

# Legal Discrimination: Bridging the Title VII Gap for Transgender Employees

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## I. INTRODUCTION

Jessi Dye walked into the first day of her dream job in November 2014 at Summerford Nursing Home in Vinemont, Alabama, where she met her new coworkers, went through a series of trainings, and filled out paperwork for human resources.<sup>1</sup> Summerford Nursing Home could have given Jessi “a real future” within the organization, including eventual promotions, raises based on excellent job performance, and compensation for further educational opportunities in her chosen field.<sup>2</sup> Over lunch, Dye entered her manager’s office to talk about her new position.<sup>3</sup> As soon as she walked in the door, her boss asked her, “*What are you?*”<sup>4</sup> After Jessi explained “that she was born male and was in the process of transitioning to female,” the boss asked, “What am I supposed to do with you?”<sup>5</sup> He then told “her to get her things and leave.”<sup>6</sup>

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<sup>1</sup> Lila Shapiro, *Boss Who Asked Transgender Woman ‘What Are You?’ Agrees to Significant Settlement*, HUFFINGTON POST (Sept. 10, 2015), [http://www.huffingtonpost.com/entry/boss-who-asks-transgender-woman-what-are-you-agrees-to-historic-settlement\\_55f0af61e4b03784e277e215](http://www.huffingtonpost.com/entry/boss-who-asks-transgender-woman-what-are-you-agrees-to-historic-settlement_55f0af61e4b03784e277e215) [https://perma.cc/PDQ9-QW3G].

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

<sup>3</sup> *Id.*

<sup>4</sup> *See id.* (emphasis added); *see also Alabama Nursing Home Settles Discrimination Case After Firing Transgender Woman*, S. POVERTY L. CTR. (Sept. 10, 2015), <https://www.splcenter.org/news/2015/09/10/alabama-nursing-home-settles-discrimination-case-after-firing-transgender-woman> [https://perma.cc/L86J-M2ER]; Bil Browning, *Fired Trans Employee Asked ‘What Are You?’ Settles Discrimination Case*, ADVOCATE (Sept. 15, 2015), <http://www.advocate.com/transgender/2015/9/15/fired-trans-employee-asked-what-are-you-wins-discrimination-case> [https://perma.cc/R3RV-E3QW].

<sup>5</sup> Shapiro, *supra* note 1; *accord* Browning, *supra* note 4.

<sup>6</sup> Shapiro, *supra* note 1. Dye agreed to an undisclosed settlement, which included requiring her former company to agree to implement a policy that prohibits discrimination against job applicants and employees on the basis of sexual orientation and gender identity, and to conduct sensitivity training concerning LGBTQ people. This settlement “may be the first successful resolution of a transgender employment claim against a private employer in Alabama.” Drew Taylor, *Settlement Reached in Transgender Discrimination Case*, MONTGOMERY ADVERTISER (Sept. 11, 2015), <http://www.montgomeryadvertiser.com/story/news/local/2015/09/10/settlement-reached-case-involving-alabama-transgender-woman/72033142/> [https://perma.cc/G5W9-6EKR]; *see also* Browning, *supra* note 4; Shapiro, *supra* note 1.

For Jessi and many other transgender<sup>7</sup> people in America, this could be a common daily occurrence because employment discrimination against trans people is legal in twenty-eight states, leaving many transgender employees unprotected.<sup>8</sup> Transgender employees could walk into their new jobs, not knowing whether or not that first day is also their last because of their gender identity. Employers could realize at any point that a person's perceived gender identity does not match the gender listed on a driver's license<sup>9</sup> or birth certificate.<sup>10</sup> Because of this, discrimination in the workplace and possible termination could both be imminent.<sup>11</sup>

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<sup>7</sup>The terms “transgender” or “trans” are umbrella terms for people whose gender identity and/or gender expression differs from what is typically associated with the sex they were assigned at birth. *GLAAD Media Reference Guide – Transgender Issues*, GLAAD, <http://www.glaad.org/reference/transgender> [<https://perma.cc/9CX9-AYTY>]. People under the transgender umbrella term may describe themselves using one or more of a wide variety of terms—including transgender. *Id.* Many transgender people are prescribed hormones by their doctors to change their bodies. Some undergo surgery as well. *Id.* But not all transgender people can or will take those steps, and a transgender identity is not dependent upon medical procedures. *Id.* The term transgender is used rather than the term transsexual, as this is an older term that “originated in the medical and psychological communities” and is not considered to be an umbrella term. *Id.* Additionally, the word “transgendered” will not be used in this Note and should not be used generally, as it adds unnecessary length to the word and is not in alignment with the terms of lesbian, gay, and bisexual. Katy Steinmetz, *Why It's Best to Avoid the Word 'Transgendered,'* TIME (Dec. 15, 2014), <http://time.com/3630965/transgender-transgendered/> [<https://perma.cc/5P-KS-JUVF>]. For example, referring to Ellen DeGeneres as “lesbianed” is incorrect. Similarly, one would not refer to Laverne Cox or Janet Mock as “transgendered.” *Id.*

<sup>8</sup>*Facts on Nondiscrimination Laws*, FAIRNESS PROJECT, <http://equalityfederation.org/fairnessproject/facts/> [<https://perma.cc/N842-TSY3>]; see also DANA BEYER ET AL., *TRANSGENDER LAW CTR., NEW TITLE VII AND EEOC RULINGS PROTECT TRANSGENDER EMPLOYEES* (2014), <http://transgenderlawcenter.org/wp-content/uploads/2014/01/TitleVII-Report-Final012414.pdf> [<https://perma.cc/NL3C-Y4PG>].

<sup>9</sup>In Ohio, an applicant can update a driver's license or ID by submitting a court order certifying a name change and/or a Declaration of Gender Change Form signed by a physician or psychologist certifying the applicant's gender identity. See *ID Documents Center / Ohio*, NAT'L CTR. FOR TRANSGENDER EQUALITY, <http://www.transequality.org/documents/state/ohio> [<https://perma.cc/4JG4-XW4H>].

<sup>10</sup>In Ohio, an applicant can get an amended birth certificate through the Office of Vital Statistics upon receipt of a court order of gender change. See *id.* This is extremely difficult to obtain considering courts do not have the authority in Ohio to issue such orders. See *id.*

<sup>11</sup>For LGBTQ individuals, studies have shown anywhere from 15–90% of workers have experienced some form of discrimination and harassment in the workplace. See Crosby Burns & Jeff Krehely, *Gay and Transgender People Face High Rates of Workplace Discrimination and Harassment*, CTR. FOR AM. PROGRESS (June 2, 2011), <https://www.americanprogress.org/issues/lgbt/news/2011/06/02/9872/gay-and-transgender-people-face-high-rates-of-workplace-discrimination-and-harassment/> [<https://perma.cc/MK-Q9-VYJ3>].

In recent history, the focus in the LGBTQ community has been on marriage equality.<sup>12</sup> The community has grown leaps and bounds in the past forty years;<sup>13</sup> the problem is that the social and legal justice movements have mainly focused on nondiscrimination efforts and the fight for marriage equality.<sup>14</sup> While DOMA has been ruled unconstitutional<sup>15</sup> and marriage equality is now the law of the land,<sup>16</sup> LGBTQ Americans could get legally married on Saturday, post about their marriage on social media on Sunday, and could walk into work and be fired on Monday.<sup>17</sup> Courts and administrative agencies have historically been unkind to the trans community, but a shift in treatment is on the horizon.<sup>18</sup> To address the lack of protections the trans community faces, the federal court system and agencies must rule that transgender employment discrimination is sex discrimination under Title VII.

This Note examines the level of employment protections for the trans community and argues for both comprehensive nondiscrimination reform and more pro-plaintiff court rulings to protect trans employees. Part II describes the problem of nondiscrimination in the larger LGBTQ context and the status of current employment protections against nondiscrimination at both the federal and state levels. Additionally, it explores an overview of the text and legislative history of Title VII of the Civil Rights Act of 1964. Part III discusses the theories used by courts and agencies to interpret Title VII to protect gender identity as well as the ways that states can follow suit with

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<sup>12</sup> See Nathaniel Frank, *The Long Road to Marriage Equality*, SLATE: OUTWARD (June 26, 2015), [http://www.slate.com/blogs/outward/2015/06/26/gay\\_marriage\\_a\\_history\\_of\\_the\\_movement\\_for\\_marriage\\_equality.html](http://www.slate.com/blogs/outward/2015/06/26/gay_marriage_a_history_of_the_movement_for_marriage_equality.html) [https://perma.cc/2H7W-CRQF].

<sup>13</sup> Homosexuality was listed as a mental illness until 1973 and was criminalized in many jurisdictions for years prior to these social movements. See *81 Words*, THIS AM. LIFE, <http://thisamericanlife.org/radio-archives/episode/204/transcript> [https://perma.cc/T77C-L2B7]; *Timeline: Milestones in the American Gay Rights Movement*, PBS: AM. EXPERIENCE, <http://www.pbs.org/wgbh/americanexperience/features/timeline/stonewall/> [https://perma.cc/9WYN-CGLJ]. Since then, gay men and lesbians have raised awareness and advocated for issues like inclusive healthcare, nondiscrimination protections, and eventually, marriage equality. See *id.*; The New Republic's *Campaign for Marriage Equality*, NEW REPUBLIC, <https://newrepublic.com/article/122097/new-republics-long-campaign-marriage-equality> [https://perma.cc/X5BS-M8UB].

<sup>14</sup> See Andrew Sullivan, *Here Comes the Groom: A (Conservative) Case for Gay Marriage*, NEW REPUBLIC (Aug. 28, 1989), <https://newrepublic.com/article/79054/here-comes-the-groom> [https://perma.cc/7T7T-Y97U].

<sup>15</sup> *United States v. Windsor*, 133 S. Ct. 2675, 2695 (2013).

<sup>16</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604, 2607 (2015).

<sup>17</sup> If there are no antidiscrimination protections, spreading news of the marriage via social media could notify their coworkers and employer, which turns into a risk of being fired. See Charlie Joughin, *Married at 11 AM. Fired at 2 PM. The Threat Is Real for Thousands of LGBT Americans*, HUM. RTS. CAMPAIGN (Oct. 10, 2014), <http://www.hrc.org/blog/married-at-11-am.-fired-at-2-pm.-for-thousands-of-lgbt-americans-the-threat> [https://perma.cc/HEF2-RKE8].

<sup>18</sup> See *supra* note 13; see also *infra* Part II.A.3.

implementing nondiscrimination reforms.<sup>19</sup> Finally, Part IV highlights the necessity of clear employment protections for trans employees and argues that transgender employment discrimination should be covered by Title VII under a stereotyping theory or a per se theory or through state passage of nondiscrimination laws. In order to allow transgender Americans to enjoy the full employment protections enjoyed by all other Americans, the federal courts need to interpret transgender employment discrimination as discrimination on the basis of sex under Title VII, both under sex stereotyping and per se theories.

