrimination is justified by a bona fide occupational qualification." *Id.* This statement makes one wonder what a "bona fide occupational qualification" might be.

154 *See Municipality Equality Index*, HUMAN RIGHTS CAMPAIGN, https://assets2.hrc.org/files/assets/resources/MEI-2018-FullReport.pdf?_ga=2.165820344.787749652.1564066129-1229824451.1559748898 (last visited Jan. 25, 2020).

155 *See id.*

156 *Id.* Richard Florida is also Director of the Martin Prosperity Institute at the University of Toronto's Rotman School of Management; Global Research Professor at New York University; and a Senior Editor with THE ATLANTIC. *Id.*

levels of income, life satisfaction, housing values, and emotional attachment to their community. . . ."[157] Consequently, communities that pass non-discrimination ordinances concerning their LGBTQ residents not only benefit from being more inclusive, they also have strong economies. This synergy results in a win-win for these communities.

C. *Public Accommodation—States*

While there are federal laws addressing discrimination[158] with regard to public accommodation, such as the Civil Rights Act of 1964, most laws addressing public accommodation were enacted by states. Many state public accommodation laws are modeled after the Civil Rights Act of 1964.[159] Notably, the public accommodation part of this Act, passed during the early 1960s when the focus was on African-American civil rights, does not include sex or gender. The Act reads as follows:

> § 2000a. Prohibition against discrimination or segregation in places of public accommodation
>
> (a) Equal access
> All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.
>
> (b) Establishments affecting interstate commerce or supported in their activities by State action as places of public accommodation; lodgings; facilities principally engaged in selling food for consumption

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157 *Id.*; *see also* M.V. Lee Badgett, Kees Waaldijk, & Yana van der Meulen Rodgers, *The relationship between LGBT inclusion and economic development: Macro-level evidence*, *in* 120 WORLD DEV. 1-14, 1 (2019) (analyzing how LGBT inclusion can lead to economic success for communities).

158 One of the most well-known federal anti-discrimination laws addressing public accommodation is The Americans With Disabilities Act of 1990, 42 U.S.C. § 12101 (2018).

159 Justin Muehlmeyer, *Toward A New Age Of Consumer Access Rights: Creating Space In The Public Accommodation For The Lgbt Community*, 19 CARDOZO J.L. & GENDER 781, 790 n. 52 (2013) (describing states that have adopted similar language to the Civil Rights Act of 1964 for their own legislation).

> on the premises; gasoline stations; places of exhibition or entertainment; other covered establishments. . . .[160]

The Act lists various establishments that qualify as a place of public accommodation and fall "within the meaning of this subchapter if [it serves the public and] its operations affect commerce, or if discrimination or segregation by it is supported by State action . . . ."[161] Examples of these establishments include hotels, motels, restaurants, theaters, concert halls, sports arenas, and stadiums.[162] The Act also defines "commerce" as it applies to the various subsections, and notes that "[t]he provisions of this subchapter shall not apply to a private club or other establishment not in fact open to the public."[163]

Forty-five states have a "nondisabled" public accommodation law.[164] These forty-five states all prohibit discrimination on grounds of race, gender, ancestry, and religion.[165] Twenty-three states plus the District of Columbia also include sexual orientation in their public accommodation statutes, and twenty-one states include gender identity.[166] Many cities and towns across the country also include sexual orientation or gender identity in their public accommodation statutes.[167]

The entirety of the Oregon public accommodation statute at issue in *Klein v. Oregon Bureau of Labor and Industries* reads as follows:

> (1) Except as provided in subsection (2) of this section, all persons within the jurisdiction of this state are entitled to the full and equal accommodations, advantages, facilities and privileges of any place of public accommodation, without any distinction, discrimination or restriction on account of race, color, religion, sex, sexual orientation,

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160 42 U.S.C. § 2000a(a-b) (2018).

161 *Id.*

162 *Id.* Reflecting the culture of the early 1960s, the list also includes inns, cafeterias, lunchrooms, lunch counters, soda fountains, gasoline stations, and motion picture houses. *Id.*

163 *Id.* at §§ 2000(a), (c), (e) (" . . . except to the extent that the facilities of such establishment are made available to the customers or patrons of an establishment within the scope of subsection (b).").

164 *State Public Accommodation Laws*, NAT'L CONF. OF STATE LEGS., http://www.ncsl.org/research/civil-and-criminal-justice/state-public-accommodation-laws.aspx (last visited Jan. 25, 2020). The five states that do not have a nondisabled public accommodation statute are: Alabama, Georgia, Mississippi, North Carolina and Texas. *Id.*

165 *Id.*

166 *Id.* (listing each state's law in a chart).

