

**DOES THE EQUAL PAY ACT PROHIBIT DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION OR GENDER IDENTITY?**

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## INTRODUCTION

The Equal Pay Act of 1963 imperfectly embodies the principle of equal pay for equal work without regard to sex.<sup>1</sup> The statute provides, with significant exceptions, that “[n]o employer . . . shall discriminate . . . between employees on the basis of sex by paying wages to employees . . . at a rate less than the rate at which he pays wages to employees of the opposite sex.”<sup>2</sup> As this text makes clear, the Equal Pay Act does not expressly enumerate “sexual orientation” or “gender identity” as a prohibited basis of discrimination, similar to other federal statutes that bar sex discrimination in employment, education, housing, health care, and credit.<sup>3</sup> But could the term “sex” in the Equal Pay Act be construed to cover wage disparities on the basis of sexual orientation or gender identity?

A number of federal courts have interpreted the sex-discrimination prohibitions of Title VII of the 1964 Civil Rights Act (“Title VII”),<sup>4</sup> Title IX of the Education Amendments of 1972 (“Title IX”),<sup>5</sup> and other statutes to cover discrimination on the basis of sexual orientation or gender identity.<sup>6</sup> Several federal agencies during the Obama Administration also adopted this view.<sup>7</sup> According to

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1. 29 U.S.C. § 206(d) (2012).
  2. 29 U.S.C. § 206(d)(1).
  3. 42 U.S.C. § 2000e-2(a)(1) (2012) (employment); 20 U.S.C. § 1681(a) (2012) (education); 42 U.S.C. § 3604(b) (2012) (housing); 42 U.S.C. § 18116(a) (2012) (health care); 15 U.S.C. § 1691(a)(1) (2012) (credit).
  4. 42 U.S.C. § 2000e-2(a)(1).
  5. 20 U.S.C. § 1681(a).
  6. *See, e.g.*, *Wetzel v. Glen St. Andrew Living Cmty., L.L.C.*, 901 F.3d 856 (7th Cir. 2018) (holding claim of sexual orientation discrimination is cognizable under the Fair Housing Act); *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 574–75 (6th Cir. 2018) (holding claim of discrimination on the basis of transgender status and gender transition is cognizable under Title VII), *cert. granted*, 87 U.S.L.W. 3411 (U.S. Apr. 22, 2019) (No. 18-107); *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 113 (2d Cir. 2018) (en banc) (holding claim of sexual orientation discrimination is cognizable under Title VII), *cert. granted*, 87 U.S.L.W. 3411 (U.S. Apr. 22, 2019) (No. 17-1623); *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 351–52 (7th Cir. 2017) (en banc) (same); *Prescott v. Rady Children’s Hosp.-San Diego*, 265 F. Supp. 3d 1090, 1099 (S.D. Cal. 2017) (holding Section 1557 of the Affordable Care Act, which incorporates Title IX, prohibits transgender identity discrimination).
  7. *See, e.g.*, *Nondiscrimination in Health Programs and Activities*, 81 Fed. Reg. 31376, 31390 (May 18, 2016) (to be codified at 45 C.F.R. pt. 92) (interpreting Section 1557 of the Affordable Care Act, which incorporates Title IX, to prohibit gender stereotyping and gender identity discrimination, and leaving the door open to prohibiting sexual

this body of decisions, discrimination on account of a person's actual or perceived sexual orientation, or their actual or perceived gender identity (or transgender status or gender transition), is sex-based and thus prohibited under these various statutes. (Throughout this article, my use of "gender identity discrimination" or a similar phrase includes discrimination on account of someone's transgender identity, transgender status, or gender transition.)

Other federal courts, however, have reached the opposite conclusion, holding that discrimination on the basis of sex is conceptually distinct from discrimination on the basis of sexual orientation or gender identity and, therefore, Title VII and Title IX cover neither.<sup>8</sup> The Trump Administration, too, has taken the position that Title VII and Title IX prohibit neither sexual orientation nor gender identity discrimination, undoing thus far various Obama-era sub-regulatory protections and changing the position of the federal government in litigation.<sup>9</sup>

In April 2019, the Supreme Court granted writs of certiorari in three Title VII cases to resolve the circuit split on both the sexual orientation question and the gender identity question.<sup>10</sup> The Court's decisions are expected in 2020.

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orientation discrimination); Memorandum from Att'y Gen. Eric Holder to U.S. Att'ys (Dec. 15, 2014) (interpreting Title VII to cover gender identity discrimination); Dear Colleague Letter on Transgender Students from U.S. Dep't of Justice & U.S. Dep't of Edu. (May 13, 2016) (interpreting Title IX to prohibit gender identity discrimination); Letter from Richard Cordray, Dir. of the Consumer Fin. Prot. Bureau, to Michael Adams, Chief Exec. Officer of Serv's & Advocacy for GLBT Elders (Aug. 20, 2016) (interpreting the Equal Credit Opportunity Act to cover sexual orientation and gender identity discrimination), <https://www.consumerfinance.com/wp-content/uploads/sites/14/2016/09/SAGE-Letter.pdf>.

8. *See, e.g.,* Wittmer v. Phillips 66 Co., 915 F.3d 328, 330–31 (5th Cir. 2019) (observing circuit precedent that sexual orientation discrimination is not prohibited under Title VII remains good law); Evans v. Ga. Reg'l Hosp., 850 F.3d 1248, 1255 (11th Cir. 2017) (adhering to circuit precedent that sexual orientation discrimination is not prohibited under Title VII); Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1221–22 (10th Cir. 2005) (holding discrimination based on transsexual status is not prohibited under Title VII); Medina v. Income Support Div., 413 F.3d 1131, 1135 (10th Cir. 2005) (same as to sexual orientation); Franciscan All., Inc. v. Burwell, 227 F. Supp. 3d 660, 688 (N.D. Tex. 2016) (holding gender identity discrimination is likely not prohibited under Section 1557 of the Affordable Care Act, which incorporates Title IX).
9. MEMORANDUM FROM ATT'Y GEN. JEFF SESSIONS TO U.S. ATT'YS (OCT. 4, 2017); DEAR COLLEAGUE LETTER ON TRANSGENDER STUDENTS FROM THE U.S. DEP'T OF JUSTICE & U.S. DEP'T OF EDUC. (Feb. 22, 2017).
10. Bostock v. Clayton County Bd. of Comm'rs, 723 Fed. Appx. 964 (11th Cir. 2018), *cert. granted*, 87 U.S.L.W. 3411 (U.S. Apr. 22, 2019) (No. 17-1618); Zarda v. Altitude Express, Inc., 883 F.3d 100 (2d Cir. 2018) (en banc), *cert. granted*, 87 U.S.L.W. 3411 (U.S. Apr. 22, 2019) (No. 17-1623); EEOC v. R.G. & G.R. Harris Funeral Homes,

This article is the first to consider whether the Equal Pay Act's prohibition of sex-based wage disparities encompasses wage disparities on the basis of sexual orientation or gender identity. As far as I am aware, no court or scholar has addressed this question. Nor has this question been addressed by the U.S. Equal Employment Opportunity Commission ("EEOC"), which enforces the Equal Pay Act along with Title VII. In 2015 and 2012, respectively, the EEOC concluded that sexual orientation discrimination and gender identity discrimination are per se sex discrimination under Title VII.<sup>11</sup> Therefore, one might presume that the Equal Pay Act should be consistently interpreted to cover wage disparities on the bases of sexual orientation and gender identity.

The statutory language of the Equal Pay Act, however, suggests a different outcome than Title VII and Title IX, or at least a more complicated route to coverage for wage disparities based on sexual orientation or gender identity. The text of the Equal Pay Act that is quoted above prohibits wage disparities "on the basis of sex,"<sup>12</sup> similar to text of Title VII ("because of . . . sex") and Title IX ("on the basis of sex").<sup>13</sup> But unlike Title VII and Title IX, the Equal Pay Act expressly requires equality between the "opposite" sexes.<sup>14</sup> That text in the Equal Pay Act suggests a more limited, binary definition of sex than does the text of Title VII or Title IX, neither of which contains such language. Conversely and importantly, this point strengthens the argument for interpreting the term "sex" in Title VII and Title IX more expansively to encompass sexual orientation and gender identity, because the use of "opposite" in the Equal Pay Act—which was enacted before Title VII and Title IX—demonstrates Congress's contemporaneous ability to write a narrower statute in this area and to expressly require an opposite sex comparator.<sup>15</sup>

The Supreme Court has instructed that the plain language of a statute is the primary determinant of the scope of Title VII and other anti-discrimination statutes, rather than the legislative history. In *Oncale v. Sundowner Offshore Services*, the Court unanimously held that Title VII prohibits male-against-male sex harassment because, even though such harassment was not a principal concern for Congress when it enacted Title VII, such harassment is a "comparable evil" covered by the

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Inc., 884 F.3d 560 (6th Cir. 2018), *cert. granted*, 87 U.S.L.W. 3411 (U.S. Apr. 22, 2019) (No. 18-107).

11. *Baldwin v. Foxx*, EEOC Decision No. 0120133080, 2015 WL 4397641 (July 15, 2015) (holding claim of sexual orientation discrimination is cognizable under Title VII); *Macy v. Holder*, EEOC Decision No. 01200120821, 2012 WL 1435995 (Apr. 20, 2012) (same as to gender identity).

12. 29 U.S.C. § 206(d)(1) (2012).

13. 42 U.S.C. § 2000e-2(a)(1) (2012); 20 U.S.C. § 1681(a) (2012).

14. 29 U.S.C. § 206(d)(1).

15. *See infra* Part IV.B.

statute's text.<sup>16</sup> Looking to the legislative history of the Equal Pay Act, in any event, we see that Congress was—unsurprisingly in the early 1960s—silent as to sexual orientation and gender identity discrimination, or sexual and gender minorities such as lesbian, gay, bisexual, and transgender (“LGBT”) people.<sup>17</sup> Thus, as with Title VII and Title IX, the legislative history of the Equal Pay Act is not especially helpful to our analysis. Moreover, Congress's failure to amend the Equal Pay Act—or Title VII or Title IX—to expressly include sexual orientation and gender identity as protected characteristics is not telling, because Congressional inaction may be interpreted in different, competing ways.<sup>18</sup> But unlike Title VII and most other federal anti-sex-discrimination statutes, I am not aware of any legislative attempts to amend the Equal Pay Act to include the terms “sexual orientation” or “gender identity.” Indeed, even the Equality Act of 2019—which is often described by its sponsors and advocates as a comprehensive federal civil rights bill for LGBT people, because it would amend Titles II (public accommodations), III (public facilities), IV (public education), VI (federal funding), and VII (employment) of the Civil Rights Act of 1964, the Fair Housing Act, the Equal Credit Opportunity Act, and other federal anti-discrimination statutes—does not address the Equal Pay Act.<sup>19</sup>

Regardless of whether the Equal Pay Act, as presently written, encompasses sexual orientation or gender identity wage disparities, evidence suggests that gay men and bisexual women and men, on average, are subject to wage disparities compared to similar heterosexual men and women, and that transgender people have significantly lower household incomes than cisgender men (i.e., men who are not transgender). For example, one meta-analysis of more than thirty studies found that gay men, on average, earn eleven percent less than comparable straight men, and discrimination was a probable explanation.<sup>20</sup> Although the meta-analysis showed that lesbians, on average, earn nine percent more than comparable straight women, these findings do not mean lesbians do not face employment discrimination; importantly, moreover, lesbians are subject to the gender wage gap, earning less, on

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16. 523 U.S. 75, 79 (1998) (“[S]tatutory 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.”).

17. *See infra* Part IV.

18. *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) (“Congressional inaction lacks ‘persuasive significance’ because ‘several equally tenable inferences’ may be drawn from such inaction, ‘including the inference that the existing legislation already incorporated the offered change.’”) (quoting *United States v. Wise*, 370 U.S. 405, 411 (1962)).

19. *See* Equality Act of 2019, H.R. 5, S. 788, 116th Cong. (2019).

20. Marieka Klawitter, *Meta-Analysis of the Effect of Sexual Orientation on Earnings*, 54 INDUS. REL. J. ECON. & SOC. 4, 21 (2015).

average, than straight and gay men.<sup>21</sup> Other evidence finds widespread discrimination, economic insecurity, and poverty among LGBT people—especially among women, bisexuals, certain racial minorities, transgender people, and those with children<sup>22</sup>—all of which underpin the need for legal protections against discrimination.

To contextualize the question of whether the Equal Pay Act covers wage disparities on the basis of sexual orientation or gender identity, Part I summarizes the most recent evidence of wage disparities and discrimination facing sexual and gender minorities in the United States. Although the legal rights and social acceptance of LGBT people have generally improved, a variety of evidence demonstrates that stigma, discrimination, and violence against LGBT people remain widespread.

Part II details the shifting legal landscape on *express* protections against sexual orientation and gender identity discrimination as it presently exists in the United States. By “express protections,” I mean that the text of the law includes the specific words “sexual orientation” or “gender identity.” Part II is important because it demonstrates why determining the scope of federal anti-sex-discrimination provisions, including the Equal Pay Act, as to sexual orientation and gender identity discrimination is so consequential. Whether the Equal Pay Act, Title VII, Title IX, or any other anti-sex-discrimination statute is interpreted to cover sexual orientation or gender identity discrimination may be the difference between having a cognizable claim or not for the many people living, working, or going to school in places with no state or local law on point.

Part III turns squarely to federal anti-sex-discrimination statutes. I first summarize the relevant laws and failed legislative efforts to amend them to expressly include sexual orientation and gender identity. Part III then synthesizes decades of judicial and agency interpretations of Title VII, Title IX, and other statutes as to sexual orientation and gender identity discrimination. The analysis shows that the courts are irreconcilably split but that an increasing number of courts are revisiting old rulings to hold that discrimination on the bases of sexual orientation and gender identity are, at bottom, discrimination because of sex.

With this body of case law as our guide, Part IV turns to the Equal Pay Act and analyzes its statutory text and legislative history. I conclude that the text of the

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21. *Id.* at 5.

22. *See, e.g.*, M.V. LEE BADGETT ET AL., THE WILLIAMS INST., NEW PATTERNS OF POVERTY IN THE LESBIAN, GAY, AND BISEXUAL COMMUNITY (2013), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGB-Poverty-Update-Jun-2013.pdf>; TAYLOR N.T. BROWN ET AL., THE WILLIAMS INST., FOOD INSECURITY AND SNAP PARTICIPATION IN THE LGBT COMMUNITY (2016), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Food-Insecurity-and-SNAP-Participation-in-the-LGBT-Community.pdf>.

Equal Pay Act—particularly the use of “opposite sex”—impedes its interpretation to cover sexual orientation or gender identity discrimination, though I recognize plausible arguments to the contrary. Yet, significantly, the text of the Equal Pay Act strengthens the arguments that Title VII and Title IX cover discrimination motivated by someone’s actual or perceived sexual orientation or gender identity, because those statutes do not expressly require an opposite sex comparator as the Equal Pay Act does. In the Conclusion, I discuss legislative and other efforts that could begin to address the employment discrimination and economic vulnerabilities that LGBT people face, which would include reducing the gender and race wage gaps, too.

### **I. RECENT EVIDENCE OF DISCRIMINATION AGAINST SEXUAL AND GENDER MINORITIES IN THE UNITED STATES**

The issue of legal protections against discrimination on the bases of sexual orientation and gender identity exists within a societal context of extensive and enduring prejudice, discrimination, and violence against LGBT people and, more broadly, sexual and gender minorities.<sup>23</sup> Despite advances in legal and lived equality

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23. “Sexual minorities” refers to people who have non-heterosexual identities, behaviors, or attractions, and “gender minorities” refers to people who are not cisgender or whose gender identity or expression does not reflect dominant, binarized sex/gender norms. Thus, people who self-identify as lesbian, gay, or bisexual are a subset of sexual minorities, people who self-identify as transgender or non-binary are a subset of gender minorities, and people who identify as queer may be a subset of both populations. *See generally* INST. OF MED. OF THE NAT’L ACAD., *THE HEALTH OF LESBIAN, GAY, BISEXUAL, AND TRANSGENDER PEOPLE: BUILDING A FOUNDATION FOR BETTER UNDERSTANDING* 25–28 (2011) (discussing sexual orientation and gender identity and expression, and providing working definitions); *see, e.g.*, Ilan H. Meyer et al., *Incarceration Rates and Traits of Sexual Minorities in the United States: National Inmate Survey, 2011–2012*, 107 AM. J. PUB. HEALTH 234, 235 (2017) (categorizing respondents as LGB (based on identity measure) or MSM or WSW (based on behavior measure), and referring to both together as sexual minorities).

The research studies and other evidence I discuss vary in terms of the populations addressed. For example, some studies compare sexual minorities to straight people, *see, e.g.*, Meyer et al., *supra*, while others compare transgender to cisgender people, *see, e.g.*, Ilan H. Meyer et al., *Demographic Characteristics and Health Status of Transgender Adults in Select US Regions: Behavioral Risk Factor Surveillance System, 2014*, 107 AM. J. PUB. HEALTH 582 (2017). Likewise, studies and the data sources on which they rely pertain to different segments of these populations. *See, e.g.*, BROWN, *supra* note 22, at 6–9 & tbl.1 (discussing differences between the Gallup Daily Tracking Survey (LGBT-identity measure; age 18+ sample), National Health Interview Survey (sexual orientation measure; aged 18+ sample), National Survey of Family Growth (sexual orientation measure; age 18–44

and social acceptance for LGBT people in the United States, recent studies indicate that anti-LGBT prejudice, discrimination, and violence remain pervasive and persistent, though there are geographic variations.<sup>24</sup> Particularly relevant to the Equal Pay Act, I summarize here: (A) economic and sociological analyses of wage differentials because of sexual orientation and gender identity; (B) recent controlled experiments in the employment and housing contexts aimed at isolating the presence or lack of discrimination against LGBT people; (C) analyses of administrative data, including EEOC charges, and (D) recent survey data and other evidence. Consistent with prior assessments of earlier research related to employment discrimination,<sup>25</sup> the cumulative evidence indicates that, despite some advancement in acceptance and the legal equality of LGBT people, anti-LGBT stigma and discrimination persist.<sup>26</sup>

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sample), American Community Survey (measure of cohabiting same-sex and different-sex couples; age 15+ sample)). In this article when discussing a particular source, I endeavor to accurately reflect that source's sample.