## II. THE PROBLEM WITH NONDISCRIMINATION: IS IT EFFECTIVE ENOUGH?

State and local governments have promulgated nondiscrimination statutes and ordinances, respectively, that protect workers from experiencing the type of treatment Jessi endured at Summerford Nursing Home.<sup>20</sup> These nondiscrimination protections exist at the federal, state, and local levels.<sup>21</sup> The problem with nondiscrimination ordinances is that they have minimal enforcement mechanisms, are controversial in scope,<sup>22</sup> or lack full coverage for LGBTQ and gender non-conforming employees.<sup>23</sup> As a result, nondiscrimination ordinances are helpful, but not complete, ways of protecting

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<sup>19</sup>“Sexual orientation” and “gender identity” are differing terms and should not be conflated. Sexual orientation is “[a]n inherent or immutable enduring emotional, romantic or sexual attraction to other people,” while gender identity is “[o]ne’s innermost concept of self as male, female, a blend of both or neither—how individuals perceive themselves and what they call themselves.” *Sexual Orientation and Gender Identity Definitions*, HUM. RTS. CAMPAIGN, <http://www.hrc.org/resources/sexual-orientation-and-gender-identity-terminology-and-definitions> [https://perma.cc/9J4Y-KE2X].

<sup>20</sup>See *supra* notes 1–6 and accompanying text; see also *Workplace Discrimination Laws and Policies*, HUM. RTS. CAMPAIGN, <http://www.hrc.org/resources/Workplace-Discrimination-Policies-Laws-and-Legislation> [https://perma.cc/DNX6-B5LP].

<sup>21</sup>See Joughin, *supra* note 17; *Workplace Discrimination Laws and Policies*, *supra* note 20.

<sup>22</sup>Controversies have followed the Springfield, Missouri; Fayetteville, Arkansas; and Charlotte, North Carolina city councils. See Jenna Deery, *Debate Continues After City Council’s Controversial Vote*, WSOCTV.COM (Mar. 2, 2015), <http://www.wsoctv.com/news/local/dozens-speak-about-controversial-restroom-non-disc/52161691> [https://perma.cc/XXD8-VSGV] (Charlotte, N.C.); Mike Landis & James Holmes, *Controversial LGBT Non-Discrimination Bill Heads Back to Springfield City Council*, KY3 (Sept. 3, 2014), [http://www.ky3.com/news/local/controversial-lgbt-nondiscrimination-bill-heading-back-to-springfield-city-council/21048998\\_27869124](http://www.ky3.com/news/local/controversial-lgbt-nondiscrimination-bill-heading-back-to-springfield-city-council/21048998_27869124) [https://perma.cc/G4LZ-ECW8] (Springfield, Mo.); Joel Walsh, *Fayetteville Antidiscrimination Vote Nears*, NW. ARK. DEMOCRAT GAZETTE (Aug. 17, 2014), <http://www.nwaonline.com/news/2014/aug/17/fayetteville-antidiscrimination-vote-ne/> [https://perma.cc/B53C-3N4G] (Fayetteville, Ark.). The debate in Charlotte seemed to escalate at the talk of a “bathroom bill.” For more information on bathroom bills, see *infra* note 86 and accompanying text.

<sup>23</sup>For a discussion regarding the lack of full coverage for LGBTQ workers under the 2007 ENDA bill, see *infra* Part II.A.1.

trans employees from discrimination.<sup>24</sup> There have been multiple attempts by Congress over the past 10 years to include the terms “gender identity” and “gender expression”<sup>25</sup> into Title VII and other new legislation.<sup>26</sup> Even when a state may have a nondiscrimination statute, not all states have an inclusive one.<sup>27</sup>

Most Americans mistakenly believe that LGBTQ workers are protected from employment discrimination through existing laws.<sup>28</sup> In reality, only twenty-two states offer nondiscrimination protections based on either sexual orientation and/or gender identity.<sup>29</sup> The thought that LGBTQ workers are already covered by existing laws incorrectly perpetuates a mischaracterization that the federal and state laws are sufficient.<sup>30</sup> Furthermore, a majority of Americans do not approve of their states not having nondiscrimination protections in place.<sup>31</sup>

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<sup>24</sup> See *Workplace Discrimination Laws and Policies*, *supra* note 20.

<sup>25</sup> Gender identity is defined as “[o]ne’s innermost concept of self as male, female, a blend of both or neither—how individuals perceive themselves and what they call themselves. One’s gender identity can be the same or different from their sex assigned at birth.” See *Sexual Orientation and Gender Identity Definitions*, *supra* note 19. Gender expression is defined as “[e]xternal appearance of one’s gender identity, usually expressed through behavior, clothing, haircut or voice, and which may or may not conform to socially defined behaviors and characteristics typically associated with being either masculine or feminine.” *Id.*

<sup>26</sup> See *infra* Part II.A.

<sup>27</sup> See *infra* Part II.B. The term “inclusive” is used to express a nondiscrimination policy that covers both sexual orientation and gender identity and/or expression. Many pieces of legislation do not cover both and as such, are not inclusive. *Facts on Nondiscrimination Laws*, FAIRNESS PROJECT, <http://equalityfederation.org/fairnessproject/facts/> [https://perma.cc/N842-TSY3].

<sup>28</sup> Brandon Lorenz, *New HRC Poll Shows Overwhelming Support for Federal LGBT Non-Discrimination Bill*, HUM. RTS. CAMPAIGN (Mar. 17, 2015), <http://www.hrc.org/blog/new-hrc-poll-shows-overwhelming-support-for-federal-lgbt-non-discrimination> [https://perma.cc/AY89-7ZVV] (“[M]ost Americans are shocked to discover that many LGBT Americans can be denied a job . . . because they still lack explicit federal protections from discrimination . . .” (quoting Senator Jeff Merkley)); see also Liz Halloran, *You Won’t Believe What Statewide Protections LGBT People Lack*, HUM. RTS. CAMPAIGN (Jan. 23, 2015), <http://www.hrc.org/blog/you-wont-believe-what-statewide-protections-lgbt-people-lack> [https://perma.cc/KFT3-TG4C].

<sup>29</sup> See *Facts on Nondiscrimination Laws*, *supra* note 27; *infra* note 87.

<sup>30</sup> See *supra* note 28.

<sup>31</sup> See German Lopez, *Most States Let Bosses Fire People for Being Gay. Majorities in Every State Don’t Approve.*, VOX (Feb. 19, 2016), <http://www.vox.com/2016/2/19/11054174/nondiscrimination-law-support-map> [https://perma.cc/7RMG-2ZGT]; see also JEROME HUNT, A STATE-BY-STATE EXAMINATION OF NONDISCRIMINATION LAWS AND POLICIES, CTR. FOR AM. PROGRESS ACTION FUND (June 2012), [https://cdn.americanprogress.org/wp-content/uploads/issues/2012/06/pdf/state\\_nondiscrimination.pdf](https://cdn.americanprogress.org/wp-content/uploads/issues/2012/06/pdf/state_nondiscrimination.pdf) [https://perma.cc/3NR9-6GFS].

Although there have been attempts to protect sexual orientation and/or gender identity in federal legislation, none have been enacted into law.<sup>32</sup> This leaves states to pick up the slack by passing local nondiscrimination ordinances.<sup>33</sup> As mentioned above, such ordinances do not always cover all of the LGBTQ community.<sup>34</sup> In 2016 alone, there have been over three dozen laws proposed attacking transgender individuals.<sup>35</sup> Protections for transgender employees at the federal and state levels are severely lacking; as such, many local governments are trying to protect their citizens by passing local nondiscrimination ordinances.<sup>36</sup>

### A. Lack of Protections at the Federal Level

At the federal level, there have been multiple attempts in recent history to protect LGBTQ workers by including the phrases “sexual orientation” and “gender identity and/or expression” in Title VII.<sup>37</sup> The Employment Non-Discrimination Act (ENDA) and the Equality Act are two of the many proposed forms of legislation to protect LGBTQ employees in the workplace.<sup>38</sup> The remaining lack of protections must be fixed by introducing and passing comprehensive reforms and protections that are fully inclusive of the entire LGBTQ community.<sup>39</sup>

#### 1. ENDA

In 1974, the Employment Non-Discrimination Act was introduced in its most comprehensive form by Congresswoman Bella Abzug.<sup>40</sup> At that time,

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<sup>32</sup> See *infra* Part II.A.

<sup>33</sup> See *infra* note 87.

<sup>34</sup> See *supra* notes 28, 31.

<sup>35</sup> See Dawn Ennis, *Report: 2016 Is the Most Dangerous Year for Transgender Americans*, ADVOCATE (Feb. 22, 2016), <http://www.advocate.com/transgender/2016/2/22/report-2016-most-dangerous-year-transgender-americans> [<https://perma.cc/W2YW-JZFN>].

<sup>36</sup> The Dallas, Texas City Council voted unanimously to bolster nondiscrimination protections for transgender people. Currently, Texas does not have statewide nondiscrimination protections for its citizens. See Dawn Ennis, *Watch: Dallas Adds Nondiscrimination Protections for Trans People*, ADVOCATE (Nov. 10, 2015), <http://www.advocate.com/politics/2015/11/10/watch-dallas-adds-non-discrimination-protections-trans-people> [<https://perma.cc/77K7-3DUJ>].

<sup>37</sup> Title VII refers to Title VII of the Civil Rights Act of 1964, which protects individuals against employment discrimination on the basis of race, color, national origin, sex, and religion. 42 U.S.C. § 2000(e) (2012) (emphasis added). Title VII applies to employers with fifteen or more employees. *Id.* Furthermore, equal employment opportunity cannot be denied to any person on the aforementioned bases. See *id.*

<sup>38</sup> Equality Act, S. 1858, 114th Cong. (2015); Employment Non-Discrimination Act of 2007, H.R. 2015, 110th Cong. (2007).

<sup>39</sup> See *infra* Part IV.

<sup>40</sup> See *H.R.14752 – Equality Act*, CONGRESS.GOV, <https://www.congress.gov/bill/93rd-congress/house-bill/14752> [<https://perma.cc/X3N3-8D97>].

ENDA would have amended Title VII to include “sex, marital status, or sexual orientation” and provided a definition for sexual orientation to mean “choice of sexual partner according to gender.”<sup>41</sup> Since 1994, versions of the bill have “been considered in every Congress, with one exception.”<sup>42</sup>

In 2007, Representative Barney Frank (D-MA) introduced a version of ENDA that included both sexual orientation and gender identity.<sup>43</sup> The House Education and Labor Committee then held the first ENDA hearing since 2002 and referred the bill out of committee.<sup>44</sup> After months of stalling, Representative Frank pivoted and shifted away from protecting trans employees.<sup>45</sup> Representative Frank stated, in October 2007, that he did not think the House had the necessary votes to pass a version of ENDA that included gender identity.<sup>46</sup> As a result, House Democrats would bring an amended bill to the floor for a vote.<sup>47</sup>

The fallout was inevitable: advocacy groups would stand by the non-inclusive ENDA.<sup>48</sup> Critics claimed that this version of ENDA was “riddled

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<sup>41</sup> *Id.*; see also Jerome Hunt, *A History of the Employment Non-Discrimination Act*, CTR. FOR AM. PROGRESS (July 19, 2011), <https://www.americanprogress.org/issues/lgbt/news/2011/07/19/10006/a-history-of-the-employment-non-discrimination-act/> [https://perma.cc/C4QJ-37N3].