167 See *Municipality Equality Index*, *supra* note 154.

> national origin, marital status or age if the individual is of age, as described in this section, or older.[168]

The purposes given by legislatures and courts of various states for inclusive public accommodation laws are similar to those in Oregon. Oregon's statute was first enacted in 1953 to "prevent operators and owners of Businesses catering to the general public to subject Negroes to oppression and humiliation."[169] Over time, other categories were added, including sex and sexual orientation.[170] In a 2018 case examining the statute, the United States District Court for Oregon reaffirmed the purpose of the law. The Oregon Public Accommodation Act proscribes "not just a refusal to serve a person . . . but also 'the greater evil of unequal treatment, which is the injury to an individual's sense of self-worth and personal integrity.'"[171] In *Klein v. Oregon Bureau of Labor and Industries*, the purpose of public accommodations statutes was also stated:

> The United States Supreme Court has repeatedly acknowledged that public accommodations statutes in particular are "well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination."[ ] The Court has further acknowledged that states enjoy "broad authority to create rights of public access on behalf of [their] citizens," in order to ensure "wide participation in political, economic, and cultural life" and to prevent the "stigmatizing injury" and "the denial of equal opportunities" that accompanies invidious discrimination in public accommodations.[172]

The *Klein* court returned to the state's interest in enforcing its public accommodations law when balancing the rights of the same-sex couple and the cake baker.[173] Noting the compelling interest in ensuring

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168 OR. REV. STAT. ANN. § 659A.403 (West 2019).

169 Schwenk v. Boy Scouts of Am., 551 P.2d 465, 467 (Or. 1976).

170 *Id*. at 468. "Sex" was added to the Oregon statute in 1973. *Id*. "Sexual orientation" was added in 2007. 2007 Or. Laws 100.

171 Harrington v. Airbnb, Inc., 348 F. Supp. 3d 1085, 1089 (D. Or. 2018) (citing King v. Greyhound Lines, 656 P.2d 349 (Or. 1982)).

172 Klein v. Oregon Bureau of Labor & Indus., 410 P.3d 1051, 1066 (2017) (quoting Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc., 515 U.S. 557, 572 (1995), *vacated*, 139 S. Ct. 2713 (2019); Roberts v. United States Jaycees, 468 U.S. 609, 625 (1984)).

173 *Klein*, 410 P.3d at 1071.

equal access to goods and services in the public sphere as well as preventing the denial of services based on discrimination, the court emphasized that this dual purpose "is no less compelling with respect to the provision of services for same-sex weddings; indeed, that interest is particularly acute when the state seeks to prevent the dignitary harms that result from the unequal treatment of same-sex couples who choose to exercise their fundamental right to marry."[174]

IV. TITLE VII AND LIBERTY INTERESTS

In addition to Title VII's objectives providing compelling arguments for including LGBTQ persons under its protection, a study of the Supreme Court's recent evolution of constitutional law provides an additional argument that these persons should be covered under Title VII.[175] When the Court held in *Obergefell v. Hodges* that same-sex couples could marry, Justice Anthony Kennedy explained in his opening line what this meant: "The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity."[176] Later in the opinion, he elaborated that "their immutable

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[174] *Id.* at 1073 (citing Obergefell v. Hodges, 135 S. Ct. 2584, 2600 (2015)).

[175] *Obergefell*, 135 S. Ct. at 2394. In *Obergefell v. Hodges*, Justice Kennedy gave a brief history of the gay movement: "In the mid–20th century, same-sex intimacy long had been condemned as immoral by the state itself in most Western nations, a belief often embodied in the criminal law. For this reason, among others, many persons did not deem homosexuals to have dignity in their own distinct identity. A truthful declaration by same-sex couples of what was in their hearts had to remain unspoken. Even when a greater awareness of the humanity and integrity of homosexual persons came in the period after World War II, the argument that gays and lesbians had a just claim to dignity was in conflict with both law and widespread social conventions. Same-sex intimacy remained a crime in many States. Gays and lesbians were prohibited from most government employment, barred from military service, excluded under immigration laws, targeted by police, and burdened in their rights to associate. . . . For much of the 20th century, moreover, homosexuality was treated as an illness. When the American Psychiatric Association published the first Diagnostic and Statistical Manual of Mental Disorders in 1952, homosexuality was classified as a mental disorder, a position adhered to until 1973. . . . Only in more recent years have psychiatrists and others recognized that sexual orientation is both a normal expression of human sexuality and immutable. . . . In the late 20th century, following substantial cultural and political developments, same-sex couples began to lead more open and public lives and to establish families. This development was followed by a quite extensive discussion of the issue in both governmental and private sectors and by a shift in public attitudes toward greater tolerance." *Id.* at 2593, 2596.