24. *See generally* ADAM P. ROMERO ET AL., THE WILLIAMS INST., GUN VIOLENCE AGAINST SEXUAL AND GENDER MINORITIES IN THE UNITED STATES: A REVIEW OF RESEARCH FINDINGS AND NEEDS (2019).
25. M.V. Lee Badgett et al., *Bias in the Workplace: Consistent Evidence of Sexual Orientation and Gender Identity Discrimination 1998–2008*, 84 CHI.-KENT L. REV. 559, 560, 567–68 (2009); Jennifer C. Pizer et al., *Evidence of Persistent and Pervasive Workplace Discrimination Against LGBT People: The Need for Federal Legislation Prohibiting Discrimination and Providing for Equal Employment Benefits*, 45 LOY. L.A. L. REV. 715, 722 (2012).
26. For cases discussing the long history of discrimination against LGB people, see, for example, *Obergefell v. Hodges*, 135 S. Ct. 2586, 2596 (2015) (observing gays and lesbians have been “prohibited from most government employment, barred from military service, excluded under immigration laws, targeted by police, and burdened in their rights to associate”); *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013) (“The avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States.”); *Lawrence v. Texas*, 539 U.S. 558, 575 (2003) (discussing stigmatization from criminal sodomy statutes); *Romer v. Evans*, 517 U.S. 620, 632 (discussing that only animus could explain broad anti-LGB legislation); *Baskin v. Bogan*, 766 F.3d 648, 658, 663 (7th Cir. 2014) (“[H]omosexuals are among the most stigmatized, misunderstood, and discriminated-against minorities in the history of the world, the disparagement of their sexual orientation, implicit in the denial of marriage rights to same-sex couples, is a source of continuing pain to the homosexual community.”); *Windsor v. United States*, 699 F.3d 169, 182 (2d Cir. 2012) (“It is easy to conclude that homosexuals have suffered a history of discrimination.”), *aff’d* 133 S. Ct. 2675 (2012).

For cases discussing discrimination against transgender people or gender minorities, see, for example, *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d

Before proceeding with discussion of the research findings, two important provisos are necessary. First, while evidence indicates that sexual orientation and gender identity discrimination against LGBT people is widespread, it is important to observe that someone need not be LGBT-identified to experience discrimination on account of one's actual or perceived sexual orientation or gender identity. For example, men who have sex with men, but who do not identify as gay or bisexual, may experience sexual orientation discrimination.<sup>27</sup> So, too, might a straight person experience sexual orientation discrimination, or a cisgender person experience discrimination because of his or her gender identity, however rare.<sup>28</sup> Most anti-discrimination laws do not distinguish between minority and majority identity or status, though the primary purpose of these laws is to root out and remedy discrimination against minorities and women. The Equal Pay Act exemplifies this

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1034, 1051 (7th Cir. 2017) (“There is no denying that transgender individuals face discrimination, harassment, and violence because of their gender identity.”); *Adkins v. City of New York*, 143 F. Supp. 3d 134, 139 (S.D.N.Y. 2015) (“[That] transgender people have suffered a history of persecution and discrimination . . . is not much in debate.”) (internal quotation marks omitted); *Brocksmith v. United States*, 99 A.3d 690, 698 n.8 (D.C. 2014) (“The hostility and discrimination that transgender individuals face in our society today is well-documented.”).

For further discussion of anti-LGBT discrimination in history, see, for example, Briefs of Scholars Who Study the LGBT Population as Amici Curiae in Support of Appellees, *Barber v. Bryant*, No. 16-60477, Campaign for S. Equality v. Bryant, No. 16-60478 (5th Cir. Dec. 22, 2016), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Barber-v.-Bryant-Amici-Brief-of-LGBT-Scholars-Filed-2016-12-22.pdf>.

27. See, e.g., Russell K. Robinson, *Racing the Closet*, 61 STAN. L. REV. 1463, 1493–94 (2009) (discussing the marginalization of men who have sex with men but who do not identify gay).
28. See, e.g., *Medina v. Income Support Div.*, 413 F.3d 1131, 1135 (10th Cir. 2005) (holding claim by heterosexual woman that she was harassed for her sexual orientation not cognizable under Title VII).

point, for the statute was clearly directed at reducing the pernicious wage disparities that women face,<sup>29</sup> but the statute protects women and men with equal force.<sup>30</sup>

Second, it is important to appreciate and account not only for the variety of forms of prejudice and discrimination that sexual and gender minorities experience, such as race or disability discrimination, but also that everyone who experiences discrimination or disadvantage, or preference or advantage, may do so in hybrid or intersectional ways. Thus, while generalities can be useful, we must not lose sight of the ever-important fact that classes of people do not experience the world monolithically. The law and some social movements, regrettably, have tended to be less nuanced, dynamic, and specific.<sup>31</sup> That said, some of the research I describe below is purposefully designed to exclude the effects of race, gender, and other factors in order to home in on the presence or absence of sexual orientation or gender identity discrimination specifically. In all respects, more research and richer data are needed so that we may benefit from a fuller and more detailed

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29. *See, e.g.*, *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974) (“Congress’ purpose in enacting the Equal Pay Act was to remedy what was perceived to be a serious and endemic problem of employment discrimination in private industry—the fact that the wage structure of ‘many segments of American industry has been based on an ancient but outmoded belief that a man, because of his role in society, should be paid more than a woman even though his duties are the same.’”) (quoting S. REP. NO. 88-176, at 1 (1963)); NAT’L EQUAL PAY TASK FORCE, FIFTY YEARS AFTER THE EQUAL PAY ACT: ASSESSING THE PAST, TAKING STOCK OF THE FUTURE 8 (2013), [https://obamawhitehouse.archives.gov/sites/default/files/equalpay/equal\\_pay\\_task\\_force\\_progress\\_report\\_june\\_2013\\_new.pdf](https://obamawhitehouse.archives.gov/sites/default/files/equalpay/equal_pay_task_force_progress_report_june_2013_new.pdf).
30. *See, e.g.*, *Winkes v. Brown Univ.*, 747 F.2d 792, 793 (1st Cir. 1984) (holding that male plaintiff established prima facie case under Equal Pay Act, but that an exception applied); *Hinton v. Va. Union Univ.*, 185 F. Supp. 3d 807, 840–42 (E.D. Va. 2016) (denying motion to dismiss Equal Pay Act claim by male administrative assistant); *Branch v. United States*, 101 Fed. Cl. 411, 415 (2011) (assessing merits of Equal Pay Act claim by male analyst).
31. *See, e.g.*, Jessica A. Clarke, *Protected Class Gatekeeping*, 92 N.Y.U. L. REV. 101, 129 n.176 (2017) (“That plaintiffs are often asked to parcel out their experiences of discrimination into isolated components based on each ‘protected class’ may be one reason empirical studies show intersectional claims have fared poorly in court.”); Gwendolyn M. Leachman, *Institutionalizing Essentialism: Mechanisms of Intersectional Subordination Within the LGBT Movement*, 2016 WIS. L. REV. 655 (2016) (arguing institutional and organizational processes explain “intramovement marginalization” of racism, sexism, and intersectional identities); Alexander M. Nourafshan, *The New Employment Discrimination: Intra-LGBT Intersectional Invisibility and the Marginalization of Minority Subclasses in Antidiscrimination Law*, 24 DUKE J. GENDER L. & POL’Y 107 (2017) (discussing LGBT intersectionalities and anti-discrimination law’s tendency toward single-axis analysis).

understanding, including with respect to the increasing number of people who are eschewing traditional identity categories altogether.<sup>32</sup>

### A. *Recent Wage Analyses*

An important body of research on anti-LGBT discrimination analyzes probability data to assess associations between earnings and sexual orientation or gender identity, by controlling for other characteristics likely to influence earnings such as education, age, race, and geographic location.<sup>33</sup> One of the challenges for this research is that few nationally-representative, large-scale surveys ask about earnings and sexual orientation, gender identity, or both, leaving scholars largely to examine federal data on same-sex couples, surveys with smaller sample sizes with less statistical power, or state-level data. In 2015, economist Mariel Klawitter published a meta-analysis of thirty-one published studies from the United States and other developed countries, finding that gay men earned, on average, eleven percent less than similarly-situated straight men, and that lesbians earned, on average, nine percent more than similarly-situated straight women—but there was a wide range of estimates across the individual studies.<sup>34</sup> According to Klawitter, for men, the wide range of results across the individual studies was largely explained by individual study characteristics (namely, sample sizes, the measure of sexual orientation, and controls for work intensity); however, Klawitter’s meta-regression offered “little clarity” for the wide range of results for women.<sup>35</sup>

Examining what might explain these differentials, Klawitter concluded that “[o]n the whole, evidence from multiple sources suggests that discrimination might

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32. *Accord* Adam P. Romero & Abbie E. Goldberg, *Introduction*, in *LGBTQ DIVORCE AND RELATIONSHIP DISSOLUTION: PSYCHOLOGICAL AND LEGAL PERSPECTIVES AND IMPLICATIONS FOR PRACTICE* 5 (Abbie E. Goldberg & Adam P. Romero eds., 2019) (“[T]here are numerous limitations of existing data—such as, in many cases, scant attention to racial/ethnic, economic, geography, and other intersections in understanding relationship dissolution and divorce among LGBTQ people. Still it is important not to downplay the existing research, which serves as a valuable platform for theory, research, and practice.”); Gary J. Gates & Adam P. Romero, *Parenting by Gay Men and Lesbians: Beyond the Current Research*, in *MARRIAGE AND FAMILY: PERSPECTIVES AND COMPLEXITIES* 227 (H. Elizabeth Peters & Claire M. Kamp Dush eds., 2009) (demonstrating substantial geographic, racial, ethnic, and socio-economic diversity among same-sex couples raising children, and calling for a research agenda that attends to the complexities and diversities among LGBT families).

33. *See generally* Badgett et al., *supra* note 25, at 581–82 (describing income disparity studies).

34. Klawitter, *supra* note 20, at 13 tbl.1.

35. *Id.* at 21.

be worse for gay men than for lesbians and that might explain the divergence in earnings effects.”<sup>36</sup> Other scholars, too, have concluded that these wage studies “support the conclusion that sexual orientation discrimination lowers the wages of gay men[.]” but that the findings for lesbians are “less clear.”<sup>37</sup> As for lesbians’ average earnings premium compared to straight women, Klawitter and others have suggested that human capital differences as well as gender and intrahousehold decision-making may at least partly explain the differentials, though further study is needed.<sup>38</sup> As economist Lee Badgett and colleagues explained:

[That] lesbians generally do not earn less than heterosexual women does not imply the absence of employment discrimination. First, lesbians might make different decisions than heterosexual women since they are less likely to marry men—who on average have higher wages—or put their careers on hold to have children. As a result, lesbians might invest in more training or actual labor market experience than do heterosexual women. This increase in “human capital” may mask the effects of discrimination. Unfortunately, it is impossible to separate out those effects in existing data. Second, some evidence suggests that women are less likely to disclose their sexual orientation at work. Thus, the findings above might be different had there been a way to measure these factors for lesbians. With better controls, it is possible that we would see that lesbians earn less than heterosexual women with the same actual experience.<sup>39</sup>

Importantly, moreover, “lesbians consistently earn less than men[, suggesting that] . . . gender discrimination has a greater impact on lesbians’ wages than sexual orientation discrimination.”<sup>40</sup>

As new and richer data become available, a fuller picture is emerging. For example, a study of 2013–2015 data from the National Health Interview Survey—which added a demographic measure of sexual orientation in 2013—found earnings advantages for both gay men and lesbians compared to their straight counterparts.<sup>41</sup>

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36. *Id.* at 22; accord Badgett et al., *supra* note 25, at 582–83.

37. Badgett et al., *supra* note 25, at 582.

38. Klawitter, *supra* note 20, at 23–24; Badgett et al., *supra* note 25, at 585.

39. Badgett et al., *supra* note 25, at 585.

40. *Id.* at 583; accord Klawitter, *supra* note 20, at 5.

41. Christopher S. Carpenter & Samuel T. Eppink, *Does It Get Better? Recent Estimate of Sexual Orientation and Earnings in the United States*, 84 S. ECON. J. 426, 434–38 (2017).

There was no clear reason for the new finding of a premium for gay men, though the authors explained that this premium was not likely primarily explained by reduced discrimination and changing patterns of household specialization (the idea that one partner would specialize in work outside the home and one would specialize in work inside the home, as many different-sex married couples historically arranged themselves).<sup>42</sup> A recent study of 2012–2014 data from United Kingdom indicated that couples-based data overstate the true earnings differences attributable to a minority sexual orientation, and that household specialization plays an important role in the lesbian earnings premium.<sup>43</sup>

There is evidence of wage gaps and labor market disadvantages for bisexual men and women in particular. According to a 2016 study, the wage penalties faced by bisexual men and women compared to similar heterosexual men and women are not explained by human capital differences or occupational characteristics but rather are partially explained by prejudicial treatment.<sup>44</sup> These findings reflect a recent study of data from mid-2013 through 2016 concluding that bisexual women and men are significantly more likely to be poor than heterosexual women and men, after controlling for education, demographic, and health measures.<sup>45</sup> Furthermore, according to this study, single gay men are more likely to be poor than their heterosexual male counterparts.<sup>46</sup>

With respect to transgender people, economist Christopher Carpenter and two colleagues recently analyzed representative data from thirty-one states and found that transgender individuals have significantly lower household incomes, lower employment rates, and higher poverty rates than comparable cisgender men.<sup>47</sup> Yet, the authors found that differences in household structure explained a substantial portion of these differences. Carpenter and colleagues also found that transgender women have significantly lower household incomes than cisgender women, and transgender men have significantly lower household incomes than

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42. *Id.*

43. Cevat G. Aksoy et al., *Sexual Orientation and Earnings: New Evidence from the United Kingdom*, 71 *INDUS. LAB. REL. REV.* 242, 263–65 (2018).

44. Trenton D. Mize, *Sexual Orientation in the Labor Market*, 81 *AM. SOC. REV.* 1132, 1152 (2016); see also Brendan Cushing-Daniels & Tsz-Ying Yeung, *Wage Penalties and Sexual Orientation: An Update Using the General Social Survey*, 27 *CONTEMP. ECON. POL'Y* 164 (2009).

45. M.V. Lee Badgett, *Left Out? Lesbian, Gay, and Bisexual Poverty in the U.S.*, 37 *POP. RESEARCH & POL'Y REV.* 667, 691 (2018).

46. *Id.*

47. Christopher S. Carpenter et al., *Transgender Status, Gender Identity, and Socioeconomic Outcomes in the United States* (unpublished draft on file with author).

cisgender men.<sup>48</sup> These findings reflect non-probability data. Among respondents to the largest survey to date of transgender and other gender minorities, for example, rates of unemployment, poverty, and other measures of economic insecurity were higher than national rates, especially among people of color.<sup>49</sup> Other studies have found substantial and statistically significant reductions in earnings for individuals transitioning from male to female, but no change or a slight increase in earnings for individuals transitioning from female to male.<sup>50</sup>

In summary, better data are needed to more fully assess wage disparities related to sexual orientation and gender identity, including at the subnational level. Considering the data and research that do exist, there is evidence that, on average, gay and bisexual men compared to straight men, and bisexual women compared to straight women, are subject to wage disparities explained at least partially by discrimination. While the evidence with respect to lesbians compared to straight women is less clear, lesbians may still be subject to sexual orientation discrimination at work and gender discrimination lowers lesbians' earnings compared to straight and gay men, on average. With respect to transgender people, limited data indicate that transgender individuals have lower household incomes, lower employment rates, and higher poverty rates than cisgender men, and that transitioning from male to female reduces earnings.

Ultimately, whether population-based data sources demonstrate wage disparities on the basis of sexual orientation or gender identity is immaterial to the practicalities of the Equal Pay Act. That is because the Equal Pay Act only applies to wage disparities in particular employment establishments and only between substantially equal jobs. Although population-based wage analyses do not shed light on the presence or absence of wage disparities within the scope of the Equal Pay Act, these studies signal the need for relevant anti-discrimination legislation, as does other recent evidence of discrimination against LGBT people discussed below.

### B. *Recent Controlled Experiments*

A second area of research on discrimination facing LGBT people involves controlled experiments designed to test the effects of sexual orientation or gender identity in real-life employment or housing scenarios. I discuss experiments in housing scenarios, too, because they are even more recent. In matched pair testing, sets of two individuals (or, e.g., resumes or email inquiries) are matched in as many

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48. *Id.*

49. SANDY E. JAMES ET AL., NAT'L CTR. FOR TRANSGENDER EQUALITY, THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 139–46 figs.9.1, 9.4, 9.5, & 9.6 (2016).

50. *See, e.g.*, Kristen Schilt and Matthew Wiswall, *Before and After: Gender Transitions, Human Capital, and Workplace Experiences*, 8 B.E.J. OF ECON. ANALYSIS & POL'Y 1, 18–19 (2008).

ways as possible, aside from the characteristic being studied (e.g., sexual orientation, gender identity, race, or sex). Then the pairs are sent out into real-world scenarios to see if, over all, one type (e.g., the LGBT person or resume) is treated better or worse than the other (e.g., the non-LGBT person or resume).<sup>51</sup> All but one of the recent published experiments have found evidence of discrimination against LGBT people.

In the employment context, two of three recent studies have found anti-LGB discrimination.<sup>52</sup> In 2014, sociologist Emma Mishel matched pairs of fictitious women's resumes—aside from an indicator of queer status—and then used those resumes to apply for administrative jobs from online databases in New York, Virginia, Tennessee, and Washington, D.C. Mishel found that the queer women were discriminated against compared to the other women, receiving about thirty percent fewer call-backs.<sup>53</sup> Similarly, in 2005, in a matched resume experiment conducted in California, New York, Pennsylvania, Nevada, Florida, Ohio, and Texas, sociologist András Tilcsik found that gay men were forty percent less likely than straight men to be asked for an interview.<sup>54</sup>

By contrast, in a 2010 resume study, sociologist John Bailey and colleagues found no significant discrimination against either gay male or lesbian applicants compared with their straight counterparts after applying to positions in San Francisco, Chicago, Dallas, and Philadelphia.<sup>55</sup> As Mishel notes, the three studies' different designs make it difficult to explain the different findings, though the studies' sites could provide some (but not all) explanation.<sup>56</sup> According to Mishel, "perhaps Bailey et al. would have found discrimination if they had selected and applied to positions in smaller, more conservative areas, as well as diversified their job source."<sup>57</sup>

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51. See generally Badgett et al., *supra* note 25, at 589–95 (discussing controlled experiments between 1981 and 2003).
  52. For a discussion of older controlled experiments in this area, see *id.* at 589–94 (summarizing that seven of eight studies in the employment and public accommodations contexts found evidence of sexual orientation discrimination).
  53. Emma Mishel, *Discrimination Against Queer Women in the U.S. Workforce: A Résumé Audit Study*, SOCIUS 1, 10–11 (2016).
  54. András Tilcsik, *Pride and Prejudice: Employment Discrimination Against Openly Gay Men in the United States*, 117 AM. J. SOC. 586, 614 (2011).
  55. John Bailey et al., *Are Gay Men and Lesbians Discriminated against When Applying for Jobs? A Four-city, Internet-based Field Experiment*, 60 J. OF HOMOSEXUALITY 873, 888 (2013).
  56. Mishel, *supra* note 53, at 10.
  57. *Id.* at 3.