<sup>42</sup> See Dana Beyer, *ENDA (Employment Non-Discrimination Act) Redux: Its History and Importance for All of Us*, HUFFINGTON POST (May 1, 2013), [http://www.huffingtonpost.com/dana-beyer/employment-non-discrimination-act-transgender\\_b\\_3186793.html](http://www.huffingtonpost.com/dana-beyer/employment-non-discrimination-act-transgender_b_3186793.html) [https://perma.cc/US2Y-S3TM].

<sup>43</sup> H.R. 2015.

<sup>44</sup> *Final Vote Results for Roll Call 1057*, HOUSE.GOV (Nov. 7, 2007), <http://clerk.house.gov/evs/2007/roll1057.xml> [https://perma.cc/VJ8B-EBJ5]. See generally *The Employment Non-Discrimination Act of 2007: Hearing on H.R. 2015 Before the Subcomm. on Health, Emp’t, Labor & Pensions of the H. Comm. on Educ. & Labor*, 110th Cong. 42–47 (2007) (statement of Mark Fahleson, Adjunct Professor of Employment Law, University of Nebraska College of Law).

<sup>45</sup> See John Aravosis, *Barney on ENDA Transgender Controversy. And, He’s Right.*, AMERICABLOG (Sept. 28, 2007), <http://americablog.com/2007/09/barney-on-enda-transgender-controversy-and-hes-right.html> [https://perma.cc/7VS6-GJ5A].

<sup>46</sup> HUMAN RIGHTS CAMPAIGN, *BEYOND MARRIAGE EQUALITY: A BLUEPRINT FOR FEDERAL NON-DISCRIMINATION PROTECTIONS* (2015), <http://hrc-assets.s3-website-us-east-1.amazonaws.com/files/documents/HRC-BeyondMarriageEquality-42015.pdf> [https://perma.cc/HQC6-6G23].

<sup>47</sup> See *supra* note 44.

<sup>48</sup> The Human Rights Campaign (HRC) caused a major fracture in gay rights organizations in 2007 when it had initially said it would not stand by the bill and then later supported the non-inclusive bill without gender identity protections. Passing a bill was better, in their minds, than passing no bill at all; in the trans community, it was viewed as demeaning. HRC had to rebuild trust in the LGBTQ community or else risk losing a large constituency of support. Jack Tuckner, *HRC Leader Stands by Non-Inclusive ENDA Decision*, WOMEN’S RTS. WORKPLACE (Apr. 10, 2008), <http://www.pridesource.com/article.html?article=29930> [https://perma.cc/8EW5-ECMZ]. For various advocacy groups standing by an inclusive ENDA, see Matt Foreman, *A Non-Transgender-Inclusive ENDA? No Way!*, BILERICO PROJECT (Sept. 27, 2007), <http://bilerico.lgbtqnation.com/2007/>



with loopholes” that were weakening protections for transgender employees in the workplace.<sup>49</sup> Those efforts were quashed by Democratic leadership, who moved forward with the non-inclusive language in the bill.<sup>50</sup> ENDA “passed the House on a bipartisan vote of 235 to 184, with 35 Republicans voting in favor.”<sup>51</sup> The Senate never took action on the bill.<sup>52</sup>

## 2. ENDA Redux

After the 2007 debacle and fallout of ENDA, Representative Frank again introduced legislation in June 2009 that included gender identity protections in the new form of ENDA.<sup>53</sup> This bill would have prohibited “discrimination against individuals in employment based on perceived or actual sexual orientation and gender identity, and retaliation against them.”<sup>54</sup> Versions of ENDA have been proposed in the 110th,<sup>55</sup> 111th,<sup>56</sup> 112th,<sup>57</sup> and 113th Congresses.<sup>58</sup> Although ENDA had a low chance of passing the Republican-controlled Congress, the cosponsors believed it was vital to introduce the bill in each session to show solidarity.<sup>59</sup> In July 2013, “ENDA cleared the Senate Health, Education, Labor and Pensions Committee with bipartisan support.”<sup>60</sup>

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09/a\_nontransgenderinclusive\_enda\_no\_way.php [https://perma.cc/3SG8-5QP2]. Neither version of the bill passed.

<sup>49</sup> See Lisa Keen, *ENDA Vote Scuttled*, BAY AREA REP. (Oct. 4, 2007), <http://www.ebar.com/news/article.php?sec=news&article=2269> [https://perma.cc/LYD8-VAUA].

<sup>50</sup> See HUMAN RIGHTS CAMPAIGN, *supra* note 46; Tuckner, *supra* note 48.

<sup>51</sup> HUMAN RIGHTS CAMPAIGN, *supra* note 46; see also *H.R. 3685 (110th): Employment Non-Discrimination Act of 2007*, GOVTRACK, <https://www.govtrack.us/congress/votes/110-2007/h1057> [https://perma.cc/DMK2-QD3K].

<sup>52</sup> HUMAN RIGHTS CAMPAIGN, *supra* note 46; see also *H.R. 3685 (110th): Employment Non-Discrimination Act of 2007*, *supra* note 51. For a discussion of the 2007 ENDA vote, see Ann C. McGinley, *Erasing Boundaries: Masculinities, Sexual Minorities, and Employment Discrimination*, 43 U. MICH. J.L. REFORM 713, 730 (2010).

<sup>53</sup> See Lisa Keen, *Frank Introduces Trans-Inclusive ENDA*, WINDY CITY TIMES (June 24, 2009), <http://www.windycitymediagroup.com/gay/lesbian/news/ARTICLE.php?AID=21636> [https://perma.cc/A3US-MCYN].

<sup>54</sup> McGinley, *supra* note 52, at 731.

<sup>55</sup> *Employment Non-Discrimination Act of 2007*, H.R. 3685, 110th Cong. (2007).

<sup>56</sup> *Employment Non-Discrimination Act of 2009*, H.R. 3017, 111th Cong. (2009); *Employment Non-Discrimination Act of 2009*, S. 1584, 111th Cong. (2009).

<sup>57</sup> *Employment Non-Discrimination Act*, H.R. 1397, 112th Cong. (2011); *Employment Non-Discrimination Act of 2011*, S. 811, 112th Cong. (2011).

<sup>58</sup> *Employment Non-Discrimination Act of 2013*, H.R. 1755, 113th Cong. (2013); *Employment Non-Discrimination Act of 2013*, S. 815, 113th Cong. (2013).

<sup>59</sup> See Isaac West, *Trans\*Politics, Solidarity, and ENDA*, FROM SQUARE (June 27, 2014), <http://www.fromthesquare.org/?p=6434#.VuX4g5MrIb0> [https://perma.cc/68D3-AVHE].

<sup>60</sup> See Ed O’Keefe, *ENDA Explained*, WASH. POST (Nov. 4, 2013), <https://www.washingtonpost.com/news/the-fix/wp/2013/11/04/what-is-the-employment-no>

The 2013 version of ENDA included both sexual orientation and gender identity protections.<sup>61</sup> Due to Republican-controlled committees, the bill was never seriously considered in the House.<sup>62</sup> More than 70% of Americans were in favor of protecting LGBTQ workers from job discrimination.<sup>63</sup> Still, with these numbers, some lawmakers believed that the law was unnecessary, given the protections that federal statutes provide and the fact that many private companies have their own policies protecting their workers.<sup>64</sup> ENDA passed the Senate in 2013 with a 64–32 vote, including ten Republican senators voting in favor of the legislation.<sup>65</sup>

Given all of these hurdles, ENDA has not passed the Senate and the House in the same session<sup>66</sup> and will likely not pass both houses in the near future, especially with the results of the presidential election.<sup>67</sup> Many advocates believe that the time for ENDA has passed and the country needs more comprehensive reform.<sup>68</sup> In the advocates' minds, ENDA was the past and the Equality Act is the future. The Equality Act is the next step for LGBTQ advocates to gain full employment equality.

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n-discrimination-act-enda/ [https://perma.cc/4ASJ-L5R4]; see also *ENDA Introduced with Bipartisan Backing*, MSNBC: MADDOWBLOG (Apr. 25, 2013), <http://www.msnbc.com/rachel-maddow-show/enda-introduced-bipartisan-backing?lite=> [https://perma.cc/E9X8-NPKU].

<sup>61</sup> See *ENDA Introduced with Bipartisan Backing*, *supra* note 60.

<sup>62</sup> See O'Keefe, *supra* note 60.

<sup>63</sup> See *id.*; see also Zack Ford, *Most Americans Think LGBT People Already Have Employment Protections—They Don't*, THINKPROGRESS (June 2, 2011), <http://thinkprogress.org/lgbt/2011/06/02/234952/most-americans-think-lgbt-people-already-have-employment-protections-they-dont/> [https://perma.cc/T96V-GMAB].

<sup>64</sup> See Mollie Reilly, *Rand Paul Says LGBT Discrimination Laws Are Unnecessary*, HUFFINGTON POST (Oct. 14, 2015), [http://www.huffingtonpost.com/entry/rand-paul-lgbt-workers\\_us\\_561ed745e4b028dd7ea691a5](http://www.huffingtonpost.com/entry/rand-paul-lgbt-workers_us_561ed745e4b028dd7ea691a5) [https://perma.cc/25E3-TS25].

<sup>65</sup> See Sunnive Brydum, *Will Trans Folk Become an ENDA Bargaining Chip?*, ADVOCATE (Nov. 8, 2013), <http://www.advocate.com/politics/transgender/2013/11/08/will-trans-folk-become-enda-bargaining-chip> [https://perma.cc/W9WR-KD6K].

<sup>66</sup> See Chris Johnson, *Boehner Tells LGBT Caucus 'No Way' ENDA Will Pass*, WASH. BLADE (Jan. 29, 2014), <http://www.washingtonblade.com/2014/01/29/boehner-tells-lgbt-caucus-way-enda-will-pass/> [https://perma.cc/8HXG-VDAR].

<sup>67</sup> The closest the ENDA has gotten to a recent vote involved Representative Jared Polis (Democrat, Colorado) filing a discharge petition in 2014 to force a vote on the bill. See Chris Johnson, *Discharge Petition Filed for ENDA with Narrowed Religious Exemption*, WASH. BLADE (Sept. 17, 2014), <http://www.washingtonblade.com/2014/09/17/dischARGE-petition-filed-enda-narrowed-religious-exemption/> [https://perma.cc/7KFU-BPTY].

<sup>68</sup> See *infra* Part II.A.3.