[176] *Id*. at 2593.

nature dictates that same-sex marriage is their only real path to this profound commitment.[177]

Referencing *Eisenstadt v. Baird* and *Griswold v. Connecticut*, the Court reiterated that fundamental liberties protected by the Due Process Clause of the Fourteenth Amendment "extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs."[178] Although there is no set formula to determining the extent of these liberties, Justice Kennedy explained, this "process is guided by many of the same considerations relevant to analysis of other constitutional provisions that set forth broad principles rather than specific requirements."[179] He explained further that while history and tradition provide guidance to this process, they "do not set its outer boundaries[,]" and that although history is to be respected, the past alone cannot "rule the present."[180] Justice Kennedy spoke in *Obergefell* of the institution of marriage and its importance to the country:

> Marriage remains a building block of our national community. For that reason, just as a couple vows to support each other, so does society pledge to support the couple, offering symbolic recognition and material benefits to protect and nourish the union . . . . The States have contributed to the fundamental character of the marriage right by placing that institution at the center of so many facets of the legal and social order.[181]

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177 *Id.* at 2594.

178 *Id.* at 2597 (citing Eisenstadt v. Baird, 405 U.S. 438, 453 (1972); Griswold v. Connecticut, 381 U.S. 479, 484–486, (1965)).

179 *Id.* at 2598.

180 *Id*.

181 Obergefell v. Hodges, 135 S. Ct. 2584, 2601-02 (2015). (Kennedy, J.) Justice Kennedy explained ("[t]he right of same-sex couples to marry that is part of the liberty promised by the Fourteenth Amendment is derived, too, from that Amendment's guarantee of the equal protection of the laws."). *Id.* at 2602. In comparing the facts of *Obergefell* with Loving v. Virginia, which held that one's race should not preclude marriage between a man and a woman, the Court noted that "[t]o deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law." *Id.* at 2603 (citing Loving v. Virginia, 388 U.S. 1 (1967)). In a case two years later, the Court re-emphasized that under *Obergefell* "the Constitution entitles same-sex couples to civil marriage 'on the same terms and conditions as opposite-sex couples.'" Pavan v. Smith, 137 S. Ct. 2075, 2076 (2017) (quoting *Obergefell*, 135 S. Ct. 2584, 2605).

In addressing those who believe same-sex marriage is wrong, Justice Kennedy offered these words: "[W]hen that sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied."[182]

In illustrating this connection between liberty and equality, the Court discussed *M.L.B. v. S.L.J.*, dealing with the termination of parental rights; *Eisenstadt v. Baird*, regarding the distribution of contraceptives; and *Skinner v. Oklahoma ex rel. Williamson,* involving the sterilization of certain criminals.[183] Citing "the interlocking nature of these constitutional safeguards" to *Lawrence v. Texas*, the Court reiterated that *Lawrence* "drew upon principles of liberty and equality to define and protect the rights of gays and lesbians . . . ."[184]

Drawing on the principles espoused in *Obergefell*, it seems axiomatic that to express one's identity—a fundamental liberty protected by the Due Process Clause of the Fourteenth Amendment—could lead one to be intentionally discriminated against under Title VII of the Civil Rights Act of 1964. Put conversely, one could be required to hide one's identity to not potentially lose one's employment. Exercising this liberty interest has been referred to as the "married on Saturday, fired on Monday" situation.[185]

In *Obergefell*, Justice Kennedy noted that "same-sex couples are denied the constellation of benefits that the States have linked to marriage" and "are consigned to an instability many opposite-sex couples would deem intolerable in their own lives."[186] Consider this scenario: employee is homosexual, and has not told coworkers and supervisors about their[187] sexual orientation because they are unsure how others would react to this information. Employee finally meets "the one in

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182 *Obergefell*, 135 S. Ct. at 2602.

183 *Id.* at 2604.

184 *Id.* (citing Lawrence v. Texas, 539 U.S. 558, 578 (2003)).

185 *See* Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 342 (7th Cir. 2017).

186 *Obergefell*, 135 S. Ct. at 2601.