The District of Columbia's Office for Human Rights conducted a study in 2015 designed to test for discrimination against transgender and gender non-conforming job applicants for grocery, restaurant, hotel, administrative, and similar level positions.<sup>58</sup> The tester applications signaled the applicant was transgender or gender non-conforming, and these applications were:

constructed to be *more-qualified* than control applications by having higher GPAs, more work experience, and having attended colleges that were ranked higher than or equal to the colleges the control applicants attended. While the tester and control applications varied slightly in other respects to avoid detection, differences were controlled for as much as possible. Therefore, when a control applicant received a callback but a tester applicant did not, it could be inferred that discrimination based on gender identity was likely.<sup>59</sup>

Among other findings, the experiment showed that nearly half (48%) of employers appeared to prefer at least one less-qualified applicant perceived as not transgender over a more-qualified applicant perceived as transgender, and a third of employers (33%) offered interviews to one or more less-qualified applicants perceived as not transgender.<sup>60</sup>

Outside of the employment context, there have been three recent studies to note—all in the housing context. With funding from the U.S. Department of Housing and Urban Development (“HUD”), Levy et al. conducted a pilot study from 2014–2015 of paired tests in which individuals in same-sex (male and female) and different-sex couples posed as renters seeking real apartments in two metropolitan areas in California and Texas.<sup>61</sup> The tester pairs were matched on race, ethnicity, and approximate age; they were assigned comparable employment and income; and other measures were taken to isolate any effect of sexual

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58. D.C. OFF. FOR HUMAN RIGHTS, *QUALIFIED AND TRANSGENDER: A REPORT ON RESULTS OF RESUME TESTING FOR EMPLOYMENT DISCRIMINATION BASED ON GENDER IDENTITY* 10 (2015), [https://ohr.dc.gov/sites/default/files/dc/sites/ohr/publication/attachments/QualifiedAndTransgender\\_FullReport\\_1.pdf](https://ohr.dc.gov/sites/default/files/dc/sites/ohr/publication/attachments/QualifiedAndTransgender_FullReport_1.pdf).

59. *Id.* (emphasis added).

60. *Id.* at 14 tbls.4 & 5.

61. DIANE K. LEVY ET AL., URBAN INST., *A PAIRED-TESTING PILOT STUDY OF HOUSING DISCRIMINATION AGAINST SAME-SEX COUPLES AND TRANSGENDER INDIVIDUALS* 5–8 (2017) (describing methodology), [https://www.urban.org/sites/default/files/publication/91486/2017.06.27\\_hds\\_lgt\\_final\\_report\\_report\\_finalized\\_1.pdf](https://www.urban.org/sites/default/files/publication/91486/2017.06.27_hds_lgt_final_report_report_finalized_1.pdf).

orientation.<sup>62</sup> The researchers found that, on the whole, landlords treated lesbians comparably to heterosexual women, but gay men were treated worse than heterosexual men in that gay men were told about fewer units and were quoted higher rents.<sup>63</sup> Levy and colleagues also conducted an exploratory study of paired tests of transgender or gender queer and cisgender men or women in the Washington, D.C. area, and found that transgender testers were told about fewer units than cisgender testers.<sup>64</sup> Together these findings “indicate that housing providers offer comparable treatment to lesbians and heterosexual women but discriminate against gay men and transgender individuals on some treatment measures at the early stage of the rental search process.”<sup>65</sup> HUD also recently conducted its own matched pairs study in the online housing market, and found that same-sex couples (male and female) experienced discrimination, relative to heterosexual couples, in that same-sex couples received fewer responses to email inquiries.<sup>66</sup>

### C. *Administrative Complaints*

Recent analyses of administrative complaints of employment, housing, and public accommodation discrimination show that LGBT people file a relatively similar number of discrimination complaints per capita as racial minorities and women.<sup>67</sup> According to Badgett and colleagues’ recent analysis of EEOC data, 9,121

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62. *Id.* at 9–14.

63. *Id.* at 37–54.

64. *Id.* at 16–18, 58–62.

65. *Id.* at 63.

66. SAMANTHA FRIEDMAN ET AL., U.S. DEP’T OF HOUSING AND URBAN DEV., OFF. OF POLICY DEV. AND RES., AN ESTIMATE OF HOUSING DISCRIMINATION AGAINST SAME-SEX COUPLES 20 (2013), [https://www.huduser.gov/portal//publications/pdf/Hsg\\_Disc\\_against\\_SameSexCpls\\_v3.pdf](https://www.huduser.gov/portal//publications/pdf/Hsg_Disc_against_SameSexCpls_v3.pdf).

67. CHRISTY MALLORY & BRAD SEARS, THE WILLIAMS INST., EVIDENCE OF EMPLOYMENT DISCRIMINATION BASED ON SEXUAL ORIENTATION AND GENDER IDENTITY: AN ANALYSIS OF COMPLAINTS FILED WITH STATE ENFORCEMENT AGENCIES, 2008–2014 (2015), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Employment-Discrimination-Complaints-2008-2014.pdf>; CHRISTY MALLORY & BRAD SEARS, THE WILLIAMS INST., EVIDENCE OF HOUSING DISCRIMINATION BASED ON SEXUAL ORIENTATION AND GENDER IDENTITY: AN ANALYSIS OF COMPLAINTS FILED WITH STATE ENFORCEMENT AGENCIES, 2008–2014 (2016), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Housing-Discrimination-Complaints-2008-2014.pdf>; CHRISTY MALLORY & BRAD SEARS, THE WILLIAMS INST., EVIDENCE OF PUBLIC ACCOMMODATIONS DISCRIMINATION BASED

charges of sexual orientation or gender identity discrimination were filed with federal and state agencies between 2013 and 2016.<sup>68</sup> Not surprisingly, these charges came in higher rates from states without statutory protections from these forms of discrimination. For the sexual orientation charges, a disproportionate number were filed by men and Black individuals. For the gender identity charges, a disproportionate number were filed by women and White individuals. And, some of the charges included claims of race, disability, or other forms of discrimination in addition to sexual orientation or gender identity discrimination. Many of the charges came from a small number of industries, including low-wage industries like retail and accommodations and food services.

D. *Other Evidence: Increasing Social Acceptance, Persistently Pervasive Anti-LGBT Violence and Discrimination, and Geographic Variation*

One common form of data on anti-LGBT discrimination in society, workplaces, and other specific settings is from surveys of the general public and/or of LGBT people themselves. Public opinion surveys indicate that social acceptance of LGBT people is increasing nationally. For example, according to nationally-representative surveys by Pew Research Center, 63% of Americans in 2016 said that “homosexuality should be accepted by society, a share that also has grown over the past few decades. Fewer (28%) say homosexuality should be discouraged. But there are differences on the issue among religious and partisan groups.”<sup>69</sup> Similarly, political scientist Andrew Flores has found that people’s feelings toward lesbian and

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ON SEXUAL ORIENTATION AND GENDER IDENTITY: AN ANALYSIS OF COMPLAINTS FILED WITH STATE ENFORCEMENT AGENCIES, 2008–2014 (2016), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Public-Accommodations-Discrimination-Complaints-2008-2014.pdf>.

68. M.V. LEE BADGETT ET AL., EVIDENCE FROM THE FRONTLINES ON SEXUAL ORIENTATION AND GENDER IDENTITY DISCRIMINATION, CTR. FOR EMPLOYMENT EQUITY (2018), <https://www.umass.edu/employmentequity/sites/default/files/CEE%2BSOGI%2Bdiscrimination%2Breport.pdf>.
69. Hannah Fingerhut, *Support Steady for Same-Sex Marriage and Acceptance of Homosexuality*, PEW RES. CTR. (May 16, 2016), <http://www.pewresearch.org/fact-tank/2016/05/12/support-steady-for-same-sex-marriage-and-acceptance-of-homosexuality/>; see also ANDREW R. FLORES, THE WILLIAMS INST., NATIONAL TRENDS IN PUBLIC OPINION ON LGBT RIGHTS IN THE UNITED STATES, 15 fig.3 (2014), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/POP-natl-trends-nov-2014.pdf> (charting responses to the General Social Survey’s question about relations between two adults of the same sex, and finding over the last four decades a substantial increase in respondents responding “not wrong at all” and a substantial decrease in respondents responding “always wrong”).

gay men have, on average, moved from “very cool feelings” in 1984 to “slightly more positive than neutral [in 2013].”<sup>70</sup> According to Flores, this shift cannot be primarily explained by generational replacement; rather, the “entire population has had ongoing changes in their feelings toward lesbians and gay men.”<sup>71</sup> There are limited data on acceptance of transgender people and bisexuals; the few surveys that exist suggest positive attitude changes toward both groups, though there appears to be more support for bisexual women than bisexual men.<sup>72</sup>

Numerous polls indicate that support nationally for same-sex marriage, as well as non-discrimination protections and adoption rights for LGBT people, has steadily risen over the past two decades, and that support for criminalizing same-sex relations has steadily decreased.<sup>73</sup> Recent polling by the Public Religion Research Institute finds a slight majority (53%) of Americans “oppose[s] laws that require transgender individuals to use bathrooms that correspond to their sex at birth rather than their current gender identity,” and that “[n]early two-thirds (64%) of Americans oppose allowing small business owners in their state to refuse to provide products or services to gay or lesbian people if doing so violates their religious beliefs.”<sup>74</sup>

National data can mask the fact that the social and political climate for LGBT people varies substantially by geography. The Williams Institute’s LGB Social and Political Climate Index, published in 2014, is instructive.<sup>75</sup> The index compares the climate for LGB people by state, drawing together “four key measures of attitudes about the rights of LGB people and beliefs about LGB people[.]” including the belief that homosexuality is a sin.<sup>76</sup> Scores on the index ranged from 45 to 92, and the average score was 60. The states in the Northeast and the Pacific

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70. FLORES, *supra* note 69, at 9–10 fig.1.

71. *Id.* at 13.

72. *Id.* at 5, 16–17 tbls.1 & 2. For some more recent U.S. data, see ANDREW R. FLORES ET AL., THE WILLIAMS INST. & IPSOS, PUBLIC SUPPORT FOR TRANSGENDER RIGHTS: A TWENTY-THREE COUNTRY SURVEY (2016), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/23-Country-Survey.pdf>.

73. FLORES, *supra* note 69, at 18–22, 25–27 figs.4–7 & tbls. 4–6.

74. Daniel Cox & Robert P. Jones, PUB. RELIGION RESEARCH INST., *Majority of Americans Oppose Transgender Bathroom Restrictions*, (Mar. 10, 2017), <https://www.prrri.org/research/lgbt-transgender-bathroom-discrimination-religious-liberty/>.

75. AMIRA HASENBUSH ET AL., THE WILLIAMS INST., THE LGBT DIVIDE: A DATA PORTRAIT OF LGBT PEOPLE IN THE MIDWESTERN, MOUNTAIN & SOUTHERN STATES (2014), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-divide-Dec-2014.pdf>.

76. *Id.* at 5–6.

had index scores higher than other regions, while states in the remainder of the country had lower index scores, especially in the South.<sup>77</sup> Some of these differences were due to the presence or absence of LGBT legal rights at the state-level: “The average climate index in states that include sexual orientation in non-discrimination policies [was] 70 . . . [whereas it was 52 for] states that do not include sexual orientation in non-discrimination policies.”<sup>78</sup> According to the authors, these findings indicate that LGB and transgender people “who live in states with less supportive legal climates also may face less social acceptance . . . .”<sup>79</sup> But even in states that scored lower on the index, polls indicate increasing acceptance of LGBT people and increasing support for their rights.<sup>80</sup>

Notwithstanding these various trends toward greater acceptance of LGBT people, research finds that survey participants substantially underreport anti-LGBT sentiments.<sup>81</sup> And other recent evidence suggests that improvement in social acceptance of LGBT people may be limited and that prejudice and discrimination remains widespread. For example, FBI and other sources of data on violence against LGBT people indicate anti-LGBT hate crimes and other forms of bias violence have not subsided over the past decade.<sup>82</sup> The FBI data, while illuminating, likely

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77. *Id.* at 5 figs. 2, 3, & 6.

78. *Id.* at 6.

79. *Id.*

80. *See, e.g.*, ANDREW R. FLORES & SCOTT BARCLAY, THE WILLIAMS INST., PUBLIC SUPPORT FOR MARRIAGE FOR SAME-SEX COUPLES BY STATES 5–6 fig.2 (2013), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Flores-Barclay-Public-Support-Marriage-By-State-Apr-2013.pdf> (finding that approval of marriage for same-sex couples has increased in every state).

81. Katherine B. Coffman et al., *The Size of the LGBT Population and the Magnitude of Antigay Sentiment Are Substantially Underestimated*, 63 MGMT. SCI. 3168, 3175–78 (2017).

82. In 2005, 1,213 victims of crimes stemming from sexual-orientation bias were reported to the FBI. U.S. Dep’t of Justice, Fed. Bureau of Investigation, *Table 1: Incidents, Offenses, Victims, and Known Offenders*, HATE CRIME STAT. 2005, <https://www2.fbi.gov/ucr/hc2005/table1.htm> (last visited Sept. 30, 2018). In 2016, 1,255 victims of these crimes were reported to the FBI. U.S. Dep’t of Justice, Fed. Bureau of Investigation, Criminal Justice Info. Serv. Div., *Table 1: Incidents, Offenses, Victims, and Known Offenders*, 2016 HATE CRIME STATISTICS, <https://ucr.fbi.gov/hate-crime/2016/tables/table-1> (last visited Sept. 30, 2018).

Analyses of FBI data from the 2000s indicate that gay people report the greatest number of hate crimes per capita, William B. Rubenstein, *The Real Story of U.S. Hate Crime Statistics*, 78 TUL. L. REV. 1213, 1233 (2004), and that gay men face higher rates of hate-motivated physical violence than lesbians, bisexuals, or other federally protected groups with high rates of hate crimes, REBECCA L. STOTZER, THE WILLIAMS

substantially underrepresent the extent of hate crimes in the country because these data only include crimes reported to police and confirmed by law enforcement to be hate crimes.<sup>83</sup> Among the incidents of hate violence against LGBTQ and HIV-affected people reported in 2016 to the National Coalition of Anti-Violence Programs (“NCAVP”) were seventy-seven homicides (including the forty-nine people killed during the Pulse Nightclub shooting).<sup>84</sup> Among the twenty-eight homicides unrelated to Pulse, the majority of victims were people of color (79%), transgender (68%), and under age thirty-five (61%).<sup>85</sup> Among the 1,036 incidents reported in 2016 to NCAVP that were not homicides, the majority of the survivors were gay men (47%), and among those reporting race or ethnicity, the majority of survivors were people of color (61%).<sup>86</sup>

The persistence of anti-LGBT stigma and discrimination is also evident in recent data from youth in U.S. high schools, arguably the population most likely to have the greatest acceptance of LGBT people. In various studies, LGBT students report much higher levels of being bullied on school property and electronically, as

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INST., COMPARISON OF HATE CRIME RATES ACROSS PROTECTED AND UNPROTECTED GROUPS – AN UPDATE 3 (2012), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Stotzer-Hate-Crime-Update-Jan-2012.pdf>; *see also* REBECCA STOTZER, THE WILLIAMS INST., COMPARISON OF HATE CRIME RATES ACROSS PROTECTED AND UNPROTECTED GROUPS 2–3 (2007), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Stotzer-Comparison-Hate-Crime-June-2007.pdf>.

In 2016, 131 victims of gender-identity bias crimes were reported, *Table 1, supra*, four times more than the thirty-three such victims reported in 2013, when the FBI included gender-identity bias crimes. U.S. Dep’t of Justice, Fed. Bureau of Investigation, Criminal Justice Info. Serv. Div., *Victims, 2013 HATE CRIME STATISTICS*, [https://ucr.fbi.gov/hate-crime/2013/topic-pages/victims/victims\\_final](https://ucr.fbi.gov/hate-crime/2013/topic-pages/victims/victims_final) (last visited Sept. 30, 2018).

83. *See* Sophie Bjork-James, *What the Latest FBI Data Do and Do Not Tell Us About Hate Crimes in the US*, THE CONVERSATION (Nov. 26, 2017, 6:45 PM), <https://theconversation.com/what-the-latest-fbi-data-do-and-do-not-tell-us-about-hate-crimes-in-the-us-87561> (discussing the incompleteness of the FBI’s hate crimes data with one major reason being that “only 41 percent of hate crimes are report [to law enforcement, and] only 10 percent are then confirmed by law enforcement investigators as hate crimes.”).
84. EMILY WATERS ET AL., NAT’L COAL. OF ANTI-VIOLENCE PROGRAMS, LESBIAN, GAY, BISEXUAL, TRANSGENDER, QUEER, AND HIV-AFFECTED HATE VIOLENCE IN 2016, at 28 (2016).
85. *Id.*
86. *Id.* at 30.

well as being threatened or injured with a weapon on school property, compared to non-LGBT students.<sup>87</sup>

Results from surveys of adults are similar. A 2017 survey of a nationally representative sample of LGBT adults commissioned by the Center for American Progress, for example, found that more than a quarter of the respondents reported experiencing discrimination because of their sexual orientation or gender identity in the past year.<sup>88</sup> These findings reflect those from numerous national and state surveys of LGBT and non-LGBT people conducted over the past two decades.<sup>89</sup> For example, in Pew Research Center's 2013 Survey of LGBT Americans, two-thirds of respondents (66%) reported personally experiencing at least one of six types of discrimination; with respect to employment, 21% of respondents reported ever being treated unfairly by an employer.<sup>90</sup> In the Pew survey, bisexuals reported less discrimination across different settings.<sup>91</sup> Similar to surveys measuring people's attitudes toward LGBT people, there are some state differences in reported discrimination among LGBT people and other evidence of discrimination.<sup>92</sup>

Survey evidence is useful but limited for several reasons, including that it reflects subjective self-reporting of respondents rather than a more objective

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87. See, e.g., Laura Kann et al., *Youth Risk Behavior Surveillance—United States, 2017*, 67 MORBIDITY & MORTALITY WKLY. REP., June 15, 2018, at 15, 17–19.

88. Sejal Singh & Laura E. Durso, CTR. FOR AM. PROGRESS, *Widespread Discrimination Continues to Shape LGBT People's Lives in Both Subtle and Significant Ways*, (May 2, 2017, 8:10 AM), <https://www.americanprogress.org/issues/lgbt/news/2017/05/02/429529/widespread-discrimination-continues-shape-lgbt-peoples-lives-subtle-significant-ways/>.