### 3. *The Equality Act*

The Equality Act was first proposed in July 2015.<sup>69</sup> The Equality Act has had a more comprehensive approach in protecting the LGBTQ community from discrimination.<sup>70</sup> Whereas ENDA would have created a new law specific to LGBTQ people,<sup>71</sup> the Equality Act will add LGBTQ protections to existing civil rights laws like the Civil Rights Act of 1964,<sup>72</sup> the Fair Housing Act,<sup>73</sup> the Equal Credit Opportunity Act,<sup>74</sup> and the Jury Selection and Service Act.<sup>75</sup> For the scope of employment, the act would directly amend Title VII by adding the phrase “sexual orientation, gender identity” after “sex” to protect all employees.<sup>76</sup>

The Equality Act has gained major support from President Obama,<sup>77</sup> as well as major companies like Apple, the Dow Chemical Company, and Levi Strauss and Co.<sup>78</sup> There has been pushback from leading civil rights groups, like the NAACP and the Leadership Conference on Civil and Human Rights, who fear that revising landmark statutes could lead to some larger issues.<sup>79</sup>

For the first time for any legislation promoting LGBTQ equality, there are two Republican cosponsors: Illinois Representative Bob Dold<sup>80</sup> and Illinois

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<sup>69</sup> See Zack Ford, *The Equality Act Could End Legal LGBT Discrimination for Good*, THINKPROGRESS (July 23, 2015), <http://thinkprogress.org/lgbt/2015/07/23/3683728/equality-act-introduction/> [<https://perma.cc/SBG7-JH5Z>].

<sup>70</sup> Equality Act, H.R. 3185, 114th Cong. (2015); Equality Act, S. 1858, 114th Cong. (2015).

<sup>71</sup> See *supra* Parts II.A.1. II.A.2.

<sup>72</sup> Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

<sup>73</sup> Fair Housing Act, 42 U.S.C. § 3601 (2012).

<sup>74</sup> Equal Credit Opportunity Act, 15 U.S.C. § 1691 (2012).

<sup>75</sup> Jury Selection and Service Act, 28 U.S.C. §§ 1861–1869 (2012).

<sup>76</sup> See Equality Act, H.R. 3185, 114th Cong. (2015); Equality Act, S. 1858, 114th Cong. (2015).

<sup>77</sup> See Juliet Eilperin, *Obama Supports Altering Civil Rights Act to Ban LGBT Discrimination*, WASH. POST (Nov. 10, 2015), [https://www.washingtonpost.com/politics/obama-supports-altering-civil-rights-act-to-include-gender-discrimination/2015/11/10/3a05107e-87c8-11e5-9a07-453018f9a0ec\\_story.html](https://www.washingtonpost.com/politics/obama-supports-altering-civil-rights-act-to-include-gender-discrimination/2015/11/10/3a05107e-87c8-11e5-9a07-453018f9a0ec_story.html) [<https://perma.cc/YG2P-SNDF>].

<sup>78</sup> Stephen Peters, *Major Corporations Announce Support for Landmark Federal LGBT Non-Discrimination Legislation*, HUM. RTS. CAMPAIGN (July 23, 2015), <http://www.hrc.org/blog/major-corporations-announce-support-for-landmark-federal-lgbt-non-discrimin> [<https://perma.cc/EAX5-KVRY>].

<sup>79</sup> See Karen Grigsby Bates, *African-Americans Question Comparing Gay Rights Movement to Civil Rights*, NPR (July 2, 2015), <http://www.npr.org/2015/07/02/419554758/african-americans-question-comparing-gay-rights-movement-to-civil-rights> [<https://perma.cc/87CW-EX77>].

<sup>80</sup> See Brandon Lorenz, *Breaking: Rep. Bob Dold Becomes First Republican to Co-Sponsor the Equality Act*, HUM. RTS. CAMPAIGN (Jan. 15, 2016), <http://www.hrc.org/blog/breaking-rep.-bob-dold-becomes-first-republican-to-co-sponsor-the-equality> [<https://perma.cc/JZ88-7ERU>].

Senator Mark Kirk.<sup>81</sup> Senator Kirk had been outspoken in the past on LGBTQ issues, like marriage equality; however, he waited almost six months after the Act was initially proposed to support it.<sup>82</sup> Having Republican cosponsors on an LGBTQ-friendly nondiscrimination bill shows the tension that exists in the Republican Party, especially for lawmakers in states that have already banned LGBTQ discrimination on their own.<sup>83</sup>

### B. Common Statewide Protections

Normally, states through their legislatures, or local cities and jurisdictions through their city councils, pass nondiscrimination ordinances with minimal enforcement mechanisms.<sup>84</sup> Local ordinances often merely impose fines similar to what one would receive on a traffic ticket.<sup>85</sup> Employers may hypothetically choose to pay the fine when incidents occur because it is cheaper than implementing a store or company-wide nondiscrimination policy. In some cities, these ordinances have even been repealed using language that is extremely harmful and offensive to trans people and others within the LGBTQ community.<sup>86</sup>

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<sup>81</sup> See Dominic Holden, *First Republican U.S. Senator Co-Sponsors LGBT Equality Act*, BUZZFEED NEWS (Jan. 19, 2016), <http://www.buzzfeed.com/dominicholden/first-republican-us-senator-co-sponsors-lgbt-equality-act#.vfRroqnVM> [https://perma.cc/74E2-DNES]; see also Dawn Ennis, *Mark Kirk Is First GOP Senator to Cosponsor Equality Act*, ADVOCATE (Jan. 19, 2016), <http://www.advocate.com/politics/2016/1/19/mark-kirk-first-gop-senator-cosponsor-equality-act> [https://perma.cc/5P74-RU65].

<sup>82</sup> See Mary Emily O'Hara, *Civil Rights 2.0: What the Equality Act of 2015 Means for LGBT Americans*, DAILY DOT (July 23, 2015), <http://www.dailydot.com/politics/equality-act-2015-lgbt-explained/> [https://perma.cc/4SA6-HBRF]; see also *Statement from Senator Kirk on Same-Sex Marriage*, MARK KIRK (Apr. 2, 2013), <http://www.kirk.senate.gov/?p=blog&id=686> [https://perma.cc/A9Q6-TS4G].

<sup>83</sup> Former Republican presidential candidates also believe these laws are unnecessary, including Senators Ted Cruz and Marco Rubio. See Zack Ford, *Republican Presidential Candidates Want You to Know They Are Against LGBT Rights*, THINKPROGRESS (Dec. 8, 2015), <http://thinkprogress.org/lgbt/2015/12/08/3729521/rubio-carson-cruz-huckabee-lgbt/> [https://perma.cc/K249-7TE9]. This is in direct contrast to the Utah legislature, which is the only instance in which a Republican controlled legislature in the United States expanded LGBT protections in a state with a high percentage of religious citizens. See Jennifer Dobner, *Little Known History Behind Utah's LGBT Nondiscrimination Law Recounted*, SALT LAKE TRIB. (Mar. 31, 2015), <http://www.sltrib.com/home/2295501-115/little-known-history-behind-utahs-lgbt-nondiscrimination> [https://perma.cc/T4C8-3UED].

<sup>84</sup> *Non-Discrimination Laws*, MOVEMENT ADVANCEMENT PROJECT, [http://www.lgbtmovement.org/equality-maps/non\\_discrimination\\_laws](http://www.lgbtmovement.org/equality-maps/non_discrimination_laws) [https://perma.cc/9PHF-KJMV].

<sup>85</sup> See *infra* notes 87, 91.

<sup>86</sup> The Houston Equal Rights Ordinance (HERO) was repealed in November 2015 by Houston, Texas voters after opponents of HERO ran ads claiming pedophiles would be able to follow young children into restrooms. Ted Oberg, *Anti-HERO Ads Center on Bathroom Use, City Complaint Data Shows Other Problems*, ABC 13 NEWS (Oct. 21, 2015), <http://abc13.com/politics/whos-benefiting-most-from-the-hero-ordinance/1012266/>

Only twenty-two states offer nondiscrimination protections: twenty states include protections for both sexual orientation and gender identity and/or expression, while two states include protections based on sexual orientation alone.<sup>87</sup> State and local policies are extremely important, especially when the federal government is slow moving on nondiscrimination reform.<sup>88</sup> However, not all states have adopted nondiscrimination reforms.<sup>89</sup> This has led to cities and municipalities passing local nondiscrimination ordinances to protect their citizens.<sup>90</sup>

One city that has passed a local nondiscrimination ordinance is Columbus, Ohio.<sup>91</sup> Columbus, Ohio has an inclusive nondiscrimination policy passed by the Columbus City Council.<sup>92</sup> Columbus Civil Rights Code Chapter 2331 makes it illegal to discriminate against individuals in employment because of race, color, religion, national origin, ancestry, sex or sexual orientation, age,

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[<https://perma.cc/C4KG-TJEP>]. Up until it was repealed, only eleven complaints had been filed under HERO. *Id.*; see also Neal Broverman, *Houston Votes to Go Backward on Equal Rights Ordinance*, ADVOCATE (Nov. 3, 2015), <http://www.advocate.com/election/2015/11/03/houston-repeals-lgbt-inclusive-hero> [<https://perma.cc/DA6W-F8HL>].

<sup>87</sup> States that prohibit employment discrimination on the basis of both sexual orientation and gender identity or expression include California (CAL GOV. CODE § 12920 (West 2011)); Colorado (COLO. REV. STAT. § 24-34-402 (2015)); Connecticut (CONN. GEN. STAT. ANN. § 46a-60 (West 2016)); Delaware (DEL. CODE ANN. tit. 19, § 711 (2015)); Hawaii (HAW. REV. STAT. ANN. § 378-2 (West 2008)); Illinois (775 ILL. COMP. STAT. 5/1-102(A) (West 2015)); Iowa (IOWA CODE ANN. § 216.6A (West 2015)); Maine (ME. REV. STAT. ANN. tit. 5, § 4572(1)(A) (2013)); Maryland (MD. CODE ANN., ST. GOV'T II § 20-602 (LexisNexis 2014)); Massachusetts (MASS. ANN. LAWS ch. 151B, § 4 (LexisNexis 2016)); Minnesota (MINN. STAT. ANN. § 363A.08 (West 2015)); Nevada (NEV. REV. STAT. ANN. § 613.330 (LexisNexis 2012)); New Jersey (N.J. STAT. ANN. § 10:5-12 (West 2016)); New Mexico (N.M. STAT. ANN. § 28-1-7 (LexisNexis 2014)); New York (N.Y. EXEC. LAW § 466.13 (McKinney 2016)); Oregon (OR. REV. STAT. § 659A.030 (2015)); Rhode Island (28 R.I. GEN. LAWS § 28-5-7 (2015)); Utah (UTAH CODE ANN. § 34A-5-106 (LexisNexis 2015)); Vermont (VT. STAT. ANN. tit. 21, § 495 (2015)); and Washington (WASH. REV. CODE ANN. § 49.60.180 (West 2008)). Some of these states choose to define gender identity under sexual orientation within their statutes in order to make the statutes more inclusive. For states that prohibit employment discrimination on the basis of sexual orientation only, see *Non-Discrimination Laws*, *supra* note 84.

<sup>88</sup> See *supra* Part II.A.