187 In this example, the gender-neutral pronouns "their" and "they" are intentionally used in a singular sense. Transgender and non-binary persons are increasingly using these pronouns to address gender constructs. In fact, the pronoun "they" was declared the "Word of the Year' in 2019 by Merriam-Webster. *See Merriam-Webster's Word of the Year 2019*, MERRIAM-WEBSTER, https://www.merriam-webster.com/words-at-play/word-of-the-year/they (last visited Jan. 25, 2020).

whom [their] soul delights."[188] The two decide to legally marry, and a public record is produced affirming the marriage. The employee then schedules an appointment with the human resources department at their workplace to add their new spouse to Employee's health insurance plan. A day later, Employee is called to their supervisor's office and is fired. Employee is told the reason for the firing is because of their sexual orientation. Employee has not only been denied one of "the constellations of benefits [ ] linked to marriage," but they have lost their job, their livelihood, because their sexual orientation was revealed by their marriage.

The "intolerable stability" Justice Kennedy speaks of continues for LGBTQ persons, even after the Supreme Court's pronouncement of the constitutional right of same-sex couples to marry. The exercise—and ensuing result—illustrated by the scenario above might be referred to as "associational liberty interest discrimination."[189] In other words, this is a situation where exercising one's liberty interest *then leads to a denial* of equality, a notion that seems at odds with Justice Kennedy's connection between liberty and equality discussed in *Obergefell*.

Assume that because of this "associational liberty interest discrimination," or other arguments made in the Title VII cases, the Supreme Court finds that LGBTQ persons are covered under Title VII of the Civil Rights Act of 1964, and that employers are no longer permitted to discriminate against prospective and current LGBTQ employees. This means that in a state without an inclusive public accommodation law, employers could be compelled to not discriminate against LGBTQ current and prospective employees, but still be able to legally discriminate against customers. For example, a business could be required by law to hire—not discriminate against—a qualified ring designer who happened to be gay. But, as a business, could legally state, "We will not design a ring for you, because we don't design rings for gay couples who want to marry." This is nonsensical and would compel an inclusive result in the next public accommodation case to be heard by the Supreme Court.

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188 This is an interpretation of a Bible verse from the Song of Solomon: "It was but a little that I passed from them, but I found him whom my soul loveth: I held him, and would not let him go, until I had brought him into my mother's house, and into the chamber of her that conceived me." *Song of Solomon* 3:4 (King James).

189 This is a phrase coined by the author.

The order in which these areas of law are addressed by the Supreme Court matters and the continuum of recognition of LGBTQ legal rights has thus far evolved in a logical manner. These LGBTQ rights cases started with *Lawrence v. Texas*, which decriminalized the sexual behavior of gay persons,[190] and most recently addressed the rights and privileges attendant to same-sex marriage, acknowledging the liberty right to "intimate choices that define personal identity and beliefs."[191] The two big public "spheres" not yet addressed—similar to the civil rights era of the 1960s—are employment and public accommodation. *Lawrence* and its progeny laid the groundwork to now consider these spheres. It seems logical that the sphere of employment, emphasizing the rights of the employee with established, settled, Title VII law, and the associated equality and liberty interests developed by the Court with regard to LGBTQ persons, should be addressed before focusing on the sphere of public accommodation.

CONCLUSION

The evolution of the law around Title VII of the Civil Rights Act of 1964 addresses squarely the inequity in allowing a class of persons to overtly or insidiously deny or discriminate against other persons based solely on their personal characteristics. The Supreme Court has said time and again that what Congress requires with Title VII is removing "artificial, arbitrary, and unnecessary barriers to employment" when those operate to discriminate on the basis of "an impermissible classification."[192] The Court said that one group cannot be preferred over another.[193] However unlikely, if LGBTQ persons were not covered under Title VII, employers could close out employment opportunities to this community entirely, and hire only heterosexual, cisgender persons.

The argument to include LGBTQ persons as one of the categories that should be covered under Title VII is bolstered and informed by recent legal developments involving the community. The Supreme Court recognized that LGBTQ persons have a liberty interest in expressing their identity, protected by the Due Process Clause of the Fourteenth Amendment. If exercising that protected liberty interest

190 Lawrence v. Texas, 539 U.S. 558 (2003).
191 Obergefell v. Hodges, 135 S. Ct. 2584, 2597 (2015).
192 Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).
193 *Id.*

means one can be legally fired from employment, then there is no protected liberty interest. In its upcoming cases, the Court should first address Title VII and employment, before addressing public accommodation, in making clear the full meaning of this liberty interest for the LGBTQ community, which is full inclusion in these public spheres.