89. See, e.g., Badgett et al., *supra* note 25, at 562–78; Pizer et al., *supra* note 25, at 720–21.

90. PEW RES. CTR., *A SURVEY OF LGBT AMERICANS: ATTITUDES, EXPERIENCES AND VALUES IN CHANGING TIMES* 41 (2013), [http://www.pewsocialtrends.org/wp-content/uploads/sites/3/2013/06/SDT\\_LGBT-Americans\\_06-2013.pdf](http://www.pewsocialtrends.org/wp-content/uploads/sites/3/2013/06/SDT_LGBT-Americans_06-2013.pdf).

91. *Id.* at 42.

92. Badgett et al., *supra* note 25, at 566–68. Compare, e.g., CHRISTY MALLORY ET AL., THE WILLIAMS INST., *THE IMPACT OF STIGMA AND DISCRIMINATION AGAINST LGBT PEOPLE IN ARIZONA* (2018), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Arizona-Impact-Discrimination-March-2018.pdf>; CHRISTY MALLORY ET AL., THE WILLIAMS INST., *THE IMPACT OF STIGMA AND DISCRIMINATION AGAINST LGBT PEOPLE IN FLORIDA* (2017), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Florida-Impact-Discrimination-Oct-2017.pdf>; CHRISTY MALLORY ET AL., THE WILLIAMS INST., *THE IMPACT OF STIGMA AND DISCRIMINATION AGAINST LGBT PEOPLE IN TEXAS* (2017), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Texas-Impact-of-Stigma-and-Discrimination-Report-April-2017.pdf>.

assessment, such as the wage analyses and controlled experiments discussed above in Sections A and B.<sup>93</sup> Finally, while I have been focused on research findings at the population level, case law, the press, and other sources document many individual examples of proven or alleged anti-LGBT discrimination in employment and other settings.<sup>94</sup>

## II. EXPRESS FEDERAL PROTECTIONS AGAINST SEXUAL ORIENTATION AND GENDER IDENTITY DISCRIMINATION

Whether federal anti-sex-discrimination statutes, including the Equal Pay Act, cover sexual orientation and gender identity discrimination is an important question because, as discussed above in Part I, research indicates that LGBT people face pervasive discrimination at work, even as social acceptance and legal rights have improved for LGBT people across the country (in some places more than others). Yet, as I explained in the Introduction, federal anti-discrimination statutes that apply to employment, education, and other settings do not *expressly* enumerate “sexual orientation” or “gender identity” as a prohibited basis of discrimination on the face of statute.

Some federal, state, and local laws and policies *do* expressly prohibit sexual orientation and gender identity discrimination, forming a patchwork of express protections in employment and in other realms. In order to provide a fuller picture and to contextualize the sex discrimination arguments I discuss in Part III, here I briefly describe: in Section A, the two federal anti-discrimination statutes that expressly include sexual orientation and gender identity as protected characteristics, and in Section B, federal Executive-level policies that offer express protections against sexual orientation and gender identity discrimination.

I do not address state or local protections that, depending on the jurisdiction, apply to public and/or private workers or others; nor do I address constitutional protections against discriminatory state actions. In short, a minority

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93. In the context of the Equal Pay Act, I have largely focused my discussion on employment discrimination and have not discussed a variety of similar forms of evidence of discrimination in other settings. For example, with respect to discrimination in health care, the Institute of Medicine has summarized:

LGBT individuals face discrimination in the health care system that can lead to an outright denial of care or to the delivery of inadequate care. There are many examples of manifestations of enacted stigma against LGBT individuals by health care providers. LGBT individuals have reported experiencing refusal of treatment by health care staff, verbal abuse, and disrespectful behavior, as well as many other forms of failure to provide adequate care. INST. OF MED., *supra* note 23, at 62.

94. *See, e.g., infra* Part III.C for a variety of cases involving claims of sexual orientation and gender identity discrimination.

of states statutorily prohibit sexual orientation and gender identity discrimination in employment (and other settings),<sup>95</sup> as do hundreds of localities.<sup>96</sup> In other words, a majority of states and the vast majority of localities do not expressly prohibit these forms of discrimination. Public employees may also have state and local protections, including from executive orders and the state and federal constitutions.<sup>97</sup> Consequently, a person's ability to redress sexual orientation or gender identity discrimination is highly dependent on their jurisdiction and the type of employer, which I illustrate in Section C.

#### A. *Federal Statutes*

At the federal level, only two broad-based statutes expressly address discrimination on the bases of sexual orientation and gender identity. The Violence Against Women Reauthorization Act of 2013—which is up for reauthorization in 2019—prohibits programs or activities funded under it from discriminating on the basis of sexual orientation or gender identity, among other bases including sex and race.<sup>98</sup> The Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act of 2009, among other things, expanded the definition of hate crimes under federal law to include those crimes motivated by a person's actual or perceived sexual orientation or gender identity.<sup>99</sup>

#### B. *Federal Executive Orders, Regulations, and Policies*

In 2014, President Obama issued an executive order that expressly prohibits federal contractors from discriminating on the basis of sexual orientation and gender

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95. *See Non-Discrimination Laws*, MOVEMENT ADVANCEMENT PROJECT, [http://www.lgbtmap.org/equality-maps/non\\_discrimination\\_laws](http://www.lgbtmap.org/equality-maps/non_discrimination_laws) (employment tab) (last visited Sept. 1, 2018).

96. *See Local Non-Discrimination Ordinances*, MOVEMENT ADVANCEMENT PROJECT, [http://www.lgbtmap.org/equality-maps/non\\_discrimination\\_ordinances](http://www.lgbtmap.org/equality-maps/non_discrimination_ordinances) (last visited Sept. 1, 2018).

97. *See Non-Discrimination Laws*, MOVEMENT ADVANCEMENT PROJECT, [http://www.lgbtmap.org/equality-maps/non\\_discrimination\\_laws](http://www.lgbtmap.org/equality-maps/non_discrimination_laws) (public employees tab) (last visited Sept. 1, 2018).

98. 34 U.S.C. § 12291(b)(13)(A) (West 2017).

99. 18 U.S.C. § 249(2) (2012).

identity (and amended Executive Order 11246 in this regard).<sup>100</sup> Presidents Obama and Clinton issued executive orders expressly barring the federal government from discriminating on the basis of gender identity (Obama) and sexual orientation (Clinton) in employment.<sup>101</sup> Under the Clinton and Obama Administrations, several federal agencies adopted policies that expressly forbid sexual orientation and/or gender identity discrimination at the agencies themselves or in programs and activities they operate.<sup>102</sup> To identify a few, a final rule expressly prohibits HUD-conducted programs from discriminating against people because of sexual orientation or gender identity;<sup>103</sup> another HUD final rule requires that homeless shelters and other programs receiving certain HUD funding treat transgender people consistent with their gender identities;<sup>104</sup> the U.S. Department of Agriculture (“USDA”) bars sexual orientation and gender identity discrimination in USDA-conducted programs but not in all USDA-funded programs;<sup>105</sup> HHS regulations implementing various provisions of the ACA expressly include sexual orientation

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100. Exec. Order No. 13672, 79 Fed. Reg. 42971 (2014) (amending Exec. Order No. 11246 to prohibit federal contractors from discriminating on the basis of sexual orientation or gender identity).
  101. *Id.* (amending Exec. Order No. 11478 to prohibit the federal government from discriminating on the basis of gender identity); Exec. Order No. 13087, 63 Fed. Reg. 30097 (1998) (amending Exec. Order No. 11478 to prohibit the federal government from discriminating on the basis of sexual orientation).
  102. *See generally* *FACT SHEET: Obama Administration’s Record and The LGBT Community*, THE WHITE HOUSE, OFF. OF THE PRESS SECRETARY (2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/06/09/fact-sheet-obama-administrations-record-and-lgbt-community> (detailing actions taken by the Obama Administration in support of LGBT people).
  103. Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity (Final Rule), 77 Fed. Reg. 5662 (Feb. 3, 2012).
  104. Equal Access in Accordance with an Individual’s Gender Identity in Community Planning and Development Programs (Final Rule), 81 Fed. Reg. 64,763 (Sept. 21, 2016).
  105. *See* Nondiscrimination in Programs or Activities Conducted by the United States Department of Agriculture (Final Rule), 79 Fed. Reg. 41,406 (July 16, 2014) (adding gender identity to policy; sexual orientation already included). As to federally-assisted programs, this Final Rule stated “OASCR is currently researching its nondiscrimination regulation for its federally assisted programs. However, the current rule only addresses nondiscrimination protection for USDA ‘conducted’ programs and activities.” *Id.* at 41409.

and gender identity;<sup>106</sup> and the Department of Defense began implementing a policy to allow openly transgender people to serve in the military.<sup>107</sup>

Under the Trump Administration, however, some of these policies have been delayed or rolled back. For example, in 2017, the Trump Administration announced a ban on military service by transgender people,<sup>108</sup> and then revised that ban to avoid preliminary injunctions that had been issued against the ban in its first formation.<sup>109</sup> HUD has delayed implementing the protections for homeless transgender people.<sup>110</sup> The Department of Commerce removed sexual orientation and gender identity from its equal employment opportunity statement, only to restore the protections after a public outcry.<sup>111</sup> And federal agencies withdrew requests to the U.S. Census Bureau to start measuring sexual orientation and gender identity on the American Community Survey and Decennial Census, which would have provided policymakers and others with valuable data on LGBT people.<sup>112</sup>

Thus far, the Trump Administration has not rescinded the executive orders prohibiting sexual orientation and gender identity discrimination in employment by federal contractors and the federal government, or any of the other regulations with express protections in place. Whether and to what extent the Administration is vigorously enforcing any of these protections is not clear. Moreover, the

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106. See 45 C.F.R. §§ 155.120(c)(1)(ii), 147.104(e), 156.200(e), 156.125(a), & 156/125(b) (2017).

107. See Julie Hirschfeld Davis & Helene Cooper, *Trump Says Transgender People Will Not Be Allowed in the Military*, N.Y. TIMES (July 26, 2017), <https://www.nytimes.com/2017/07/26/us/politics/trump-transgender-military.html>.

108. *Id.*

109. See Dave Philipps, *Second Judge Blocks Trump's Transgender Ban in the Military*, N.Y. TIMES (Nov. 21, 2017), <https://www.nytimes.com/2017/11/21/us/transgender-ban-military.html>.

110. See Jennifer Hansler, *Carson Defends Delay in LGBT [sic] Homeless Protections*, CNN (Mar. 20, 2018); Rebecca Savransky, *Carson: Some 'Not Comfortable' with Transgender People in Homeless Shelters*, THE HILL (Mar. 21, 2018).

111. See Juliet Eilperin, *Commerce Department Cuts LGBT Protections—Then Restores Them—In Equal Opportunity Policy Statement*, WASH. POST (June 16, 2017).

112. See Letter from Tom Carper & Kamala D. Harris, U.S. Senators, to John H. Thompson, Dir. of the U.S. Census Bureau (May 22, 2017), <https://www.harris.senate.gov/imo/media/doc/2017-05-22-carper-harris-letter-to-census-bureau-re-new-subjects-press-.pdf>; Hansi Lo Wang, *Census Bureau Caught in Political Mess Over LGBT Data*, NPR (June 18, 2017); Hansi Lo Wang, *Collecting LGBT Census Data Is 'Essential' to Federal Agency, Document Shows*, NPR (June 20, 2017); Hansi Lo Wang, *Trump Officials 'Did Not Want' Census Survey To Ask About Sexual Orientation*, NPR (Sept. 20, 2018).

Administration has pursued plans to strengthen protections for people with religious or moral objections to abiding by anti-discrimination principles. In 2017, President Trump issued an executive order that directed that “[a]ll executive departments and agencies . . . shall, to the greatest extent practicable and to the extent permitted by law, respect and protect the freedom of persons and organizations to engage in religious and political speech.”<sup>113</sup> This Executive Order, among other things, also instructed then-Attorney General Sessions to issue guidance for the agencies,<sup>114</sup> which he did five months later.<sup>115</sup>

Agencies are now moving regulations, making enforcement decisions, and taking other actions that are accommodating of claims for religious exemptions from anti-discrimination principles and policies, or are otherwise aimed at strengthening relationships between religious organization and the federal government. For example, in 2018, the Office for Civil Rights at the U.S. Department of Health and Human Services (HHS) issued a proposed rule intended to strengthen protections for health care providers to opt out of performing services they find objectionable,<sup>116</sup> as well as announced the creation of a new division at the agency devoted to provider conscience issues.<sup>117</sup> In 2017, the U.S. Department of Justice filed a brief in support of a baker seeking a constitutional exemption from a state anti-discrimination statute that prohibits discrimination on the basis of sexual orientation,<sup>118</sup> and HHS issued a Request for Information seeking feedback on expanding the ability of religious organizations to access public funding and to participate in HHS programs.<sup>119</sup> In an individual example, the U.S. Air Force reversed a decision to sanction a colonel who

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113. Promoting Free Speech and Religious Liberty, Exec. Order No. 13798 § 2, 82 Fed. Reg. 21675 (May 4, 2017).

114. *Id.* § 4, 82 Fed. Reg. 21675.

115. MEMORANDUM FROM ATT’Y GEN. JEFF SESSIONS TO ALL EXEC. DEP’T’S AND AGENCIES (OCT. 6, 2017), <http://www.justice.gov/opa/press-release/file/1001891/download>.

116. Protecting Statutory Conscience Rights in Health Care; Delegations of Authority (Proposed Rule), 83 Fed. Reg. 3880 (Jan. 26, 2018).

117. *HHS Announces New Conscience and Religious Freedom Division*, U.S. DEP’T OF HEALTH & HUM. SERVS. (Jan. 18, 2018), <http://www.hhs.gov/about/news/2018/01/18/hhs-ocr-announces-new-conscience-and-religious-freedom-division.html>.

118. Brief for the United States as Amicus Curiae Supporting Petitioners, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018) (No. 16-111).

119. Removing Barriers for Religious and Faith-Based Organizations to Participate in HHS Programs and Receive Public Funding; Request for Information, 82 Fed. Reg. 49300 (Oct. 25, 2017).

refused to sign a retirement form for someone under his command with a same-sex spouse. According to the Secretary of the Air Force, the sanction against the colonel was not warranted and his religious beliefs should be accommodated, because a more senior officer signed the form.<sup>120</sup>

### C. *The Shifting Patchwork of Protections Illustrated*

Because federal anti-discrimination statutes by and large do not expressly prohibit sexual orientation and gender identity discrimination, plaintiffs seeking to remedy such discrimination must look to one of the federal policies discussed above in this Part, a state or local law or policy (if they exist), or the state or federal constitution (if applicable)—putting aside for the moment any protections that federal anti-sex-discrimination statutes might provide. In the employment context, for example, having an express legal right against sexual orientation discrimination or gender identity discrimination depends entirely on where and for whom one works. And as the Obama and Trump Administrations have demonstrated, the federal Executive Branch can profoundly expand or constrict the protections that address sexual orientation and gender identity discrimination across the nation.

A comparison of the employment discrimination protections applicable in Chicago, Illinois, and Savannah, Georgia, is illuminating of the patchwork. The Illinois Human Rights Act expressly prohibits employment discrimination because of one's sexual orientation, and sexual orientation is defined to include gender identity.<sup>121</sup> The City of Chicago's Human Rights Ordinance prohibits employment discrimination on the bases of sexual orientation and gender identity, as well.<sup>122</sup> Thus, someone alleging sexual orientation or gender identity discrimination in Chicago could pursue redress under these laws. In Savannah, there are no comparable protections because state and local laws do not expressly prohibit sexual orientation or gender identity discrimination.<sup>123</sup> Yet in both Chicago and Savannah, if the employer alleged to have discriminated on the basis of sexual orientation or

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120. Letter from Heather Wilson, Sec'y of the Air Force, to Vicky Hartzler, U.S. Representative (Apr. 2, 2018), <http://firstliberty.org/wp-content/uploads/2018/04/4.2.18-Colonel-Bohannon-Appeal4.pdf>.

121. 775 ILL. COMP. STAT. 5/1-103 (O-1) (2015) (defining "sexual orientation"); 775 ILL. COMP. STAT. 5/1-103 (Q) (2015) (defining "unlawful discrimination"); 775 ILL. COMP. STAT. 5/2-102 (2015) (prohibiting unlawful discrimination in employment).

122. CHICAGO, ILL., CIVIL RIGHTS ORDINANCE § 2-160-030 (2012).

123. See CHRISTY MALLORY ET AL., THE WILLIAMS INST., THE ECONOMIC IMPACT OF STIGMA AND DISCRIMINATION AGAINST LGBT PEOPLE IN GEORGIA 11–12 (2017), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Economic-Impact-of-Discrimination-and-Stigma-against-LGBT-People-in-Georgia-FINAL-4.pdf>.

gender identity is a federal contractor subject to Executive Order 11246, then the person alleging discrimination would be able to file a claim with the Office for Federal Contract Compliance Programs (“OFCCP”) at the U.S. Department of Labor, which enforces that executive order.<sup>124</sup> There are further layers to this patchwork, such as whether the employer is a state actor subject to constitutional guarantees.

Adding to this patchwork, I discuss in the next Part judicial and agency interpretations of Title VII and other anti-sex discrimination laws to cover sexual orientation and gender identity discrimination. As discussed below, some courts have interpreted Title VII and other statutes to prohibit sexual orientation discrimination and/or gender identity discrimination, such as the U.S. Court of Appeals for the Seventh Circuit which has held that sexual orientation discrimination is prohibited under Title VII.<sup>125</sup> Thus, a plaintiff in Chicago, which is within the Seventh Circuit, may have federal claims in addition to claims under state and local law. In contrast, the U.S. Court of Appeals for the Eleventh Circuit, which has jurisdiction over Georgia, has concluded that Title VII does not prohibit sexual orientation discrimination, but has held that anti-transgender discrimination is impermissible gender stereotyping.<sup>126</sup> Thus, a plaintiff in Savannah will not have a cause of action for sexual orientation discrimination under Title VII, but may have a cause of action for gender identity discrimination. If all of this sounds convoluted, it is.

### **III. JUDICIAL AND AGENCY INTERPRETATIONS OF STATUTES PROHIBITING SEX DISCRIMINATION WITH RESPECT TO SEXUAL ORIENTATION AND GENDER IDENTITY DISCRIMINATION**

As described above, federal law is a shifting patchwork of express protections against sexual orientation and gender identity discrimination, including a couple of broad-based statutes, a couple of executive orders applying to employment by the federal government and federal contractors, and a host of regulations applying to different situations. Adding to that morphing complex are the laws and policies of a minority of states and hundreds of localities that may apply to either or both public and private employment (among other settings, such as

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124. Implementation of Executive Order 13672 Prohibiting Discrimination Based on Sexual Orientation and Gender Identity by Contractors and Subcontractors (Final Rule), 79 Fed. Reg. 72985 (Dec. 9, 2014).