<sup>89</sup> Some states, like Kentucky, have passed bills that are essentially “license[s] to discriminate,” that would allow individuals and businesses to deny service to LGBTQ people without being penalized under local antidiscrimination ordinances. Sunnive Brydum, *Kentucky Senate Passes ‘License to Discriminate’ Bill*, ADVOCATE (Mar. 15, 2016), <http://www.advocate.com/politics/2016/3/15/kentucky-senate-passes-license-discriminate-bill> [<https://perma.cc/BV3G-9FB3>]; see also Jenna Portnoy, *Religious Freedom or License to Discriminate?*, WASH. POST (Feb. 12, 2016), [https://www.washingtonpost.com/local/virginia-politics/religious-freedom-or-license-to-discriminate/2016/02/12/5775fe9ed11411e5-abc9-ea152f0b9561\\_story.html](https://www.washingtonpost.com/local/virginia-politics/religious-freedom-or-license-to-discriminate/2016/02/12/5775fe9ed11411e5-abc9-ea152f0b9561_story.html) [<https://perma.cc/7PLP-G64P>].

<sup>90</sup> See *infra* notes 93, 95.

<sup>91</sup> COLUMBUS, OHIO, CODE OF ORDINANCES ch. 2331.03 (2015).

<sup>92</sup> *Id.*

disability, familial status, and gender identity or expression.<sup>93</sup> Additionally, Columbus has set up procedures with the Community Relations Commission to give plaintiffs the best chance of seeing their discrimination claims through.<sup>94</sup> Despite having these many measures in place, employers who violate this section are “guilty of unlawful employment practices,” which is only a first-degree misdemeanor.<sup>95</sup> In theory, an employer could continue to discriminate over and over against their employees and continue paying a nominal fine.

Employers should realize that treating their employees with respect is the best for their business and workplace environments.<sup>96</sup> Continuing to discriminate would negatively impact the business in such a way that businesses could avoid coming into Columbus and the state of Ohio, causing loss of both potential revenue and economic stimulation to other states that have nondiscrimination laws in place.<sup>97</sup>

Although more jurisdictions are generally covered under Title VII rather than under their own particular nondiscrimination ordinances, the battle for updating Title VII is a constant reminder of what is still necessary to protect transgender employees: inclusive language within Title VII for both gender identity and/or expression. Congress is unlikely to pass legislation that amends Title VII to include sexual orientation and gender identity and/or expression anytime soon.<sup>98</sup> It is now up to the federal court system to follow the EEOC’s

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<sup>93</sup>The Columbus Code of Ordinances mentions employment discrimination. *Id.* Although the state of Ohio doesn’t have a statewide nondiscrimination policy, Columbus’ policy is one of the most inclusive policies in the state that protects its citizens from unwanted discrimination. *Id.*

<sup>94</sup>If there has been an allegation of discrimination, “[t]he Community Relations Commission is authorized to investigate, mediate, conciliate and conduct hearings on complaints alleging discrimination and to work with the City Attorney to prosecute cases where discrimination has occurred.” *Discrimination Complaint Investigation*, CITY COLUMBUS, <https://www.columbus.gov/Templates/Detail.aspx?id=30113> [<https://perma.cc/N6W9-CPHK>].

<sup>95</sup>COLUMBUS, OHIO, CODE OF ORDINANCES ch. 2331.03. A misdemeanor of the first degree in Columbus carries a fine of up to \$1,000. OHIO REV. CODE ANN. § 2929.28(2)(a)(i) (West 2006).

<sup>96</sup>See Charles Radcliffe, *The Real Cost of LGBT Discrimination*, WORLD ECON. F. (Jan. 5, 2016), <https://www.weforum.org/agenda/2016/01/the-real-cost-of-lgbt-discrimination/> [<https://perma.cc/CK9V-RC7Q>] (describing how at a macro level, the cost of discrimination to a country’s economy is in the billions; for example, discrimination against LGBTQ people in India is costing the country up to \$32 billion a year in lost economic output).

<sup>97</sup>*Id.* Right next door in Pennsylvania, legislators are considering a nondiscrimination law that protects workers on the basis of both sexual orientation and gender identity. See Tim Scott & Robert Donchez, *For a Prosperous Future, Pa. Needs to Pass an LGBT Nondiscrimination Law Now: Tim Scott and Robert Donchez*, PENNLIVE (Mar. 16, 2016), [http://www.pennlive.com/opinion/2016/03/for\\_a\\_prosperous\\_future\\_pa\\_nee.html](http://www.pennlive.com/opinion/2016/03/for_a_prosperous_future_pa_nee.html) [<https://perma.cc/NEV5-KLVV>].

<sup>98</sup>See *supra* note 82 and Part II.A.3 for a discussion of the 2015 version of the Equality Act.

lead in interpreting Title VII to include gender identity as discrimination on the basis of sex.<sup>99</sup>

### C. Overview of Title VII

Title VII of the Civil Rights Act of 1964 states “[i]t shall be an unlawful employment practice . . . to discriminate against any individual . . . *because of* such individual’s . . . *sex*.”<sup>100</sup> Additionally, employers cannot “limit, segregate, or classify” employees or applicants that would deprive the “individual of employment opportunities . . . *because of* such individual’s . . . *sex*.”<sup>101</sup> The main goal of Title VII was to reduce racial discrimination in the workplace.<sup>102</sup> To find out what the legislature meant at the time of passage, the legislative history could be extremely helpful in determining what the legislature meant by the addition of the word ‘sex.’ However, Title VII’s prohibition of sex discrimination has very little legislative history.<sup>103</sup> In fact, Virginia Representative Howard W. Smith proposed an amendment to add “sex” to Title VII in only the last few hours of discussion.<sup>104</sup> In fact, legal scholars believe that the addition of sex was meant to be a “poison pill” for the bill.<sup>105</sup>

Under Title VII, a plaintiff alleging employment discrimination must show: (1) despite being qualified for the position, they suffered an adverse employment action when other similarly situated employees did not, and (2) the difference in treatment was due to their sex or sex stereotyping.<sup>106</sup> If a

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<sup>99</sup> See *infra* Part III.C.

<sup>100</sup> 42 U.S.C. § 2000e-2(a)(1) (2012) (emphasis added).

<sup>101</sup> *Id.* § 2000e-2(a)(2) (emphasis added).

<sup>102</sup> *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662 (9th Cir. 1977) (“The major concern of Congress at the time the Act was promulgated was race discrimination.”), *overruled by* *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000).

<sup>103</sup> See, e.g., *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 63–64 (1986) (“The prohibition against discrimination based on sex was added to Title VII at the last minute . . . [W]e are left with little legislative history to guide us in interpreting the Act’s prohibition . . . .”); see also *Holloway*, 566 F.2d at 662 (“Sex as a basis of discrimination was added as a floor amendment one day before the House approved Title VII, without prior hearing or debate.”); Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431, 457–58 (1966).

<sup>104</sup> 110 CONG. REC. 2577 (1964) (statement of Rep. Smith).

<sup>105</sup> See generally Robert Stevens Miller, Jr., *Sex Discrimination and Title VII of the Civil Rights Act of 1964*, 51 MINN. L. REV. 877 (1967) (discussing how the amendment can be viewed as a result of political maneuvering rather than congressional intent to bring equality to women). The addition of sex was “a poison pill that would make the bill more difficult to pass in the House.” Louis Menand, *The Sex Amendment*, NEW YORKER (July 21, 2014), <http://www.newyorker.com/magazine/2014/07/21/sex-amendment> [<https://perma.cc/P62U-BNDV>]; see also *Sex and the Civil Rights Act*, BACKSTORY, <http://backstoryradio.org/2014/07/10/sex-and-the-civil-rights-act/> [<https://perma.cc/49RN-8URH>].

<sup>106</sup> See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989) (“[T]he plaintiff who shows that an impermissible motive played a motivating part in an adverse employment

transgender plaintiff wanted to bring a claim, they would have to prove that they have received sex stereotyping in the form of gender identity. The stereotype, in this situation, is that people's biological sex automatically matches the sex they identify with.

Despite these challenges, Title VII is still the best option for transgender employees to claim employment discrimination because sex has been construed to include gender identity discrimination.<sup>107</sup> On the basis of sex, Title VII could be a new tool in the toolkit for trans plaintiffs to win on their discrimination claims.<sup>108</sup> The tides are shifting and more courts and federal agencies are interpreting "sex" within Title VII to include transgender and gender non-conforming plaintiffs.<sup>109</sup>

### III. TITLE VII INTERPRETATION: "ON THE BASIS OF SEX"

Courts have held that Title VII does not prohibit discrimination based on one's sexual orientation or gender identity.<sup>110</sup> Based on the legislative history, courts were quick to rule that Congress did not intend that the term "sex" be interpreted to include both sexual orientation and gender identity.<sup>111</sup> When examining Title VII and whether it protects transgender employees on the basis of gender identity, the change is eminent in both the times and the text. Recently, both courts and federal agencies have been interpreting Title VII to cover transgender plaintiffs on the basis of sex.<sup>112</sup> Under Title VII, the word "sex" "encompasses both sex—that is, the biological differences between men and women—and gender."<sup>113</sup> In order to introduce a sex stereotyping claim, *Price Waterhouse* is still the gold standard for transgender or gender non-conforming plaintiffs to follow.

#### A. *Price Waterhouse and Sexual Stereotyping*

In *Price Waterhouse*, the Supreme Court ruled that sex-role stereotyping can be an actionable form of employment discrimination.<sup>114</sup> Ann Hopkins had been an extremely successful senior manager at Price Waterhouse and had worked for the firm for five years.<sup>115</sup> The partners in Hopkins's office

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decision thereby places the burden on the defendant to show that it would have made the same decision in the absence of the unlawful motive.").

<sup>107</sup> See *infra* Parts III.B.2, III.C.

<sup>108</sup> See *infra* Parts III.B.2, III.C.

<sup>109</sup> See generally *infra* Part III.

<sup>110</sup> McGinley, *supra* note 52, at 732.

<sup>111</sup> *Id.* at 750–51.

<sup>112</sup> See *infra* Parts III.A, III.B.

<sup>113</sup> Schwenk v. Hartford, 204 F.3d 1187, 1202 (9th Cir. 2000); see also Smith v. City of Salem, 378 F.3d 566, 572 (6th Cir. 2004) ("The Supreme Court made clear that in the context of Title VII, discrimination because of 'sex' includes gender discrimination . . .").

<sup>114</sup> See generally *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

<sup>115</sup> *Id.* at 233.



prepared a statement in support of her candidacy for partner that highlighted her success at securing a \$25 million government contract for the firm, calling it “an outstanding performance” and that Hopkins was “virtually at the partner level.”<sup>116</sup>

Hopkins was the only woman among the eighty-eight candidates for partnership and she was “held for reconsideration the following year.”<sup>117</sup> To improve her chances for partnership, Hopkins was told she should “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.”<sup>118</sup> Additionally, various partners described her as “macho,” “overcompensat[ing] for being a woman,” and needing “a course at charm school.”<sup>119</sup>

The Court concluded that this was discrimination for failing to conform with gender-based expectations and it violated Title VII, holding that “[i]n the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.”<sup>120</sup> Although *Price Waterhouse* discriminated against Ann Hopkins for failing to conform to stereotypical gender norms, gender discrimination occurs any time an employer treats an employee differently for failing to conform to any gender-based expectations or norms.<sup>121</sup> “What matters, for purposes of . . . the *Price Waterhouse* analysis, is that in the mind of the perpetrator the discrimination is related to the sex of the victim . . . .”<sup>122</sup>

The *Price Waterhouse* case was the first of its kind to have its rationale transcend different types of plaintiffs: gender non-conforming plaintiffs could now bring claims that they were discriminated against because they did not conform to society’s view of how they should dress, walk, talk, etc.<sup>123</sup> In order to fully bridge the gap for trans employees, the claims are much stronger and more likely to make an impact on the court if they are all argued together. Federal courts should follow *Price Waterhouse* when considering sex stereotyping theories and rule in favor of the plaintiffs.<sup>124</sup>

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<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 231.