125. *See infra* Part III.C (discussing *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 351–52 (7th Cir. 2017) (en banc)).

126. *See infra* Part III.C (discussing *Evans v. Georgia Reg'l Hosp.*, 850 F.3d 1248, 1255 (11th Cir. 2017) and *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011)).

housing and public accommodations). Complicating matters further, as I describe in this Part, are conflicting federal court decisions on the questions of whether federal sex-discrimination prohibitions encompass discrimination because of one's actual or perceived sexual orientation or gender identity, which I discuss in Section C below. Section A summarizes some of the most important federal anti-sex-discrimination statutes, and Section B briefly discusses legislative efforts to amend those statutes to expressly include sexual orientation and gender identity. Part II above and this Part lay the necessary groundwork for consideration of the Equal Pay Act, to which I turn in Part IV.

#### A. *Federal Statutes Prohibiting Sex Discrimination*

The overwhelming majority of federal anti-discrimination statutes do not expressly enumerate “sexual orientation” or “gender identity” in their terms, but nearly all—with some noteworthy exceptions—prohibit sex discrimination. Most notably with respect to employment, Title VII generally prohibits employment discrimination “because of such individual’s . . . sex,”<sup>127</sup> and the Equal Pay Act prohibits wage disparities by sex for people doing substantially the same work in the same establishment.<sup>128</sup> With respect to education, Title IV of the Civil Rights Act of 1964 (“Civil Rights Act”) prohibits discrimination on the basis of sex by public elementary and secondary schools and public institutions of higher learning,<sup>129</sup> and Title IX of the Education Amendments of 1972 (“Title IX”) prohibits discrimination on the basis of sex in education programs and activities operated by recipients of federal funding.<sup>130</sup> Sex discrimination prohibitions also exist with respect to health care,<sup>131</sup> housing,<sup>132</sup> credit,<sup>133</sup> and other settings.<sup>134</sup>

With the exception of the Equal Pay Act and Title IX, each of these statutes prohibits race and other forms of discrimination (though, again, not expressly sexual orientation or gender identity). Furthermore, not all federal anti-discrimination statutes include sex as a barred basis of discrimination. Among the provisions of the Civil Rights Act, for example, Titles II and VI do not prohibit sex discrimination:

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127. 42 U.S.C. § 2000e-2(a)(1) (2012).

128. 29 U.S.C. § 206(d)(1) (2012).

129. 42 U.S.C. § 2000c (2012).

130. 20 U.S.C. § 1681(a) (2012).

131. 42 U.S.C. § 18116 (2012).

132. 42 U.S.C. § 3604(a) (2012).

133. 15 U.S.C. § 1691 (2012).

134. *See, e.g.*, 28 U.S.C. § 1862 (2012).

Title II prohibits public accommodations (such as motels, restaurants, and theaters) from discriminating “on the ground of race, color, religion, or national origin,”<sup>135</sup> and Title VI prohibits programs and activities receiving federal funding from discriminating “on ground of race, color, or national origin.”<sup>136</sup>

B. *Recent Legislation Related to Sexual Orientation, Gender Identity, and Sex Discrimination*

In 2015, a bipartisan group of Members of Congress introduced the Equality Act, a bill to add sexual orientation and gender identity to a relatively comprehensive set of federal anti-discrimination statutes.<sup>137</sup> The Equality Act did not advance in the 114th Congress. The Equality Act was reintroduced in 2017, but again did not advance under Republican leadership.<sup>138</sup> The Equality Act was again introduced in 2019, and at the time of this writing was moving forward in the House of Representatives under Democratic leadership.<sup>139</sup> The bill currently has 240 cosponsors in the House and 46 cosponsors in the Senate.

The Equality Act of 2019 would add sex, sexual orientation, and gender identity to Titles II and VI of the Civil Rights Act (public accommodations and federal funding),<sup>140</sup> and would add sexual orientation and gender identity to Titles III (public facilities), IV (public education), VII (employment) of the Civil Rights Act,<sup>141</sup> the Fair Housing Act,<sup>142</sup> the Equal Credit Opportunity Act,<sup>143</sup> the Jury Selection and Services Act,<sup>144</sup> and several other laws.

The Equality Act does not address the Equal Pay Act, Title IX, Section 1557 of the Affordable Care Act, or other anti-discrimination statutes.<sup>145</sup> Yet, importantly for the purposes of this article, the Equality Act does provide that sexual

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135. 42 U.S.C. § 2000a (2012).

136. 42 U.S.C. § 2000d (2012).

137. Equality Act, H.R. 3185, S. 1858, 114th Cong. (1st Sess. 2015).

138. Equality Act of 2017, H.R. 2282, S. 1006, 115th Cong. (1st Sess. 2017).

139. Equality Act of 2019, H.R. 5, S.788, 116th Cong. (1st Sess. 2019).

140. *Id.* §§ 3, 6.

141. *Id.* §§ 4, 5, 7.

142. *Id.* § 10.

143. *Id.* § 11.

144. *Id.* § 12.

145. *See generally id.*

orientation and gender identity discrimination are forms of sex discrimination,<sup>146</sup> and, indeed, the term sex is defined to include sex stereotypes, sexual orientation, and gender identity.<sup>147</sup> The term sexual orientation is defined in the Equality Act to mean “homosexuality, heterosexuality, or bisexuality.”<sup>148</sup> The term gender identity is defined as “the gender-related identity, appearance, mannerisms, or other gender-related characteristics of an individual, regardless of the individual’s designated sex at birth.”<sup>149</sup>

The modern Equality Act reflects and expands failed legislation first introduced in Congress in 1974, also called the Equality Act.<sup>150</sup> Since then, proposed legislation largely focused on employment, with some version of the Employment Non-discrimination Act introduced and not enacted for decades.<sup>151</sup> In addition, narrower bills targeting public accommodations, credit, housing, education, and jury service have been introduced, but none of these bills has been enacted.<sup>152</sup> None of these bills over the past four-and-half decades, as far I am aware, have sought to amend the Equal Pay Act. I have recounted these legislative efforts here because they are relevant to the court and agency interpretations to which I now turn.

C. *Conflicting Court and Agency Interpretations of Title VII and Other Federal Anti-Sex-Discrimination Statutes*

Since the late in 1970s, courts and agencies have been confronting the question of whether Title VII and other statutes prohibit discrimination on the basis of sexual orientation or gender identity. Most of the law in this area involves Title VII and, to a lesser extent, Title IX; however, in the discussion below, I endeavor to

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146. *Id.* §§ 2(12), 2(13).

147. *Id.* § 9(2).

148. *Id.*

149. *Id.*

150. Equality Act, H.R. 14752, 93rd Cong. (2d Sess. 1974).

151. *See, e.g.*, Employment Non-Discrimination Act, S. 815, 113th Cong. (2013); S. 811, 112th Cong. (2011); S. 1584, 111th Cong. (2009); H.R. 3017, 111th Cong. (2009); H.R. 3685, 110th Cong. § (2007); S. 1705, 108th Cong. (2003); S. 1284, 107th Cong. (2001); S. 1276, 106th Cong. (1999); S. 869, 105th Cong. (1997); S. 932, 104th Cong. (1995); S. 2238, 103d Cong. (1994).

152. *See, e.g.*, Student Non-Discrimination Act of 2018, H.R. 5374, 115th Cong. (2017); Customer Non-Discrimination Act, H.R. 3520, 115th Cong. (2017); Fair and Equal Housing Act of 2017, H.R. 1447, 115th Cong. (2017); Freedom from Discrimination in Credit Act of 2017, S.1143, H.R. 2498, 115th Cong. (2017); Juror Non-Discrimination Act and Jury ACCESS Act, H.R. 1515, S. 635, 115th Cong. (2017).

cite decisions construing various statutes in order to provide a more complete account. My goal here is not to describe every important nuance in this area of law, but rather to synthesize this large body of conflicting and evolving law. I seek to provide a clear articulation of the divide and the knots, as well as the collective reasoning behind and against holding that sexual orientation and gender identity are forms of sex discrimination prohibited under Title VII, Title IX, and other statutes. With that understanding, I assess similar arguments as to the Equal Pay Act in Part IV.

As a matter of statutory construction, all courts agree that we begin with the text of the statute.<sup>153</sup> Title VII provides, in relevant part, that “[i]t shall be an unlawful employment practice for an employer . . . 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.”<sup>154</sup> Title IX provides: “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”<sup>155</sup>

Crucially, neither Title VII nor Title IX define the term “sex.”<sup>156</sup> Thus, Congress largely left it to the courts and enforcement agencies to determine what specifically qualifies and what does not qualify as impermissible sex discrimination under these statutes. Keeping in mind the broad remedial purposes of these statutes, courts have over decades expanded these statutes’ reach in some respects. For example, courts have held that gender stereotyping and same-sex sex harassment are prohibited under both, even though, as the Supreme Court made clear in *Oncale v. Sundowner Offshore Services*, same-sex sex harassment “was assuredly not the principal evil Congress was concerned with when it enacted Title VII.”<sup>157</sup> In other words, while legislative history may help supplement our understanding of Congressional intent, the text of the statute controls its scope.<sup>158</sup> In any event, there

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153. See, e.g., *Sebelius v. Clover*, 569 U.S. 369, 376 (2013) (citing *BP Am. Prod. Co. v. Burton*, 549 U.S. 84, 91 (2006)); *Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004).

154. 42 U.S.C. § 2000e-2(a)(1) (2012).

155. 20 U.S.C. § 1681(a) (2012).

156. See, e.g., *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 362–63 (7th Cir. 2017) (en banc); *Bd. of Educ. of the Highland Local Sch. Dist. v. U.S. Dep’t of Educ.*, 208 F. Supp. 3d 850, 865 (S.D. Ohio 2016).

157. *Oncale v. Sundowner Offshore Serv’s*, 523 U.S. 75, 79 (1998).

158. *Id.*

is little legislative history on the inclusion of “sex” in Title VII,<sup>159</sup> and Title VII’s and Title IX’s legislative histories do not mention LGBT people, sexual orientation, or gender identity.<sup>160</sup> As a result, whether Title VII, Title IX, or other statutes can be interpreted to reach sexual orientation or gender identity discrimination, has divided the courts for decades.

### 1. The Early Decisions

In the earliest cases, courts consistently held that Title VII did not protect LGBT people and rejected arguments that the discrimination they faced was “because . . . of sex.”<sup>161</sup> For example, in 1979, the U.S. Court of Appeals for the Ninth Circuit concluded in *De Santis v. Pacific Telephone and Telegraph Co.* that “Title VII’s prohibition of ‘sex’ discrimination applies only to discrimination on the basis of gender and should not be judicially extended to include sexual preference such as homosexuality,” and rejected arguments that Title VII prohibited sex-stereotyping related to “effeminacy.”<sup>162</sup> Similarly, in 1985, the U.S. Court of Appeals for the Seventh Circuit concluded in *Ulane v. Eastern Airlines* that Title VII “is not so expansive in scope as to prohibit discrimination against transsexuals,” relying on the Ninth Circuit’s decision in *De Santis* and other similar decisions.<sup>163</sup>

These courts generally agreed that “Congress had a narrow view of sex in mind” and “never considered nor intended that [Title VII] apply to anything other than the traditional concept of sex.”<sup>164</sup> In other words, the courts accepted, with little analysis, that the relevant statutory language “because . . . of sex” could not include sexual orientation or gender identity discrimination based on the conclusion

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159. *See Meritor Savs. Bank v. Vinson*, 477 U.S. 57, 64 (1986) (“[W]e are left with little legislative history to guide us in interpreting the Act’s prohibition against discrimination based on ‘sex.’”).

160. *See, e.g., Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 137–42 (2d Cir. 2018) (en banc) (Lynch, J., dissenting) (recounting the history of Title VII and surrounding historical context, and observing “that there was no discussion of sexual orientation discrimination in the debates on Title VII of the Civil Rights Act”).

161. 42 U.S.C. § 2000e-2(a)(1) (2012).

162. *DeSantis v. Pac Tel. & Tel. Co.*, 608 F.2d 327, 329 (9th Cir. 1979), *abrogated in part on other grounds*, *Nichols v. Azteca Rest. Enterpr., Inc.*, 256 F.3d 864, 874–75 (9th Cir. 2011); *see also, e.g., Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979).

163. *Ulane v. E. Airlines*, 742 F.2d 1081, 1087 (7th Cir. 1984); *see also, e.g., Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 749–50 (8th Cir. 1982); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662–63 (9th Cir. 1977).

164. *Ulane*, 742 F.2d at 1085.

that what these plaintiffs alleged was simply different than the sex discrimination proscribed by Title VII. Some of these courts also focused on the fact that Congress had repeatedly rejected legislation that would have extended Title VII to cover sexual orientation, to show Congressional intent to not include protections against sexual orientation or gender identity discrimination.<sup>165</sup>

These early cases—and some relatively recent ones—framed the issue as whether Title VII protects LGBT people. That is not the correct framing because Title VII does protect LGBT people from covered discrimination. This question is thus not whether “homosexuals” or “transsexuals” are protected; the correct framing is whether these statutes prohibit discrimination on the bases of sexual orientation and gender identity.

## 2. Evolving Interpretations of “Sex”

Two U.S. Supreme Court decisions called these early decisions into question. In 1989, in *Price Waterhouse v. Hopkins*, a plurality of the Court held that Title VII forbids an employer from discriminating against an employee for failing to conform to stereotypical notions of how women and men should look or behave in terms of gender.<sup>166</sup>

[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for, in forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes. An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible Catch-22: out of a job if they behave aggressively and out of a job if they do not. Title VII lifts women out of this bind.<sup>167</sup>

In other words, to demonstrate that an employer took an adverse employment action “because . . . of sex,” as required by the statute, a plaintiff may rely on evidence that an employer acted upon sex or gender stereotypes, such as that woman

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165. *E.g., id.* at 1085–86.

166. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989) (plurality).

167. *Id.* at 251 (quoting *L.A. Dep’t. of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)).

should “walk more femininely, talk more femininely, [or] dress more femininely.”<sup>168</sup> According to the plurality, “[t]he critical inquiry . . . is whether gender was a factor in the employment decision at the moment it was made. . . . [S]ince we know that the words “because of” do not mean “solely because of,” we also know that Title VII meant to condemn even those decisions based on a mixture of legitimate and illegitimate considerations.”<sup>169</sup>

After *Price Waterhouse*, some courts have interpreted the decision to reject the notion that “sex” discrimination occurs only in situations in which an employer prefers a man over a woman (or vice versa); rather, Title VII encompasses any differential treatment based on a consideration “related to the sex of” the individual.<sup>170</sup> In other words, according to these courts, *Price Waterhouse* stands for the proposition that sex and gender must be irrelevant to employment decisions (except in narrow exceptions) and employers cannot make employment decision motivated by norms, stereotypes, expectations, or preferences related to sex and gender.<sup>171</sup>

Yet, for many years other courts continued to hold that sexual orientation discrimination and, to a lesser extent, gender identity discrimination were not prohibited under Title VII. For example, in 1989, on the heels of *Price Waterhouse*, the U.S. Court of Appeals for the Eighth Circuit flatly stated that “Title VII does not prohibit discrimination against homosexuals.”<sup>172</sup> The EEOC, at this time, agreed that discrimination “based on . . . [the] perception [that one] is a homosexual” is not cognizable under Title VII.<sup>173</sup> Courts adhered to this view, even while they started to recognize that same-sex sex harassment—which, in some fact patterns, could be viewed as sexual orientation discrimination—was prohibited under Title VII.<sup>174</sup>

The second Supreme Court decision that led many courts to revisit the question of Title VII’s coverage against sexual orientation and gender identity

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168. *Id.* at 235 (internal quotation marks omitted).

169. *Id.* at 241. The Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 § 107(a) (codified at 42 U.S.C. § 2000e-2(m)) codified the “motivating factor” standard.

170. *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000); *see also, e.g., Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 215–16 (1st Cir. 2000).

171. *See Schwenk*, 204 F.3d at 1202; *see also Griggs v. Duke Power Co.*, 401 U.S. 424, 436 (1971) (explaining Congress intended Title VII to make sex “irrelevant” to employment decisions).

172. *Williamson v. A.G. Edward and Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989).

173. *Ernest Dillon, Appellant*, EEOC Doc. 01900157, 1990 WL 1111074, at \*4 (Feb. 14, 1990).

174. *See, e.g., Wrightson v. Pizza Hut of Am.*, 99 F.3d 138, 143–44 (4th Cir. 1996).

discrimination was *Oncale v. Sundowner Offshore Services*, from 1998. In *Oncale*, the Supreme Court unanimously held that Title VII prohibits same-sex sex harassment, despite the fact that “male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII.”<sup>175</sup> According to the Court:

[S]tatutory 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 “discrimination . . . 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.”<sup>176</sup>

An asymmetry thus developed in the law where “one way to prove [same-sex sex harassment] is to put forth evidence that [the plaintiff’s] harasser is homosexual and that she proposed sexual activity with the plaintiff”;<sup>177</sup> whereas for LGB plaintiffs (or those perceived to be LGB), their sexual orientation (or perceived sexual orientation) became an obstacle to demonstrating harassment or other forms of discrimination on the basis of sex.<sup>178</sup>

More important for present purposes, even after *Price Waterhouse* and *Oncale*, many courts adhered to the early view that “sex” in Title VII should be understood narrowly as biological, binary sex.<sup>179</sup> For example, in 2007, the U.S. Court of Appeals for the Tenth Circuit held in *Ettsity v. Utah Transit Authority* that “discrimination against a transsexual based on the person’s status as a transsexual is

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175. *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 79 (1998).

176. *Id.* at 79–80.

177. *Medina v. Income Support Div.*, 413 F.3d 1131, 1134 (10th Cir. 2005).

178. *E.g.*, *Estate of D.B. by Briggs v. Thousand Islands Cent. Sch. Dist.*, 169 F. Supp. 3d 320, 332–33 (N.D.N.Y. 2016) (“The critical fact under the circumstances is the actual sexual orientation of the harassed person. If the harassment consists of homophobic slurs directed at a homosexual, then a gender-stereotyping claim by that individual is improper bootstrapping. If, on the other hand, the harassment consists of homophobic slurs directed at a heterosexual, then a gender-stereotyping claim by that individual is possible.”) (internal citation omitted), *abrogated by* *Christiansen v. Omnicom Grp. Inc.*, 852 F.3d 195, 200 (2d Cir. 2017).

179. *Medina*, 413 F.3d at 1134.

not discrimination because of sex under Title VII.”<sup>180</sup> In reaching this conclusion, the Tenth Circuit agreed with the Seventh Circuit’s determination in *Ulane* that “sex” in Title VII encompasses “[only] a binary conception of sex.”<sup>181</sup> In a similar vein, in 2005, the Tenth Circuit held in *Medina v. Income Support Division, New Mexico* that “Title VII’s protections . . . do not extend to harassment due to a person’s sexuality.”<sup>182</sup>

In contrast, other courts have understood *Price Waterhouse* and *Oncale* to “eviscerate” the limited view that Congress never meant Title VII to “apply to anything other than the traditional conception of sex,” as the U.S. Court of Appeals for the Sixth Circuit held in 2004 in *Smith v. City of Salem*.<sup>183</sup> Likewise, the Ninth Circuit explained in 2000 in *Schwenk v. Hartford* that “under *Price Waterhouse*, ‘sex’ under Title VII encompasses both sex—that is, the biological differences between men and women—and gender” and that “[d]iscrimination because one fails to act in the way expected of a man or woman is forbidden under Title VII.”<sup>184</sup> In both *Smith* and *Schwenk*, the courts allowed transgender plaintiffs’ suits to proceed.

Yet, interestingly, both the Sixth and Ninth Circuits (and other courts) have continued to hold that sexual orientation discrimination remained outside the ambit of Title VII, unless the plaintiff had specific evidence that he or she was subjected to stereotypes about how men and women should appear or act in terms of gender or other evidence showing discrimination based on sex.<sup>185</sup> In other words, courts have not treated sexual orientation discrimination and gender identity discrimination the same; rather those concepts have had different trajectories under Title VII decisional law. Specifically, courts and agencies accepted that gender identity discrimination could be prohibited under Title VII more easily and earlier than sexual orientation discrimination. Indeed, during the Obama Administration, even as the Department of Justice and other Executive departments adopted the position that gender identity discrimination is per se sex discrimination, they developed a “wait-and-see” approach to the question of whether sexual orientation discrimination is per se sex discrimination.<sup>186</sup>

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180. *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1221 (10th Cir. 2007).

181. *Id.* at 1222.

182. *Medina*, 413 F.3d at 1135.

183. *Smith v. City of Salem*, 378 F.3d 566, 572–73 (6th Cir. 2004) (quoting *Ulane v. E. Airlines*, 742 F.2d 1081, 1085 (7th Cir. 1984)).

184. *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000).

185. *Compare, e.g.*, *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757 (6th Cir. 2006) *with* *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061 (9th Cir. 2002).

186. *See, e.g.*, U.S. Dep’t of Health and Human Servs., Office of the Secretary, Office for Civil Rights, Final Rule: Nondiscrimination in Health Programs and Activities, 81 Fed.

### 3. Parsing Cognizable Sex Discrimination Claims From Sexual Orientation and Gender Identity Claims

Even as courts have disagreed as to the full scope of Title VII, “every court of appeals has recognized that disparate treatment for failing to conform to gender-based expectations is sex discrimination and has also concluded that this principle applies with equal force in cases involving plaintiffs who are gay, bisexual, heterosexual, or transgender,” as the EEOC has explained.<sup>187</sup> In *Smith v. City of Salem*, the Sixth Circuit held that a transgender plaintiff who suffered adverse employment consequences after “he began to express a more feminine appearance and manner on a regular basis” had a cognizable claim under Title VII.<sup>188</sup> Similarly, in 2009, in *Prowel v. Wise Business Forms*, the U.S. Court of Appeals for the Third Circuit ruled for a gay man suing for employment discrimination based on sex, holding that evidence that his co-workers harassed him because of his “effeminate” nature and mannerisms was sufficient to defeat summary judgment for the employer.<sup>189</sup> In reaching this conclusion, the Third Circuit adhered to circuit precedent that “Title VII does not prohibit discrimination based on sexual orientation” but explained that “[t]his does not mean, however, that a homosexual individual is barred from bringing a *sex discrimination* claim under Title VII . . . .”<sup>190</sup> Yet the Third Circuit insightfully observed, “the line between sexual orientation discrimination and discrimination ‘because of sex’ can be difficult to draw.”<sup>191</sup>

In contrast to *Prowel*, the U.S. Court of Appeals for the Second Circuit held in 2005’s *Dawson v. Bumble and Bumble* that a lesbian’s sex discrimination claim failed

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Reg. 31376, 31390 (May 18, 2016) (“OCR has decided not to resolve in this rule whether discrimination on the basis of an individual’s sexual orientation status alone is a form of sex discrimination under Section 1557. We anticipate that the law will continue to evolve on this issue, and we will continue to monitor legal developments in this area. We will enforce Section 1557 in light of those developments and will consider issuing further guidance on this subject as appropriate.”).

187. *Couch v. Chu*, Appeal No. 0120131136, 2013 WL 4499198, at \*7 (E.E.O.C. Aug. 13, 2013).

188. *Smith v. City of Salem*, 378 F.3d 566, 572 (6th Cir. 2004).

189. *Prowel v. Wise Bus. Forms*, 579 F.3d 285, 291 (3d Cir. 2009).

190. *Id.* at 289 (quoting *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 357 at 261 (3d Cir. 2001)).

191. *Id.* at 291; *see also, e.g.*, *Doe by Doe v. City of Belleville*, 119 F.3d 563, 580–82 (7th Cir. 1997) (concluding male plaintiff who alleged he wore an earring and was habitually called “fag” or “queer” had raised a triable issue of fact as to whether he was subject to impermissible gender stereotyping), *vacated on other grounds*, *City of Belleville v. Doe by Doe*, 523 U.S. 1001 (1998).

because she had presented no evidence that her employer had acted on any stereotypes about her appearance or manner, leaving her only with a non-cognizable sexual orientation claim.<sup>192</sup> In reaching that conclusion, the Second Circuit explained—like the Third Circuit in *Prowel* did—“it is often difficult to discern when [the plaintiff] is alleging that the various adverse employment actions allegedly visited upon her by [her employer] were motivated by animus toward her gender, her appearance, her sexual orientation, or some combination of these” because “the borders [between these classes] are so imprecise.”<sup>193</sup> The Second Circuit more recently explained, in *Christiansen v. Omnicom Group*, that *Dawson* and other decisions in this area stood for the proposition “being gay, lesbian, or bisexual, standing alone, does not constitute nonconformity with a gender stereotype that can give rise to a cognizable gender stereotyping claim.”<sup>194</sup> In practice, however, trying to parse evidence of sex stereotyping from evidence of sexual orientation discrimination made it “especially difficult for gay plaintiffs to bring” sex stereotyping claims.<sup>195</sup>

Recently, a panel of the Seventh Circuit in *Hively v. Ivy Tech Community College, South Bend* succinctly mapped this knot:

As a result of *Price Waterhouse*, a line of cases emerged in which courts began to recognize claims from gay, lesbian, bisexual, and transgender employees who framed their Title VII sex discrimination claims in terms of discrimination based on gender non-conformity (which we also refer to, interchangeably, as sex stereotype discrimination) and not sexual orientation. But these claims tended to be successful only if those employees could carefully cull out the gender non-conformity discrimination from the sexual orientation discrimination. When trying to separate the discrimination based on sexual orientation from that based on sex stereotyping, however, courts soon learned that the distinction was elusive.

And so for the last quarter century since *Price Waterhouse*, courts have been haphazardly, and with limited success, trying to figure out how to draw the line between gender norm discrimination, which can

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192. *Dawson v. Bumble & Bumble*, 398 F.3d 211, 218 (2d Cir. 2005), *overruled by* *Zarda v. Altitude Express, Inc.* 883 F.3d 100 (2d Cir. 2018) (en banc).

193. *Dawson*, 398 F.3d at 217.

194. *Christiansen v. Omnicom Grp. Inc.*, 852 F.3d 195, 201 (2d Cir. 2017).

195. *Id.* at 200 (quoting and abrogating *Maroney v. Waterbury Hosp.*, No. 3:10-CV-1415, 2011 WL 1085633, at \*2 n.2 (D. Conn. Mar. 18, 2011)).

form the basis of a legal claim under *Price Waterhouse*'s interpretation of Title VII, and sexual orientation discrimination, which is not cognizable under Title VII. As one scholar has stated, "The challenge facing the lower courts since *Price Waterhouse* is finding a way to protect against the entire spectrum of gender stereotyping while scrupulously not protecting against the stereotype that people should be attracted only to those of the opposite gender." . . . [C]ourts have gone about this task in different ways—either by disallowing any claims where sexual orientation and gender nonconformity are intertwined, (and, for some courts, by not allowing claims from lesbian, gay, or bisexual employees at all), or by trying to tease apart the two claims and focusing only on the gender stereotype allegations. In both methods, the opinions tend to turn circles around themselves because, in fact, it is exceptionally difficult to distinguish between these two types of claims. Discrimination against gay, lesbian, and bisexual employees comes about because their behavior is seen as failing to comply with the quintessential gender stereotype about what men and women ought to do—for example, that men should have romantic and sexual relationships only with women, and women should have romantic and sexual relationships only with men. In this way, almost all discrimination on the basis of sexual orientation can be traced back to some form of discrimination on the basis of gender nonconformity. . . . Whether the line is nonexistent or merely exceedingly difficult to find, it is certainly true that the attempt to draw and observe a line between the two types of discrimination results in a jumble of inconsistent precedents.<sup>196</sup>

While courts and agencies have come to generally accept that LGBT plaintiffs are protected from sex discrimination, including when based on sex or gender stereotypes,<sup>197</sup> the courts remain conflicted about whether, and to what

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196. *Hively v. Ivy Tech Cmty. Coll.*, 830 F.3d 698, 704–06 (7th Cir. 2016), *as amended* (Aug. 3, 2016) (internal citations omitted; quoting Brian Soucek, *Perceived Homosexuals: Looking Gay Enough for Title VII*, 63 AM. U. L. REV. 715, 726 (2014)), *reh'g en banc granted, opinion vacated*, No. 15-1720, 2016 WL 6768628 (7th Cir. Oct. 11, 2016), *and on reh'g en banc sub nom.* *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339 (7th Cir. 2017) (en banc).

197. *See, e.g., Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1065 (9th Cir. 2002) ("[The district court] appears to have held that Rene's otherwise viable cause of action was defeated because he believed he was targeted because he is gay. That is not the law."). Importantly, however, a recent empirical assessment of same-sex harassment cases

extent, either sexual orientation discrimination or gender identity discrimination is per se sex discrimination within the scope of federal anti-sex-discrimination statutes, as I explain in the next two subsections. The recent trend among federal courts is to hold that gender identity and, to a somewhat lesser extent, sexual orientation discrimination are sex-based and within the scope of Title VII and Title IX, though some courts have recently reached different conclusions.

#### 4. Sexual Orientation Discrimination as Per Se Sex Discrimination: Recent Developments

As discussed in the immediately preceding subsection, many courts have held that “a gender stereotyping claim should not be used to bootstrap protection for sexual orientation into Title VII.”<sup>198</sup> Courts holding that sexual orientation discrimination is not prohibited under Title VII reason that (1) Title VII does not expressly enumerate sexual orientation as a prohibited basis of discrimination; (2) sexual orientation discrimination and sex discrimination are conceptually distinct; (3) the scant legislative history of the sex discrimination provision in Title VII does not support reading sexual orientation discrimination to be prohibited under it; and (4) Members of Congress have continually introduced legislation to explicitly add sexual orientation to federal anti-discrimination laws, evidencing Congress’s understanding that Title VII does not already prohibit sexual orientation discrimination. Most, if not all, appellate courts that have concluded that Title VII (or a similar statute) does not prohibit sexual orientation discrimination have utilized some or all of these rationales.<sup>199</sup>

For example, in *Evans v. Georgia Regional Hospital*, a divided panel of the U.S. Court of Appeals for the Eleventh Circuit adhered to this view, while permitting a lesbian plaintiff’s claim based on gender stereotyping to proceed.<sup>200</sup> Concurring,

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revealed judicial biases against “openly gay” alleged harassers and in favor of heterosexism. Jessica A. Clarke, *Inferring Desire*, 63 DUKE L.J. 525, 571–95 (2013).

198. *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 464 (6th Cir. 2006) (quoting *Dawson v. Bumble & Bumble*, 398 F.3d 211, 218 (2d Cir. 2005)).

199. *See, e.g.*, *Medina v. Income Support Div.*, 413 F.3d 1131, 1135 (10th Cir. 2005); *Rene*, 305 F.3d at 1063–64; *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 261 (3d Cir. 2001); *Simonton v. Runyun*, 232 F.3d 33, 34–37 (2d Cir. 2000), *overruled by Zarda v. Altitude Express, Inc.* 883 F.3d 100 (2d Cir. 2018) (en banc); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999); *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989); *Wrightson v. Pizza Hut of Am.*, 99 F.3d 138, 143 (4th Cir. 1996), *abrogated on other grounds by Oncale v. Sundowner Offshore Serv’s*, 523 U.S. 75, 79 (1998).

200. *Evans v. Georgia Reg’l Hosp.*, 850 F.3d 1248, 1255 (11th Cir. 2017) (citing *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979)), *cert. denied*, 138 S. Ct. 557 (2017).

Judge Pryor explained that “[a] gay individual may establish with enough factual evidence that she experienced sex discrimination because her *behavior* deviated from a gender stereotype held by an employer.”<sup>201</sup> Such a claim is to be distinguished from a *status*-based sexual orientation claim, according to Judge Pryor.<sup>202</sup> In other words, [b]ecause a claim of gender nonconformity is a behavior-based claim, not a status-based claim, a plaintiff still “must show that the employer actually relied on her gender in making its decision.”<sup>203</sup>

In conflict with these decisions, a growing number of courts are concluding that sexual orientation discrimination is impermissible sex discrimination, as has the EEOC. Most recently among the Courts of Appeals, the Second and Seventh Circuits, both sitting en banc in 2018 and 2017, respectively, overturned circuit precedent and held that Title VII prohibits sexual orientation discrimination as per se sex discrimination. In *Zarda v. Altitude Express, Inc.*, the Second Circuit began its analysis by noting that, under Title VII, sex need only be a motivating factor for the adverse employment action, and that “sex” includes “non-conformity with gender norms.”<sup>204</sup> Turning then to the question of whether sexual orientation discrimination is “motivated, at least in part, by sex,” the court observed that a person’s sexual orientation cannot be defined or understood without reference to his or her sex as well as the sex of the person to whom he or she is attracted.<sup>205</sup> According to the Institute of Medicine, for example, “the focus of sexual orientation is the biological sex of a person’s actual or potential relationship partners” and “sexual orientation is inherently a relational construct [because it] depends on the biological sex of the individuals involved, *relative to each other*.”<sup>206</sup>

The EEOC, too, in its decision holding that sexual orientation discrimination is per se sex discrimination, *Baldwin v. Foxx*, highlighted the fact the sexual orientation is a function of sex:

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201. *Id.* at 1259 (Pryor, J., concurring) (emphasis added).

202. *Id.* at 1259–61.

203. *Id.* at 1260 (quoting *Hopkins*, 490 U.S. at 251).

204. *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 112 (2d Cir. 2018) (en banc) (citing 42 U.S.C. § 2000e-2(m)); see also *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250–51 (1989).

205. *Id.* at 113–14; accord *id.* at 135 (Cabranes, J., concurring) (“Zarda’s sexual orientation is a function of his sex. . . . That should be the end of the analysis.”); *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 358 (7th Cir. 2016) (Flaum, J., concurring) (“One cannot consider a person’s homosexuality without also accounting for their sex: doing so would render ‘same’ [sex] . . . meaningless.”).

206. INST. OF MED., *supra* note 23, at 27.

A man is referred to as “gay” if he is physically and/or emotionally attracted to other men. A woman is referred to as “lesbian” if she is physically and/or emotionally attracted to other women. Someone is referred to as “heterosexual” or “straight” if he or she is physically and/or emotionally attached to someone of the opposite-sex.<sup>207</sup>

Second, the Second Circuit endorsed the Seventh Circuit’s “comparator” analysis in *Hively v. Ivy Tech Community College of Indiana*.<sup>208</sup> Under this “evidentiary technique,”<sup>209</sup> a court considers whether an employee’s treatment would have been different “but for that person’s sex.”<sup>210</sup> In *Hively*, the Seventh Circuit compared the plaintiff Hively—a lesbian professor alleging that she was denied a promotion due to sexual orientation discrimination—with a hypothetical straight male professor who was promoted.<sup>211</sup> The Seventh Circuit concluded that, under the facts alleged, if Hively had been a man, she would have been granted the promotion; in other words, her sex motivated the denial of a promotion.<sup>212</sup> The EEOC reasoned similarly in *Baldwin*:

[A]ssume that an employer suspends a lesbian employee for displaying a photo of her female spouse on her desk, but does not suspend a male employee for displaying a photo of his female spouse on his desk. The lesbian employee in that example can allege that her employer took an adverse action against her that the employer would not have taken had she been male. That is a legitimate claim under Title VII that sex was unlawfully taken into account in the adverse employment action.<sup>213</sup>

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207. *Baldwin v. Foxx*, Appeal No. 0120133080, 2015 WL 4397641, at \*5 (E.E.O.C. July 15, 2015) (citing American Psychological Ass’n, *Definition of Terms: Sex, Gender, Gender Identity, Sexual Orientation* (Feb. 2011)).

208. *Zarda*, 883 F.3d. at 116.

209. *Id.* at 134 (Jacobs, J., concurring).

210. *City of L.A. Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978) (internal quotation marks omitted).

211. *Hively*, 853 F.3d at 345.

212. *Id.*; see also *In re Levenson*, 537 F.3d 925, 929 (9th Cir. 2009) (Reinhardt, J.); *Videckis v. Pepperdine Univ.*, 100 F.Supp.3d 927, 937 (C.D. Cal. 2015); *Hall v. BNSF Railway Co.*, No. C13–2160, 2014 WL 4719007, at \*2 (W.D. Wash. 2014); *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212, 1215–16, 1223–24 (D. Or. 2002).