<sup>118</sup> *Id.* at 235 (quoting *Hopkins v. Price Waterhouse*, 618 F. Supp. 1109, 1117 (D.D.C. 1985)).

<sup>119</sup> *Id.*

<sup>120</sup> *Price Waterhouse*, 490 U.S. at 250. The Court noted a “catch 22” in the type of sex stereotyping that Hopkins received: “out of a job if they behave aggressively and out of a job if they do not.” *Id.* at 251.

<sup>121</sup> REBECCA J. COOK & SIMONE CUSACK, *GENDER STEREOTYPING* 19–20 (2010).

<sup>122</sup> *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000); *see also Price Waterhouse*, 490 U.S. at 254–55 (describing how “sex-linked evaluations . . . play a part in the [employer’s] decision-making process”).

<sup>123</sup> *See Price Waterhouse*, 490 U.S. at 228.

<sup>124</sup> *See infra* Part III.B.

## B. Court Interpretations of Title VII

Sex stereotyping theories have become increasingly more common throughout the lower appellate courts, including stereotyping on basic gender roles.<sup>125</sup> Courts have widely recognized the sex stereotyping theory as a valid way of establishing sex discrimination.<sup>126</sup> In various circuits, federal appellate courts have ruled on transgender plaintiffs in the realm of employment discrimination. Specifically, the 6th Circuit and the D.C. Circuit have provided guidance on how transgender or gender non-conforming employees should be treated.<sup>127</sup> Using either a sex stereotyping theory or a per se discrimination theory would greatly increase the chances of transgender plaintiffs succeeding on their discrimination claims.<sup>128</sup>

### 1. Sixth Circuit

Following *Price Waterhouse v. Hopkins*, many transgender litigants have successfully used the sex stereotyping theory.<sup>129</sup> There have been no cases before the Supreme Court regarding transgender plaintiffs and employment discrimination; however, the Sixth Circuit holds a precedent that other circuits should follow in *Smith v. City of Salem*.<sup>130</sup> In 2004, the Sixth Circuit held that

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<sup>125</sup>The First, Sixth, Seventh, Tenth, and Eleventh Circuits have reached varying conclusions as to whether discrimination based on gender identity in and of itself constitutes discrimination based on sex. See generally *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011), *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215 (10th Cir. 2007), *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004), *Rosa v. Park W. Bank & Tr. Co.*, 214 F.3d 213 (1st Cir. 2000); *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984).

<sup>126</sup>See, e.g., *Lewis v. Heartland Inns of Am., L.L.C.*, 591 F.3d 1033, 1038, 1041 (8th Cir. 2010) (concluding that evidence that a female “tomboyish” plaintiff had been fired for not having the “Midwestern girl look” suggested “her employer found her unsuited for her job . . . because her appearance did not comport with its preferred feminine stereotype”); *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 291–92 (3d Cir. 2009) (holding that an effeminate gay man who did not conform to his employer’s vision of how a man should look, speak, and act provided sufficient evidence of gender stereotyping harassment under Title VII); *Simonton v. Runyon*, 232 F.3d 33, 37 (2d Cir. 2000) (indicating a gay man would have a viable Title VII claim if “the abuse he suffered was discrimination based on sexual stereotypes, which may be cognizable as discrimination based on sex”); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 261, 261 & n.4 (1st Cir. 1999) (analyzing a gay plaintiff’s claim that his co-workers harassed him by “mocking his supposedly effeminate characteristics” and acknowledging that “a man can ground a claim on evidence that other men discriminated against him because he did not meet stereotyped expectations of masculinity”).

<sup>127</sup>See *infra* Parts III.B.1, III.B.2.

<sup>128</sup>See *infra* Part IV.

<sup>129</sup>See generally *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 100 F. Supp. 3d 594 (E.D. Mich. 2015); *Adkins v. City of New York*, 143 F. Supp. 3d 134 (S.D.N.Y. 2015); *Lewis v. High Point Reg’l Health Sys.*, 79 F. Supp. 3d 588 (E.D.N.C. 2015); *Finkle v. Howard Cnty.*, 12 F. Supp. 3d 780 (D. Md. 2014).

<sup>130</sup>See generally *Smith*, 378 F.3d 566.

“[s]ex stereotyping based on a person’s gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior.”<sup>131</sup> Furthermore, “a label . . . is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity.”<sup>132</sup>

In *Smith*, the plaintiff worked in the Salem, Ohio Fire Department for seven years as a lieutenant “without any negative incidents.”<sup>133</sup> Smith was born a male and was diagnosed with Gender Identity Disorder (GID).<sup>134</sup> After diagnosis, Smith began medical treatment and started “expressing a more feminine appearance on a full-time basis,” including while at work.<sup>135</sup> When coworkers began questioning her and making comments about her appearance,<sup>136</sup> Smith told her supervisor about her diagnosis and treatment and asked for discretion.<sup>137</sup> Discretion was not given and the City’s executive body arranged to meet to discuss Smith and how the City could terminate her employment.<sup>138</sup> Smith found out that the executive body had planned to require her “to undergo three separate psychological evaluations with physicians of the City’s choosing;” if she refused to do so, the City could terminate her for insubordination.<sup>139</sup>

To establish a *prima facie* case of employment discrimination under Title VII, Smith had to show that (1) she is a member of a protected class; (2) she suffered an adverse employment action; (3) she was qualified for the position in question; and (4) she was treated differently from similarly situated individuals outside of her protected class.<sup>140</sup> The Sixth Circuit determined that she made her *prima facie* case because she is a member of a protected class (gender, specifically the term, “sex” under Title VII); she did suffer an adverse employment action; she was qualified for the position in question; and she was treated differently from similarly situated individuals outside of her protected class.<sup>141</sup>

In Smith’s complaint, she asserted Title VII claims for retaliation and employment discrimination on the basis of sex, relying on *Price Waterhouse v. Hopkins*’ theory of sex stereotyping.<sup>142</sup> When Smith “began to express a more feminine appearance” at work on a regular basis and her co-workers

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<sup>131</sup> *Id.* at 575.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 568.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Smith*, 378 F.3d at 568. Coworkers mentioned that Smith’s “appearance and mannerisms were not masculine enough.” *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *See generally id.*

<sup>139</sup> *Id.* at 569.

<sup>140</sup> *Perry v. McGinnis*, 209 F.3d 597, 601 (6th Cir. 2000).

<sup>141</sup> Smith had been a lieutenant for seven years without any incidents. *Smith*, 378 F.3d at 568, 570–71.

<sup>142</sup> *Id.* at 571.

commented on her “appearance and mannerisms as not being masculine enough,” the court found that Smith’s “failure to conform to sex stereotypes concerning how a man should look and behave was the driving force behind” the City’s decision to let her go; thus, Smith’s claims of sex stereotyping and gender discrimination were sufficiently plead.<sup>143</sup>

In the Sixth Circuit, “discrimination against a plaintiff who is a transsexual—and therefore fails to act and/or identify with his or her gender—is no different from the discrimination directed against Ann Hopkins in *Price Waterhouse*, who, in sex-stereotypical terms, did not act like a woman.”<sup>144</sup> “Sex stereotyping based on a person’s gender non-conforming behavior is impermissible discrimination, irrespective of [its] cause . . . .”<sup>145</sup> The Sixth Circuit has set up an impressive precedent in sex stereotyping for trans plaintiffs that other appellate courts should follow. With the D.C. Circuit, the *Schroer* case provides a newer precedent in per se discrimination theory.

## 2. D.C. Circuit

Within the D.C. Circuit, the U.S. District Court for the District of Columbia found in favor of a plaintiff who was rescinded a job offer with the Library of Congress once the Library found out she was transgender.<sup>146</sup> *Schroer v. Billington* was a landmark decision in which the Court found that discrimination against a person for transitioning is sex discrimination under federal law.<sup>147</sup> This marks the first time that gender identity discrimination was ruled per se sex discrimination by a federal court.

Diane Schroer was born male.<sup>148</sup> Before changing her legal name or transitioning, Schroer applied for a terrorism specialist position at the Library of Congress in August 2004.<sup>149</sup> Schroer was well-qualified, including twenty-five years of service in the U.S. Armed Forces where she retired as a Colonel.<sup>150</sup> Schroer had been diagnosed with Gender Identity Disorder and was planning her transition when she applied for the position.<sup>151</sup> She applied for the position using her legal name, David J. Schroer, as she had not yet started to present herself as a woman.<sup>152</sup> In October 2004, Schroer had an interview with three CRS staff members and “attended the interview dressed

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<sup>143</sup> *Id.* at 572.

<sup>144</sup> *Id.* at 575. For a greater discussion of *Price Waterhouse v. Hopkins* and its effects on transgender plaintiffs’ claims, see *supra* Part III.A.

<sup>145</sup> *Smith*, 378 F.3d at 575.

<sup>146</sup> See *Schroer v. Billington*, 577 F. Supp. 2d 293, 295 (D.D.C. 2008); *Schroer v. Library of Congress*, ACLU (Nov. 19, 2009), <https://www.aclu.org/cases/schroer-v-library-congress> [<https://perma.cc/2ZFX-MZ2P>].

<sup>147</sup> *Schroer v. Library of Congress*, *supra* note 146.

<sup>148</sup> *Schroer*, 577 F. Supp. 2d at 293.

<sup>149</sup> *Id.*

<sup>150</sup> See *Schroer v. Library of Congress*, *supra* note 146.

<sup>151</sup> *Schroer*, 577 F. Supp. 2d at 295.

<sup>152</sup> *Id.*

in traditionally masculine attire.”<sup>153</sup> Of the eighteen people that interviewed, Schroer scored the highest.<sup>154</sup> After the staff’s unanimous recommendation, Schroer was offered and, subsequently, accepted the job.<sup>155</sup>

Schroer later went to lunch with Charlotte Preece, a member of the staff that interviewed Schroer.<sup>156</sup> Schroer told Preece “that she was transgender, that she would be transitioning from male to female, and that she would be starting work as ‘Diane.’”<sup>157</sup> Preece asked, “Why in the world would you want to do that?” And the conversation then turned into whether or not Schroer would need a different security clearance in order to do the job.<sup>158</sup>

The “ultimate question” in Title VII cases is “whether [the] plaintiff has proved ‘that the defendant intentionally discriminated against [her]’” because of a protected characteristic.<sup>159</sup> Gender identity is not a protected characteristic in Title VII; however, sex is.<sup>160</sup> In *Schroer*, several of the Library’s asserted reasons (security clearance concerns, trustworthiness, distraction) for not hiring Schroer “were not its ‘true reasons, but were . . . pretext[s] for discrimination.’”<sup>161</sup> The judge also ruled that discrimination on the basis of gender identity is discrimination on the basis of sex because “the Library’s refusal to hire Schroer after being advised that she planned to change her anatomical sex by undergoing sex reassignment surgery was *literally* discrimination ‘because of . . . sex.’”<sup>162</sup> The evidence in *Schroer*, particularly “that the Library was enthusiastic about hiring David Schroer” but then revoked the offer upon learning that David would become Diane, always pointed to discrimination on the basis of sex.<sup>163</sup>

These cases in various circuits have started a shift in attitudes surrounding transgender rights. As a result, federal agencies and departments have started to interpret Title VII to protect transgender workers in employment discrimination claims.<sup>164</sup> Most recently, Attorney General Loretta Lynch has

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<sup>153</sup> *Id.* at 295–96.