213. *Baldwin v. Foxx*, Appeal No. 0120133080, 2015 WL 4397641, at \*5 (E.E.O.C. July 15, 2015); see also Andrew Koppelman, “*Why Discrimination Against Lesbians and Gay Men*

The dissents in *Zarda* and *Hively* correctly observed that the comparator not only had a different sex, but also a different sexual orientation, and argued that the comparison failed because two characteristics were changed, not just the sex.<sup>214</sup> But as the majority in *Zarda* explained, this merely emphasized the earlier point that sexual orientation is a function of sex: that is, changing the sex, necessarily changed the sexual orientation—one change (sexual orientation) flowed from the other (sex).<sup>215</sup>

Third, the courts in *Zarda* and *Hively* and the EEOC in *Baldwin* held that sexual orientation discrimination also is sex discrimination because sexual orientation discrimination “is invariably rooted in stereotypes about men and women.”<sup>216</sup> According to *Zarda*, [a]pplying *Price Waterhouse’s* reasoning to sexual orientation, we conclude that when, for example, “‘an employer . . . acts on the basis of a belief that [men] cannot be [attracted to men], or that [they] must not be,’ but takes no such action against women who are attracted to men, the employer ‘has acted on the basis of gender.’”<sup>217</sup> Or, as *Hively* explained, being gay “represents the ultimate case of failure to conform” to gender stereotypes.<sup>218</sup>

Fourth, the Second and Seventh Circuits and EEOC looked to an associational theory as to why sexual orientation discrimination is sex discrimination. Quoting the EEOC’s *Baldwin* decision, *Zarda* reasoned that “if a male employee married to a man is terminated because his employer disapproves of same-sex marriage, the employee has suffered associational discrimination based on his own sex because ‘the fact that the employee is a man instead of a woman motivated the employer’s discrimination against him.’”<sup>219</sup>

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*is Sex Discrimination*,” 69 *N.Y.U.L. Rev.* 197, 208 (1994) (“If a business fires Ricky . . . because of his sexual activities with Fred, while th[is] action [] would not have been taken against Lucy if she did exactly the same things with Fred, then Ricky is being discriminated against because of his sex.”).

214. *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 148 (2d Cir. 2018) (en banc) (Lynch, J., dissenting) (citing *Hively*, 853 F.3d at 363 (Sykes, J., dissenting)).

215. *Id.* at 116 (majority opinion).

216. *Id.* at 119; *accord* *Boutillier v. Hartford Pub. Sch.*, 221 F. Supp. 3d 255, 269 (D. Conn. 2016); *Videckis v. Pepperdine Univ.*, 150 F. Supp. 3d 1151, 1160 (C.D. Cal. 2015); *Terveer v. Billington*, 34 F. Supp. 3d 100, 116 (D.D.C. 2014); *Howell v. N. Cent. College*, 320 F. Supp. 2d 717, 723 (N.D. Ill. 2004); *Heller*, 195 F. Supp. 2d at 1224–25; *Centola v. Potter*, 183 F. Supp. 2d 403, 410 (D. Mass. 2002); *Baldwin*, 2015 WL 4397641, at \*7.

217. *Zarda*, 883 F.3d at 120–21.

218. *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 346 (7th Cir. 2016)

219. *Zarda*, 883 F.3d at 125 (quoting *Baldwin*, 2015 WL 4397641, at \*6).

In response to the reasoning of the line of cases holding that sexual orientation discrimination is not prohibited under Title VII, *Zarda*, *Hively*, and *Baldwin* held that even if Congress did not have sexual orientation discrimination in mind when it enacted Title VII, that fact does not determine whether the statutory text “because of . . . sex” includes sexual orientation discrimination. For, again, the Supreme Court has unanimously ruled that “statutory prohibitions often go beyond the principal evil [they were passed to combat] to cover reasonably comparable evils,” and that Title VII’s prohibition of sex-based discrimination “must extend to [sex-based discrimination] of any kind that meets the statutory requirements.”<sup>220</sup> Nor is the subsequent statutory history of Title VII illuminating because it is silent as to sexual orientation discrimination and court decisions holding such discrimination outside of Title VII’s coverage.<sup>221</sup> In response to the point that Congress has rejected legislation offered to explicitly add sexual orientation to Title VII, the Supreme Court has explained that “[c]ongressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change.”<sup>222</sup> According to *Zarda*, “we decline to assign congressional silence a meaning it will not bear.”<sup>223</sup>

##### 5. Gender Identity Discrimination as Per Se Sex Discrimination: Recent Developments

Courts early on held that transgender people were not protected under Title VII from discrimination on account of their transgender status, and more recently the Tenth Circuit adopted the view that Title VII does not reach anything beyond discrimination based on “traditional notions of sex.”<sup>224</sup> That is because, according to this interpretation, the term “sex” in Title VII is best understood to mean biologically male or female. Several district courts and appellate judges have recently adopted this view, as well.<sup>225</sup> Further according to this view, this interpretation of “sex”—to not include gender identity—is correct because Congress knows how to prohibit gender identity discrimination expressly, as evidenced by the Violence

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220. *Oncale v. Sundowner Offshore Serv’s*, 523 U.S. 75, 79–80 (1998).

221. *Zarda*, 883 F.3d at 129–30; *Hively*, 853 F.3d at 343–44; *Baldwin*, 2015 WL 4397641, at \*9.

222. *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) (internal quotation marks omitted).

223. *Zarda*, 883 F.3d at 130.

224. *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1221–22 (10th Cir. 2005).

225. *See, e.g., Hively*, 853 F.3d at 362 (Sykes, J., dissenting).

Against Women Reauthorization Act of 2013<sup>226</sup> and the Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act.<sup>227</sup> Most recently, in *Franciscan Alliance, Inc. v. Burwell*, a district court in Texas adopted this narrow view of sex in the context of the anti-sex-discrimination provision of the Patient Protection and Affordable Care Act.<sup>228</sup>

In contrast to these decisions, an increasing number of courts have held that Title VII and other sex discrimination statutes protect transgender people from discrimination related to their gender identity, transgender status, or gender transition process. In 2011, in *Glenn v. Brumby*, the Eleventh Circuit explained that discrimination against a transgender woman was impermissible sex discrimination on a *Price Waterhouse* theory:

A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes. “[T]he very acts that define transgender people as transgender are those that contradict stereotypes of gender-appropriate appearance and behavior.” . . . There is thus a congruence between discriminating against transgender . . . individuals and discrimination on the basis of gender-based behavioral norms.<sup>229</sup>

Like *Glenn*, many courts that have interpreted existing sex discrimination protections to cover discrimination based on gender identity—including the First, Sixth, Seventh, and Ninth Circuits—have largely relied on a gender stereotyping theory that transgender individuals are protected from discrimination based on their deviation, or perceived deviation, from gender stereotypes.<sup>230</sup>

But, as the EEOC held in 2012, in *Macy v. Holder*, evidence of impermissible gender stereotyping is only one way to prove sex discrimination: a person facing gender identity discrimination may (but need not) rely on evidence of gender

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226. 34 U.S.C. § 12291(b)(13)(A).

227. 18 U.S.C. § 249(a)(2).

228. *Franciscan All., Inc. v. Burwell*, 227 F. Supp. 3d 660, 689 (N.D. Tex. 2016).

229. *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011) (quoting Ilona M. Turner, *Sex Stereotyping Per Se: Transgender Employees and Title VII*, 95 CAL. L. REV. 561, 563 (2007)).

230. *Whitaker v. Kenosha Sch.*, 858 F.3d 1034 (7th Cir. 2017); *Glenn*, 663 F.3d at 1316; *Rosa v. Park W. Bank & Tr. Co.*, 214 F.3d 213, 215–16 (1st Cir. 2000) (interpreting the Equal Credit Opportunity Act); *Schwenk v. Hartford*, 204 F.3d 1187, 1201–02 (9th Cir. 2000).

stereotyping.<sup>231</sup> As *Macy* clarified, the ultimate question in all of these cases is whether sex or gender was a motivating factor of the discrimination.<sup>232</sup> Thus, for example, in *Schroer v. Billington*, the district court held:

The evidence establishes that the Library was enthusiastic about hiring David Schroer—until she disclosed her transsexuality. The Library revoked the offer when it learned that a man named David intended to become, legally, culturally, and physically, a woman named Diane. This was discrimination “because of . . . sex.”<sup>233</sup>

In 2018, the Sixth Circuit held that “discrimination on the basis of transgender and transitioning status is necessarily discrimination on the basis of sex,” agreeing with the reasoning of *Macy*.<sup>234</sup> This decision builds on the earlier decision of the Sixth Circuit in *Smith*, which “found no ‘reason to exclude Title VII coverage for non sex-stereotypical behavior simply because the person is transsexual.’”<sup>235</sup> Federal district courts have held similarly.<sup>236</sup>

In 2014, then-Attorney General Eric Holder issued a memorandum adopting *Macy*’s holding and reasoning for the Department of Justice,<sup>237</sup> and other federal agencies during the Obama Administration interpreted numerous sex discrimination provisions to cover anti-transgender discrimination.<sup>238</sup> However, the

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231. *Macy v. Holder*, Appeal No. 0120120821, 2012 WL 1435995, at \*10 (E.E.O.C. Apr. 20, 2012).

232. *Id.*

233. *Schroer v. Billington*, 577 F. Supp. 2d 293, 306 (D.D.C. 2008).

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

235. *Id.* at 572 (quoting *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004)); *see also Barnes v. City of Cincinnati*, 401 F.3d 729, 736–37 (6th Cir. 2005).

236. *See, e.g., Rumble v. Fairview Health Servs*, No. 14-cv-2037, 2015 WL 1197415, at \*2 (D. Minn. Mar. 16, 2015); *Lewis v. High Point Reg’l Health Sys.*, 79 F. Supp. 3d 588 (E.D.N.C. 2015); *Finkle v. Howard Cty.*, 12 F. Supp. 3d 780, 788 (D. Md. 2014); *Muir v. Applied Integrated Tech., Inc.*, No. DKC 13-0808, 2013 WL 6200178, at \*10 (D. Md. Nov. 26, 2013); *Schroer*, 577 F. Supp. 2d at 306–08; *Lopez v. River Oaks Imaging Diagnostic Grp., Inc.*, 542 F. Supp. 2d 653, 660 (S.D. Tex. 2008).

237. ATTORNEY GENERAL MEMORANDUM, TREATMENT OF TRANSGENDER EMPLOYMENT DISCRIMINATION CLAIMS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 (Dec. 15, 2014), <http://www.justice.gov/file/188671/download>.

238. *See, e.g., supra* note 7; 5 C.F.R. §§ 300.102-300.103, 335.103, 410.302, 537.105 (2018); U.S. DEP’T OF LABOR, OFF. OF FEDERAL CONTRACT COMPLIANCE PROGRAMS,

Trump Administration has reversed course, adopting the position that “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.”<sup>239</sup> As to *Price Waterhouse*, the Department of Justice’s current position is:

Although Title VII bars sex stereotypes insofar as [one] causes disparate treatment of men and women, Title VII is not properly construed to proscribe employment practices (such as sex-specific bathrooms) that take account of the sex of employees but do not impose different burdens on similarly situated members of each sex.<sup>240</sup>

Similarly, the Departments of Justice and Education, in 2017, withdrew Obama-era guidance that protected transgender students under Title IX.<sup>241</sup>

In late 2016, the U.S. Supreme Court granted a writ of certiorari to decide the Title IX question as to gender identity, but when the Trump Administration changed the position of the federal government and withdrew the U.S. Department of Education guidance at issue, the Supreme Court remanded the case to the lower court for further consideration.<sup>242</sup> In April 2019, the Supreme Court granted writs of certiorari in *Bostock v. Clayton County Board of Commissioners* and *Zarda v. Altitude Express, Inc.* to decide the sexual orientation question under Title VII,<sup>243</sup> and in *R.G. & G.R. Harris Funeral Homes v. EEOC* to decide the gender identity question under Title VII.<sup>244</sup>

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Directive 2014-02, REGARDING GENDER IDENTITY AND SEX DISCRIMINATION (Aug. 19, 2014).

239. MEMORANDUM FROM ATT’Y GEN. JEFF SESSIONS TO U.S. ATT’YS, *supra* note 9, at 2.

240. *Id.* (internal quotation marks and citations omitted).

241. U.S. DEP’T OF JUSTICE & U.S. DEP’T OF LABOR, LETTER ON WITHDRAWING STATEMENTS OF POLICY AND GUIDANCE (FEB. 22, 2017).

242. *Gloucester Cty. Sch. Bd. v. G.G.*, 137 S. Ct. 1239 (2017).

243. *Bostock v. Clayton County Bd. of Bd. of Comm’rs*, 723 Fed. Appx. 964 (11th Cir. 2018), *cert. granted*, 87 U.S.L.W. 3411 (U.S. Apr. 22, 2019) (No. 17-1618); *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018) (en banc), *cert. granted*, 87 U.S.L.W. 3411 (U.S. Apr. 22, 2019) (No. 17-1623).

244. *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018), *cert. granted*, 87 U.S.L.W. 3411 (U.S. Apr. 22, 2019) (No. 18-107).

With this body of law as our guide, I now turn to whether the Equal Pay Act can be construed to cover wage disparities based on sexual orientation or gender identity.

#### IV. THE EQUAL PAY ACT

Assuming *arguendo* that sexual orientation discrimination and gender identity discrimination are per se sex discrimination, as a growing number of courts are holding,<sup>245</sup> does the Equal Pay Act prohibit wage disparities on the basis of sexual orientation or gender identity along the same lines as Title VII and Title IX? We might presume the answer is yes, but each statute requires an independent assessment. This is an important question because, as recounted above in Part I, employment discrimination against LGBT people is widespread and such discrimination can take the form of wage penalties. Before analyzing this question, I first provide an overview of the Equal Pay Act, its primary purpose, and distinguish its coverage and operation from Title VII, which also prohibits discriminatory pay differentials.

##### A. *What is the Equal Pay Act?*

Enacted in 1963, the Equal Pay Act aimed to remedy “a serious and endemic problem of employment discrimination in private industry” by mandating equal pay for equal work regardless of sex.<sup>246</sup> Indeed, the Act’s “policy” was to “correct the conditions” of “wage differentials based on sex.”<sup>247</sup> The Equal Pay Act provides, in its main provision:

No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality

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245. *See supra* Parts III.C.4–5.

246. *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974).

247. Pub. L. No. 88-38, 77 Stat. 56 (1963).

of production; or (iv) a differential based on any other factor other than sex: *Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.<sup>248</sup>

Thus, an employer violates the Equal Pay Act by paying men and women differently for substantially equal work. To establish a prima facie violation of the Equal Pay Act, a plaintiff must show that “(1) she was performing work which was substantially equal to that of the male employees considering the skills, duties, supervision, effort and responsibilities of the jobs; (2) the conditions where the work was performed were basically the same; (3) the male employees were paid more under such circumstances.”<sup>249</sup> The jobs in question do not need to be identical; rather, they need only be substantially equal in terms of the skill, effort, and responsibility (as opposed to merely looking at, for example, job titles).<sup>250</sup> The Equal Pay Act applies to all forms of compensation, including salary, overtime pay, bonuses, and other benefits.<sup>251</sup>

However, not all pay differentials between men and women violate the Act. Rather, the Act exempts pay differentials that are the result of a seniority system, merit system, productivity system, or any other non-sex rationale.<sup>252</sup> As to the fourth catchall exception, an en banc panel of the Ninth Circuit recently held in *Rizo v. Yovino* that prior pay is not a “factor other than sex”<sup>253</sup> given that “gender discrimination has been baked into our pay scales.”<sup>254</sup>

Title VII, passed the year after the Equal Pay Act, also prohibits employers from compensating employees discriminatorily based on sex. “[S]omeone who has an Equal Pay Act claim may also have a claim under Title VII,” as explained by the EEOC, which enforces both Title VII and the Equal Pay Act.<sup>255</sup> Generally speaking,

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248. 29 U.S.C. § 206(d)(1) (2012).

249. *Riser v. QEP Energy*, 776 F.3d 1191, 1196 (10th Cir. 2015) (internal quotation marks and citation omitted).

250. *Coming*, 417 U.S. at 202–04 & n. 24; *Riser*, 776 F.3d at 1196.

251. 29 C.F.R. § 1620.10 (1996); U.S. EEOC, *Equal Pay/Compensation Discrimination*, <https://www.eeoc.gov/laws/types/equalcompensation.cfm>.

252. 42 U.S.C. § 206(d)(1) (2012); *see also Coming*, 417 U.S. at 196.

253. *Rizo v. Yovino*, 887 F.3d 453, 454 (9th Cir. 2018) (en banc), *vacated on other grounds by Yovino v. Rizo*, 139 S. Ct. 706 (2019).

254. *Id.* at 468–69 (McKeown, J., concurring).

255. EEOC, *supra* note 251.

courts interpret the Equal Pay Act and Title VII “in pari materia, and neither should be interpreted in a manner that would undermine the other.”<sup>256</sup>

There are important distinctions between the two statutes. Most obviously, whereas the Equal Pay Act focuses on compensation, Title VII sweeps broadly to encompass pay differentials as well as other manifestations of sex discrimination such as harassment.<sup>257</sup> With respect to pay differentials, whereas the Equal Pay Act requires the jobs in question be substantially equal, Title VII does not have such a requirement.<sup>258</sup> Thus, as the C.F.R. states, “[T]itle VII covers types of wage discrimination not actionable under the EPA.”<sup>259</sup>

Yet, the Equal Pay Act is more permissive of claims within its ambit because it does not require the plaintiff to prove discriminatory intent, as would be required for disparate treatment claims under Title VII.<sup>260</sup> Under Title VII, to survive summary judgment, a plaintiff must establish a prima facie case of discrimination by presenting evidence that “gives rise to an inference of unlawful discrimination.”<sup>261</sup> Such evidence of discriminatory intent may be direct or circumstantial or may be established through the *McDonnell Douglas* burden-shifting framework. Under the *McDonnell Douglas* framework, after the plaintiff successfully establishes a prima facie case of discrimination, the burden of production shifts to the defendant to articulate a legitimate, non-discriminatory reason for its employment decision. If the defendant offers such a reason, the plaintiff must show that the reason is pretextual.<sup>262</sup>

By contrast, “[a]n EPA plaintiff need not prove that the employer acted with discriminatory intent to obtain a remedy under the statute.”<sup>263</sup> Rather, “[t]he Equal Pay Act creates a type of strict liability; [once a plaintiff demonstrates a wage disparity within the scope of the statute] no intent to discriminate need be

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256. *Laffey v. Nw. Airlines, Inc.*, 567 F.2d 429, 446 (D.C. Cir. 1976) (citations omitted).

257. 42 U.S.C. § 206(d)(1); 42 U.S.C. § 2000e-2(a) (2012).

258. EEOC, *supra* note 251.

259. 29 C.F.R. § 1620.27(a).

260. *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 640 (2007) *superseded on other grounds by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5.

261. *Cordova v. State Farm Ins.*, 124 F.3d 1145, 1148 (9th Cir. 1997); *see also McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

262. *See, e.g., Fonseca v. Sysco Food Servs. of Ariz.*, 374 F.3d 840, 847–50 (9th Cir. 2004); *Cordova*, 124 F.3d at 1148–49.