<sup>154</sup> *Id.* at 296.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Schroer*, 577 F. Supp. 2d at 296.

<sup>158</sup> *Id.* at 296–97. Preece met with various CRS officials to see if Diane’s security clearance would be stalled because Schroer already had clearance under her birth name of David. *Id.* at 297–99. Preece later called Schroer and rescinded the job offer. *Id.*

<sup>159</sup> *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993) (quoting *Tex. Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981)).

<sup>160</sup> 42 U.S.C. § 2000e-2(a) (2012).

<sup>161</sup> *Schroer*, 577 F. Supp. 2d at 300 (alterations in original) (quoting *Burdine*, 450 U.S. at 253).

<sup>162</sup> *Id.* at 307–08.

<sup>163</sup> *Id.* at 306.

<sup>164</sup> *See infra* Part III.C. The Department of Justice and the Department of Labor have also followed this rationale. *See* Memorandum from Attorney Gen. Eric Holder on the Treatment of Transgender Emp’t Discrimination Claims Under Title VII of the Civil Rights Act of 1964 to U.S. Attorneys & Heads of Dep’t Components (Dec. 15, 2014),

laid the groundwork for the Department of Justice to include sexual orientation discrimination claims as sex discrimination under Title VII.<sup>165</sup> Agencies, including the Equal Employment Opportunity Commission (EEOC), have interpreted both gender identity discrimination and sexual orientation discrimination<sup>166</sup> as discrimination on the basis of sex under Title VII.<sup>167</sup> The EEOC's decisions holding gender identity discrimination as sex discrimination should hold great weight with the courts when they are faced with similar legal challenges.

### C. Agency Interpretations of Title VII

The Equal Employment Opportunity Commission was created within the Civil Rights Act of 1964.<sup>168</sup> With this new commission, individuals were now able to reconcile their cases before filing in court. Subsequent laws allowed the EEOC to sue in federal court if it found cases of employment

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<http://www.justice.gov/file/188671/download> [<https://perma.cc/K4CJ-2MUS>]; see also Exec. Order No. 13672, 79 Fed. Reg. 42,971 (July 21, 2014); U.S. Dep't of Labor Directive 2014-02 (Aug. 19, 2014); Thomas E. Perez, Sec'y of Labor, *Another Step Toward Equality for LGBT Workers*, WHITE HOUSE (Apr. 8, 2015), <https://www.whitehouse.gov/blog/2015/04/08/another-step-toward-equality-lgbt-workers> [<https://perma.cc/HZ6A-J43P>].

<sup>165</sup>Loretta E. Lynch, Attorney Gen., Remarks at Press Conference Announcing Complaint Against the State of North Carolina to Stop Discrimination Against Transgender Individuals (May 9, 2016), <https://www.justice.gov/opa/speech/attorney-general-loretta-e-lynch-delivers-remarks-press-conference-announcing-complaint> [<https://perma.cc/KC5W-J3NU>].

<sup>166</sup>The EEOC has recently ruled that discrimination on the basis of sexual orientation is sex discrimination under Title VII. *Baldwin v. Foxx*, Appeal No. 0120133080, 2015 WL 4397641, at \*6 (E.E.O.C. July 15, 2015). Sexual orientation is different than gender identity. See *Sexual Orientation and Gender Identity Definitions*, *supra* note 19. In the simplest of terms, “[s]exual orientation is who you go to bed with . . . but gender identity is who you go to bed as.” Mark Kathryn Burke, *Gender Identity Versus Attraction: ‘It’s Apples and Oranges’ Says Bruce Jenner*, ABC NEWS (Apr. 24, 2015) (quoting Dr. Norman Spack), <http://abcnews.go.com/Health/gender-identity-versus-attraction-apples-oranges-bruce-jenner/story?id=30570293> [<https://perma.cc/7ETD-HH2U>].

<sup>167</sup>Because of the length constraints of this Note, sexual orientation discrimination as sex discrimination cannot be fully discussed here. For an in-depth discussion of sexual orientation discrimination under Title VII, see Chris Geidner, *Justice Department Makes Move Toward Backing Sexual Orientation Claims Under Existing Law*, BUZZFEED NEWS (Jan. 28, 2016), <http://www.buzzfeed.com/chrisgeidner/justice-department-makes-move-toward-backing-sexual-orientation-claims> [<https://perma.cc/7C98-TKTH>]; Trudy Ring, *Antigay Discrimination May Already Be Illegal, According to Justice Dept. Brief*, ADVOCATE (Jan. 29, 2016), <http://www.advocate.com/politics/2016/1/29/antigay-discrimination-may-already-be-illegal-according-justice-department-brief> [<https://perma.cc/MBA7-D29P>]; see also Loretta E. Lynch, *supra* note 165.

<sup>168</sup>Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

discrimination.<sup>169</sup> Recently, the EEOC has ruled that both sexual orientation and gender identity discrimination is discrimination on the basis of sex for federal employees.<sup>170</sup> Although Title VII does not explicitly state sexual orientation or gender identity in the covered categories, the EEOC has been at the forefront of the law's sudden shift. The administrative shift should be viewed by the courts as slow but steady progress.

In 2012, the EEOC ruled that transgender discrimination is discrimination on the basis of sex for federal employees.<sup>171</sup> *Macy v. Holder* is a landmark case in the realm of transgender employment discrimination precedent.<sup>172</sup> Mia Macy worked as a police detective in Phoenix, Arizona.<sup>173</sup> In 2010, she was relocating to San Francisco and was searching for a job.<sup>174</sup> At this time, she presented her appearance as a man, but had full plans to transition to female.<sup>175</sup> Her supervisor in Phoenix mentioned that the federal Bureau of Alcohol, Tobacco, and Firearms (ATF) had an opening for a ballistics expert in the Walnut Creek crime laboratory, a position for which Macy was well-qualified.<sup>176</sup> While still presenting as a man, Macy spoke with the Director in the office by telephone about her qualifications, and the Director told Macy that she would get this position, barring any problems in her background check.<sup>177</sup>

In March 2011, Macy informed Aspen, the contractor responsible for her hire, by email that she was transitioning from male to female and that they should notify the Director.<sup>178</sup> In April 2011, Macy learned that the agency had told the Director of her transition and she received an email five days later that the position at Walnut Creek was no longer available because of budget cuts.<sup>179</sup> On May 10, 2011, Macy "contacted an agency EEO counselor to discuss her concerns," finding out "that the position at Walnut Creek had not been cut but, rather, that someone else had been hired for the position."<sup>180</sup> The counselor informed Macy that the Agency decided to hire another applicant "because that person was farthest along in the background investigation."<sup>181</sup> On June 13, 2011, Macy filed a complaint with the EEOC stating she was

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<sup>169</sup> Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103, 106 (codified as amended in scattered sections of 42 U.S.C.).

<sup>170</sup> See Geidner, *supra* note 167; Ring, *supra* note 167; see also Loretta E. Lynch, *supra* note 165.

<sup>171</sup> *Macy v. Holder*, Appeal No. 0120120821, 2012 WL 1435995, at \*4 (E.E.O.C. Apr. 20, 2012).

<sup>172</sup> See generally *id.*

<sup>173</sup> *Id.* at \*1.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Macy*, 2012 WL 1435995, at \*1.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* at \*2.

<sup>181</sup> *Id.*

discriminated against because of her gender identity and because of sex stereotyping.<sup>182</sup>

When Macy received a letter from the EEOC on October 26, 2011, it informed her that “claims of discrimination on the basis of gender identity stereotyping cannot be adjudicated before the [EEOC].”<sup>183</sup> Macy sent a letter on November 8, 2011, which disagreed with the Agency’s assertion that the Title VII and EEOC process could not entirely adjudicate her claim.<sup>184</sup> Macy argued “that the discrimination against [her] was based on ‘separate and related’ factors, including on the basis of sex, sex stereotyping, sex due to gender transition/change of sex, and sex due to gender identity.”<sup>185</sup> Responding to Macy’s letter, the Agency issued a correction to the Letter of Acceptance; the Agency would accept the complaint “on the basis of sex (female)” under Title VII and the EEOC’s Part 1614 regulations.<sup>186</sup>

In order to resolve confusion in a recurring legal issue, the EEOC ensures that uniform standards are implemented defining the nature of employment discrimination under the statutes it enforces.<sup>187</sup> To this end, the Commission found that claims of discrimination that are based on gender identity are cognizable under the sex discrimination prohibition of Title VII.<sup>188</sup> When an employer discriminates against someone because the person is transgender, the employer engages in disparate treatment “related to the sex of the victim.”<sup>189</sup> An employer is making a “gender-based evaluation,” violating *Price Waterhouse*, if it discriminates against its employee because he or she expresses

his or her gender in a non-stereotypical fashion, because the employer is uncomfortable with the fact that the person has transitioned or is in the process of transitioning from one gender to another, or because the employer simply does not like that the person is identifying as a transgender person.<sup>190</sup>

As of 2016, the U.S. Supreme Court has yet to interpret Title VII as protecting transgender employees. However, agencies, like the EEOC, should be given great deference when it comes to their interpretation of statutes.<sup>191</sup> Courts may “lack the resources and expertise to understand and evaluate fully

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<sup>182</sup> *Id.*

<sup>183</sup> *Macy*, 2012 WL 1435995, at \*2.

<sup>184</sup> *Id.* at \*3.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> Exec. Order No. 12067, 3 C.F.R. 206 (1978).

<sup>188</sup> *Macy*, 2012 WL 1435995, at \*4.

<sup>189</sup> *See* Schwenk v. Hartford, 204 F.3d 1187, 1202 (9th Cir. 2000).

<sup>190</sup> *Macy*, 2012 WL 1435995, at \*7.

<sup>191</sup> Courts should defer to agency interpretations of statutes unless they are unreasonable. This is known as *Chevron* deference. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).



the consequences of complex statutory schemes. Sometimes agencies are simply better at assessing and applying alternative statutory interpretations.”<sup>192</sup> As favorable agency interpretations of Title VII grow in number for trans plaintiffs, courts are likely to follow in the same wave.<sup>193</sup>

#### IV. BRIDGING THE TITLE VII GAP: *PRICE WATERHOUSE* AND BEYOND

Courts have used the *Price Waterhouse* theory of sexual stereotyping to interpret Title VII’s prohibition of discrimination because of sex as barring discrimination based on a perceived failure to conform to the socially constructed characteristics of men and women.<sup>194</sup> Many courts have also recognized that transgender or gender identity discrimination claims can and may be established under the theory of sex stereotyping.<sup>195</sup> By pursuing both sex stereotyping theory and per se theory claims, transgender plaintiffs are more likely to be successful in their employment discrimination cases.