263. EEOC v. Md. Ins. Admin., 879 F.3d 114, 120 (4th Cir. 2018) (collecting cases).

shown.”<sup>264</sup> Accordingly, “pretext as it is understood in the Title VII context plays no role in Equal Pay Act claims.”<sup>265</sup> The exceptions provided by the Equal Pay Act thus function as affirmative defenses that the employer must prove.<sup>266</sup> In turn, as the C.F.R. states, “any violation of the Equal Pay Act is also a violation of [T]itle VII.”<sup>267</sup> For these reasons, the Equal Pay Act may in certain cases provide relief to a plaintiff more easily than Title VII.

The available remedies and procedures are different under the statutes. Under the Equal Pay Act, a prevailing plaintiff may recover lost wages and liquidated damages; under Title VII, a prevailing plaintiff may be entitled to back and front pay, equitable relief (such as reinstatement), and compensatory and punitive damages.<sup>268</sup> The deadlines and administrative requirements are different as well: under the Equal Pay Act, a plaintiff may file suit directly in court within two years of the alleged violation (or three years if the violation was willful), whereas under Title VII, a complainant must first bring a charge before the EEOC before filing suit and must follow various other administrative procedures with shorter deadlines than the Equal Pay Act’s statute of limitations.<sup>269</sup>

B. *Does the Equal Pay Act Prohibit Sexual Orientation or Gender Identity Discrimination?*

I turn now to consider whether the Equal Pay Act applies to wage disparities on the basis of sexual orientation or gender identity, because such discrimination is sex-based. The Supreme Court has emphasized that “[t]he Equal Pay Act is broadly remedial, and it should be construed and applied so as to fulfill the underlying purposes which Congress sought to achieve.”<sup>270</sup> At the signing ceremony, President John F. Kennedy called the Act “a first step” in “achiev[ing] full equality of economic opportunity—for the average woman worker earns only 60 percent of the

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264. *Maxwell v. City of Tucson*, 803 F.2d 444, 446 (9th Cir. 1986) (quoting *Strecker v. Grand Forks Cnty. Soc. Serv. Bd.*, 640 F.2d 96, 99 n. 1 (8th Cir. 1980) (en banc)).

265. *Rizo v. Yovino*, 887 F.3d 453, 460 (9th Cir. 2018) (en banc).

266. *Corning Glass Works v. Brennan*, 417 U.S. 188, 196–97 (1974); *Md. Ins. Admin.*, 879 F.3d at 120–21.

267. 29 C.F.R. § 1620.27(a).

268. HEATHER A. MORGAN ET AL., LEGAL FRAMEWORK FOR PAY DISCRIMINATION CLAIMS 28–31 (2016), [https://www.americanbar.org/content/dam/aba/events/labor\\_law/am/2016/payequity%20\\_morgan.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/events/labor_law/am/2016/payequity%20_morgan.authcheckdam.pdf).

269. See generally U.S. EEOC, *Filing a Lawsuit in Federal Court*, [https://www.eeoc.gov/federal/fed\\_employees/lawsuit.cfm](https://www.eeoc.gov/federal/fed_employees/lawsuit.cfm) (last visited Sept. 1, 2018).

270. *Corning*, 417 U.S. at 208.

average wage for men.”<sup>271</sup> Although Congress was aimed at “correct[ing] basic injustice being visited upon women in many fields of endeavor,”<sup>272</sup> the Equal Pay Act also prohibits an employer from compensating a man less than his female colleague doing substantially the same work.<sup>273</sup>

To be sure, the plain language of the Act prohibits pay differentials “on the basis of sex,” not just those against women. The statutory text reflects the legislative history in this regard. For example, the House report stated that the legislation would make it a violation of the Fair Labor Standards Act for an employer to pay “a discriminatory wage rate, where the discrimination is based on the sex of the employee.”<sup>274</sup> Likewise, the Senate Report stated that the bill “is designed to eliminate any wage rate differentials which are based on sex.”<sup>275</sup>

For consideration of whether the Equal Pay Act prohibits employers from differently compensating employees doing substantially equal work based on sexual orientation or gender identity, “it is appropriate to begin with the language of the statute itself.”<sup>276</sup> The Equal Pay Act’s use of “on the basis of sex” mirrors the texts of Title VII (“because of . . . sex”) and Title IX (“on the basis of sex”). And like Title VII and Title IX, the Equal Pay Act does not provide a definition of sex.<sup>277</sup> Therefore, one might assume that the Equal Pay Act could plausibly be interpreted to cover sexual orientation and gender identity wage disparities akin to the reasoning of the Second and Seventh Circuits in *Zarda* and *Hively*, and the Sixth and Eleventh Circuits in *Harris Funeral Home* and *Glenn*.<sup>278</sup> Indeed, the EEOC, which enforces both the Equal Pay Act and Title VII, has already concluded in *Baldwin* and *Macy* that Title VII forbids sexual orientation and gender identity discrimination because they

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271. President John F. Kennedy, Remarks Upon Signing the Equal Pay Act of 1968, (June 10, 1963), <https://www.jfklibrary.org/Asset-Viewer/Archives/JFKPOF-045-001.aspx>.

272. 109 Cong. Rec. 9212 (1963) (statement of Rep. Donohue).

273. See cases cited *supra* note 30.

274. H.R. Rep. No. 309, 88th Cong., 1st Sess., 2 (1963).

275. S. Rep. No. 176, 88th Cong., 1st Sess., 1 (1963).

276. *Nw. Airlines, Inc. v. Transp. Workers Union of Am.*, 451 U.S. 77, 91 (1981); see also *id.* (“Factors relevant to this inquiry are the language of the statute itself, its legislative history, the underlying purpose and structure of the statutory scheme, and the likelihood that Congress intended to supersede or to supplement existing state remedies.”).

277. 29 U.S.C. § 206(d)(1) (2012).

278. See *supra* Parts III.C.4–5.

are sex-based,<sup>279</sup> and the EEOC and courts aim to read Title VII and the Equal Pay Act harmoniously.

However, there is a term in the Equal Pay Act that presents an obstacle to such an interpretation. The Equal Pay Act provides that an employer may not pay higher wages to one sex over “the opposite sex.”<sup>280</sup> Thus, the plain text of the statute requires an “opposite sex” comparator. Title VII and Title IX do not have comparable language. The Oxford English Dictionary defines the adjective “opposite” as “[s]ituated on the other or further side, or on either side, of an intervening line, space, or thing; contrary in position; facing.”<sup>281</sup> Thus, the use of the word “opposite sex” in the Equal Pay Act is fairly read to conceptualize sex as binary: male and female. The text “opposite sex” suggests a narrower, binary conception of sex akin to the one adopted in *Ulane* and *Etsitty*.<sup>282</sup> This reading comports with courts’ articulation of the prima facie case under the Equal Pay Act: a plaintiff must show that “(1) she was performing work which was substantially equal to that of the male employees considering the skills, duties, supervision, effort and responsibilities of the jobs; (2) the conditions where the work was performed were basically the same; (3) the male employees were paid more under such circumstances.”<sup>283</sup>

Consider a hypothetical in which an employer pays a lesbian more than a bisexual woman, though they have the exact same job. The employer does this because he does not like bisexuals. That is sexual orientation discrimination, but the bisexual woman would not be able to show that she was being paid less than someone of the “opposite sex.” In other words, if we accept that sexual orientation discrimination is sex-based and if we were to thus replace the statutory text “on the basis of sex” with “on the basis of sexual orientation,” we would still run into the requirement of an “opposite sex” comparator. Even if we changed “opposite sex” to read “opposite sexual orientation,” bisexuality and homosexuality are not opposites.

Changing the hypothetical so that the employee being paid more is a man. The same sexual orientation discrimination would still be present (employer dislikes

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279. *See supra* Parts III.C.4–5.

280. 42 U.S.C. § 206(d)(1).

281. *Opposite*, OXFORD ENGLISH DICTIONARY, <http://www.oed.com/view/Entry/131986?redirectedFrom=opposite#eid> (last visited Apr. 25, 2019); *accord Opposite*, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 1583 (1961) (defining the adjective “opposite” as “set over against something that is at the other end or side of an intervening line or space”).

282. *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1223 (10th Cir. 2005); *Ulane v. E. Airlines*, 742 F.2d 1081, 1086 (7th Cir. 1984).

283. *Riser v. QEP Energy*, 776 F.3d 1191, 1196 (10th Cir. 2015) (internal quotation marks and citation omitted).

bisexuals) *but* now the female bisexual employee would also be able to show a violation of the Equal Pay Act because a male comparator would exist. One might argue that the employer in this scenario could qualify for the catchall exception; that is, that sexual orientation discrimination is “a “factor other than sex.” But here, continuing with our assumption that *Zarda*, *Hively*, and *Baldwin* correctly held that sexual orientation discrimination is sex-based, the employer would fail because the catchall exception—like plain language of Title VII (“because of . . . sex”)—only speaks of “sex” rather than “opposite sex.”

It is important to note that my reading of the Equal Pay Act does not cast a doubt on *Zarda*, *Hively*, *Baldwin*, or the gender identity cases,<sup>284</sup> because Title VII’s text does not require an “opposite sex” comparator. In fact, the Equal Pay Act strengthens the argument that Title VII and other anti-sex-discrimination statutes without such “opposite sex” language should be construed more broadly, because the Equal Pay Act evidences Congress’s ability to write a narrower statute than it did subsequently in Title VII and other statutes.<sup>285</sup>

What about for transgender people? If an employer pays a transgender woman less than a cisgender woman because the employer does not like transgender people, that would be gender identity discrimination. But again, the transgender plaintiff would not be able to make out the *prima facie* case under the Equal Pay Act, because the comparator would also be a woman. What about intersex people who do not fall on the ends of the binary? This is an interesting question, for if sex is, in reality, more of a continuum than a binary of opposites—like gender—then what is the “opposite sex” of someone who is intersex? The obstacle for coverage under the Equal Pay Act, as written, in all of these cases is the requirement of an “opposite sex” comparator. Perhaps the term “opposite sex” could be interpreted so as to not require a male-female comparison, but such an interpretation would strain generally accepted definitions of the adjective “opposite.”

As discussed above in Part III.C, courts first began to conclude that Title VII prohibits sexual orientation and gender identity discrimination based on a *Price Waterhouse* theory because LGBT people, by definition, defy various gender/sex stereotypes. Does *Price Waterhouse* offer us a path forward under the Equal Pay Act? The answer seems to be no. Even in its strongest form, *Price Waterhouse* requires employment decisions be free of gender considerations, including stereotypes about how people should identify in terms of their own gender or the gender of the person to whom they should be attracted.<sup>286</sup> Yet, still, the Equal Pay Act requires that

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284. *See supra* Part III.C.4–5.

285. *Cf.* *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 176-77 (1994) (surveying other statutes to conclude that “Congress knew how to impose aiding and abetting liability when it chose to do so”).

286. *See supra* Part III.C.2–3.

someone of the “opposite sex” be paid more for substantially equal work.<sup>287</sup> If, for example, an employer pays a gay man less than a straight man because the employer does not like that the gay man wears nail polish, that would be evidence of impermissible sex discrimination under *Price Waterhouse*.<sup>288</sup> Such a plaintiff could succeed under Title VII; but, once again, the Equal Pay Act claim would seem to fail for lack of an opposite sex comparator.

My reading of the Equal Pay Act is consistent with the legislative history, which teaches that Congress was focused on “eliminating the “outmoded belief that a man, because of his role in society, should be paid more than a woman even though his duties are the same.”<sup>289</sup> In this regard, Congress clearly had a sex binary in mind when it enacted the Equal Pay Act and, significantly, Congress wrote that binary into the statute. Lastly, I note that the legislative history of the Equal Pay Act unsurprisingly makes no reference to LGBT people, sexual orientation, or transgender identity or status.<sup>290</sup> Like the legislative histories of Title VII and Title IX, such silence is not particularly instructive to our construction of the Equal Pay Act because the text of the statute controls and Congress’s silence here does not guide us one way or another.<sup>291</sup> Moreover, as far as I am aware, there have not been legislative attempts to amend the Equal Pay Act to include sexual orientation or gender identity, unlike Title VII and Title IX.<sup>292</sup>

### CONCLUSION

Individual examples of discrimination, wage studies, controlled experiments, surveys, and other evidence indicate that anti-LGBT discrimination remains widespread and that such discrimination may manifest as pay differentials. Stigma, discrimination, and violence contribute to economic, social, and familial vulnerabilities for LGBT people, as well as adversely impact their health and well-

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287. 29 U.S.C. § 206(d)(1) (2012).

288. *See supra* Part III.C.2–3.

289. S. Rep. No. 176, 88th Cong., 1st Sess., 1 (1963); *accord Corning*, 417 U.S. at 195 (1974); National Equal Pay Task Force, *Fifty Years After the Equal Pay Act: Assessing the Past, Taking Stock of the Future* (2013), [https://obamawhitehouse.archives.gov/sites/default/files/equalpay/equal\\_pay\\_task\\_force\\_progress\\_report\\_june\\_2013\\_new.pdf](https://obamawhitehouse.archives.gov/sites/default/files/equalpay/equal_pay_task_force_progress_report_june_2013_new.pdf).

290. *See generally* BUREAU OF NATIONAL AFFAIRS, INC., *EQUAL PAY FOR EQUAL WORK: FEDERAL EQUAL PAY LAW OF 1963* (1963); Comm. on Educ. and Labor, *Legis. History of the Equal Pay Act of 1963, Amending Section 6 of the Fair Labor Standards Act of 1938, As Amended*, Public Law 88-38, 88th Cong., H.R. 6060 and S. 1409, 1 (1963).

291. *See supra* Part III.C.4.

292. *See supra* Part III.B.

being.<sup>293</sup> In light of all of this evidence, it is clear that federal, state, and local anti-discrimination laws aimed at rooting out and remedying sexual orientation and gender identity discrimination in employment, housing, education, and other vital spheres are necessary (but certainly not sufficient) to achieve LGBT equality.

If, however, the Equal Pay Act may not be interpreted, as written, to forbid wage disparities based on sexual orientation or gender identity, as I have suggested, that conclusion underscores the need for legislative and other actions to correct discriminatory pay differentials related to sexual orientation and gender identity where they exist. Yet the “comprehensive” Equality Act of 2019 would not amend the Equal Pay Act.<sup>294</sup> While the Equality Act would expressly make sexual orientation and gender identity prohibited bases under Title VII, there are significant differences between the Equal Pay Act and Title VII.<sup>295</sup> Thus, it is incumbent upon Congress to consider amending the Equal Pay Act to add additional prohibited bases of discrimination, including sexual orientation, gender identity, and race.

Such a broader statute would reflect some states’ equal pay laws.<sup>296</sup> Currently, California prohibits pay differentials on the basis of sex, race, and ethnicity;<sup>297</sup> Iowa prohibits pay differentials because of “age, race, creed, color, sex, sexual orientation, gender identity, national origin, religion, or disability” in the private sector;<sup>298</sup> and Oregon’s equal pay law applies to “race, color, religion, sex, sexual orientation, national origin, marital status, veteran status, disability or age.”<sup>299</sup> Furthermore, some states have enacted protections that are stronger than the federal Equal Pay Act in terms of what qualifies as “equal work.”<sup>300</sup>

Yet it is apparent from the profound yet limited impact on sex discrimination of Title VII and the Equal Pay Act,<sup>301</sup> that current anti-discrimination law may never be sufficient to eliminate discrimination against

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293. *See supra* Part I.

294. *See supra* Part.III.B.

295. *See supra* Part IV.A.

296. *See* Stephanie Bornstein, *Equal Work*, 77 MD. L. REV. 581, 615 (2018) (charting the scope of state equal pay laws).

297. CAL. LAB. CODE §§ 1197.5(a) & (b) (West 2017).

298. IOWA CODE ANN. § 216.6A(2)(a) (2010).

299. OR. REV. STAT. § 652.210(5); 652.220(1)(a) (West effective Jan. 1, 2019).

300. Bornstein, *supra* note 296, at 624–31 (2018) (discussing recent law reforms in Massachusetts, California, and Oregon).

301. Vicki Schultz, *Taking Sex Discrimination Seriously*, 91 DENVER U.L. REV. 996, 1005–13 (2015).

LGBT people or others. Many have argued that the Equal Pay Act and Title VII should be strengthened in light of consistent data showing a persistent wage gap by gender (even when comparing men and women with comparable qualifications and experience).<sup>302</sup> And, there is consistent evidence of a pay gap by race as well as evidence that women of color “fare the worst.”<sup>303</sup> While research finds that demographic differences in human capital and hours worked contribute to both the gender and race wage gaps, occupational segregation and discrimination contribute at least as much.<sup>304</sup>

I highlight the gender and race wage gaps because we cannot lose sight of the ways in which race, gender, and other dimensions of power operate against and among LGBT people. For example, a growing body of research finds that LGBT people are more likely to be in poverty compared to similarly situated non-LGBT people with the same characteristics; however, these studies also indicate that poverty among LGBT people is not evenly distributed in the population.<sup>305</sup> Poverty rates among LGBT people, instead, are highest among bisexuals, women, certain racial minorities, those with children, and other subgroups.<sup>306</sup> Not surprisingly, then, research indicates that closing the gender wage gap, the race wage gap, or both would help reduce poverty among LGBT people, especially African American and Hispanic women.<sup>307</sup>

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302. See Bornstein, *supra* note 296, at 591 (discussing three recent studies to argue “[e]ven after controlling for nearly all possible quantifiable variables, there remains some portion of the gender wage gap that cannot be explained, leading researchers to infer discrimination”).

303. *Id.* at 592.

304. *Id.* at 594–99; see also Vicki Schultz, *Life’s Work*, 100 COLUM. L. REV. 1881, 1903–05 (2000); Vicki Schultz, *Open Statement on Sexual Harassment from Employment Discrimination Law Scholars*, 71 STAN. L. REV. ONLINE 17, 22–25 (2018) (discussing relationship between harassment and occupational segregation and proposing reforms); Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061, 2131–36 (1998) (discussing sociological research on sex segregation and its connection to discrimination).

305. See BADGETT ET AL., *supra* note 22; BROWN, *supra* note 22; Badgett, *supra* note 45; Carpenter et al., *supra* note 47; Kerith J. Conron et al., *Sexual orientation and Sex Differences in Socioeconomic status: a population-based investigation in the National Longitudinal Study of Adolescent to Adult Health*, 72 J. EPIDEMIOLOGY & COMMUNITY HEALTH 1 (2018).

306. See BADGETT ET AL., *supra* note 22; BROWN, *supra* note 22; Badgett, *supra* note 45; Conron et al., *supra* note 305.

307. M.V. LEE BADGETT & ALYSSA SCHNEEBAUM, THE WILLIAMS INST., THE IMPACT OF WAGE EQUALITY ON SEXUAL ORIENTATION POVERTY GAPS 5–9 (2015).