Title VII is unlikely to be amended by Congress to include gender identity and/or expression. In order to bridge the Title VII gap and protect all citizens in the realm of employment, states lacking these protections for gender identity and/or expression should pass comprehensive nondiscrimination reform. Additionally, the federal court system should follow the EEOC’s rationale and include transgender plaintiffs under the Title VII distinction of “sex.”<sup>196</sup>

##### *A. Transgender Plaintiffs Should Pursue More Sex Stereotyping Claims, Both Descriptive and Prescriptive.*

*Price Waterhouse* laid the groundwork for sex stereotyping claims.<sup>197</sup> With respect to transgender plaintiffs, a motivating factor for the discrimination must include a consideration of gender stereotypes. Using substantiated case law, a transgender plaintiff has some options, depending on the facts and circumstances surrounding their claim. The strongest of their claims will be a theory of sexual stereotyping, as first introduced in *Price Waterhouse*.<sup>198</sup>

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<sup>192</sup> Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 COLUM. L. REV. 1235, 1249 (2007).

<sup>193</sup> See *infra* Part IV.

<sup>194</sup> *Macy*, 2012 WL 1435995, at \*7.

<sup>195</sup> See, e.g., *Glenn v. Brumby*, 663 F.3d 1312, 1320–21 (11th Cir. 2011); *Barnes v. City of Cincinnati*, 401 F.3d 729, 738 (6th Cir. 2005); *Smith v. City of Salem*, 378 F.3d 566, 572 (6th Cir. 2004); *Rosa v. Park W. Bank & Tr. Co.*, 214 F.3d 213, 215–16 (1st Cir. 2000).

<sup>196</sup> See generally *Macy*, 2012 WL 1435995.

<sup>197</sup> See *supra* Part III.A.

<sup>198</sup> See generally *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

There are two types of stereotypes involved in a stereotyping theory claim: descriptive stereotypes and prescriptive stereotypes. Descriptive stereotypes tell a stock story about how people with certain characteristics behave, what they prefer, and where their competencies lie.<sup>199</sup> For example, this can be shown as describing an entire gender as something: “women are x.” Prescriptive stereotypes tell a story about how members of a certain group should think, feel, and behave.<sup>200</sup> These are basic value judgments about what people should be or how people should act: “women should act in x fashion.” If someone has been penalized because they have failed to meet the gender-based expectations for how people of that gender should behave, that plaintiff will have an actionable claim in court under Title VII.

The stereotyping in *Price Waterhouse* is considerably similar to stereotyping that trans plaintiffs face. In *Price Waterhouse*, Ann Hopkins was a woman in a position of power trying to elevate herself and her career to the next level.<sup>201</sup> As such, she had to be tough and formidable; however, her peers saw it as “overcompensat[ing]” and “macho.”<sup>202</sup> Hopkins was not playing the role of a “token woman.”<sup>203</sup> Token women are vulnerable to typecasting: for example, women can be perceived in a packaged way, as a mother, sister, seductress, or iron maiden. For the purposes of this analogy, Ann Hopkins could be considered an iron maiden; when Hopkins behaved in a way that was stereotypically male (aggressive, competitive, ambitious, independent), she was open to the negative criticism painting her as uncaring or as lacking understanding.<sup>204</sup> When an employer (Price Waterhouse) acted on the basis that women cannot or must not be aggressive (sex stereotypes), they have illegally acted on the basis of gender when it came to making an employment decision.<sup>205</sup>

By analogy, transgender plaintiffs can also prove that employers acted on the basis of gender when it came to making an employment decision. For example, if an employee transitions from female to male and the employee is discriminated against, this is an actionable Title VII claim because the employee is not conforming to traditional stereotypes and was discriminated against for the gender nonconforming behavior. Additionally, plaintiffs can prove sexual stereotyping alongside disparate treatment Title VII claims. By

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<sup>199</sup> See Diana Burgess & Eugene Borgida, *Who Women Are, Who Women Should Be: Descriptive and Prescriptive Gender Stereotyping in Sex Discrimination*, 5 PSYCHOL. PUB. POL'Y & L. 665, 668–69 (1999).

<sup>200</sup> *Id.* at 665.

<sup>201</sup> *Price Waterhouse*, 490 U.S. at 231–32.

<sup>202</sup> *Id.* at 235.

<sup>203</sup> For a definition of “token woman,” see generally ROSABETH MOSS KANTER, *MEN AND WOMEN OF THE CORPORATION* (1977).

<sup>204</sup> *Id.*

<sup>205</sup> *Price Waterhouse*, 490 U.S. at 250.

analogy, two married straight men, one cisgender and the other transgender,<sup>206</sup> have a picture of their wives on their desks; only the trans man is suspended for displaying the picture. Had the transgender man been cisgender, the employee can allege that the employer would not have taken an adverse action against him. The trans man would then have an actionable claim until Title VII because the employer did not suspend a similarly situated employee for being with a woman when the employer suspended the trans man for being with a woman.<sup>207</sup>

Being able to pursue both descriptive and prescriptive stereotypes, like those found in *Price Waterhouse*, gives transgender plaintiffs more to work with in their legal battles. Having an employer analyze a transgender employee's individual characteristics and then determining whether or not the employee could perform the respective job duties is exactly what *Price Waterhouse* is trying to protect against. If a transgender employee has been assessed as both an individual and on what an individual *should* look like, behave like, etc., the sex stereotyping theory furthers their legal argument of employment discrimination. These prescriptive stereotypes are only applied to employees who violate the norm in a specific way. The *Price Waterhouse* Court insisted that "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group."<sup>208</sup> Transgender employees should be evaluated on one characteristic only: whether or not they are able to do their job based solely on their qualifications.

In the Sixth Circuit, both *Smith v. City of Salem*<sup>209</sup> and *Barnes v. City of Cincinnati*<sup>210</sup> have established that transgender people can bring a sex

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<sup>206</sup>In this example, sexual orientation and gender identity must remain separate. Both men have a sexual orientation of heterosexual, but their gender identities are different, resulting in disparate treatment. For the difference between sexual orientation and gender identity, see *Sexual Orientation and Gender Identity Definitions*, *supra* note 19.

<sup>207</sup>This example parallels the example in the *Baldwin* case before the EEOC:

[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. *See Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978) ("Such a practice does not pass the simple test of whether the evidence shows 'treatment of a person in a manner which but for that person's sex would be different.'").

*Baldwin v. Foxx*, Appeal No. 0120133080, 2015 WL 4397641, at \*7 (E.E.O.C. July 15, 2015).

<sup>208</sup>*Price Waterhouse*, 490 U.S. at 251.

<sup>209</sup>For a discussion of *Smith v. City of Salem*, see *supra* Part III.B.1.

<sup>210</sup>In *Barnes*, a police officer "was a male-to-female transsexual who was living as a male while on duty but often lived as a woman off duty." *Barnes v. City of Cincinnati*, 401 F.3d 729, 733 (6th Cir. 2005). He had a reputation of being a "cross-dresser." *Barnes* was

stereotyping claim of sex discrimination under *Price Waterhouse*.<sup>211</sup> This precedent should be adopted by other circuits in order to fully protect the rights of the plaintiff. Arguing for a sex stereotyping theory should hold considerable weight with the federal court system. Having the solid foundation under *Price Waterhouse* only strengthens sexual stereotyping claims. If transgender plaintiffs want to fully cover their bases, per se theory claims should also be argued. Combining sex stereotyping and per se theory claims are the best course of action when bringing an employment discrimination claim. This brings the highest likelihood of victory to the transgender plaintiff. Regardless of whether or not a person has transitioned, per se theory claims help transgender plaintiffs. It will always be a violation of Title VII to discriminate on the basis of transgender status.<sup>212</sup>

*B. Gender Identity Discrimination Is Per Se Sex Discrimination; as Such, Transgender Plaintiffs Should Pursue Per Se Theory Claims in Court.*

The sex stereotyping claims have been around for years and are better when responding to more fluid situations of employment discrimination.<sup>213</sup> Per se theory claims are newer to the realm of gender identity employment discrimination. When trans plaintiffs have actually transitioned, the per se theory is of the utmost necessity because the discrimination is likely to be based on the gender identity of the individual. If someone is discriminated against on the basis of gender identity, it is per se sex discrimination; sex and gender have been used in fluid terms.<sup>214</sup> Because gender identity discrimination is per se sex discrimination, it is always violating Title VII to discriminate on the basis of gender identity.<sup>215</sup>

Whether a transgender employee relies on a “sex stereotyping” theory or a “sex discrimination per se” theory, the employee’s claim is cognizable under

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demoted from his rank as sergeant and ended up filing suit against the city of Cincinnati for sex discrimination. *Id.* The Sixth Circuit held that Barnes had stated a claim for relief pursuant to Title VII’s prohibition of sex discrimination because “his failure to conform to sex stereotypes concerning how a man should look and behave was the driving force behind defendant’s actions.” *Id.* at 737.

<sup>211</sup> EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 100 F. Supp. 3d 594, 603 (E.D. Mich. 2015).

<sup>212</sup> A weakness in the sex stereotyping approach is that plaintiffs must not focus on who they are, but on how they act. It pushes plaintiffs into a box to prove that the person discriminating against them was doing so because of the failure to conform to gender stereotypes. It may ask the court to avoid the gender identity of the plaintiff all together in order to succeed on the claim.

<sup>213</sup> See generally *Price Waterhouse*, 490 U.S. 228.

<sup>214</sup> Schroer v. Billington, 577 F. Supp. 2d 293, 306–07 (D.D.C. 2008).

<sup>215</sup> See *supra* Part IV.B.

Title VII.<sup>216</sup> This is apparent through the court's reasoning in *Schroer*.<sup>217</sup> The phrase "because of sex" could be interchangeable with almost any of the other characteristics (race, national origin, religion, etc.) to show how an employee should be treated. The following is an example from *Schroer*: Say an employee is fired after converting from Christianity to Judaism. An employer could say that there is no bias or animus toward Christians or Jews but only those who "convert." This example would be a clear case of discrimination "because of religion" under Title VII. A court could not and should not accept that only those with their initial religion are covered by Title VII. "Discrimination 'because of religion' easily encompasses discrimination because of a *change* of religion."<sup>218</sup>

Similarly, like the Court referenced in *Schroer*, a situation may arise where a transgender employee has been fired after she has transitioned from male to female. Her employer stated that there was no animus towards men or women, only those who transition from one sex to another. Now, the employee has "changed" her sex (through transition or other means), and faces discrimination because of the decision to transition (stopped presenting as a man and started presenting as a woman). By analogy, the discrimination "because of sex" also easily encompasses discrimination because of a change in sex. In this way, discrimination on the basis of gender identity is per se sex discrimination.

In order to fully encompass a plaintiff's claims, both sex stereotyping and per se claims can be argued. Courts should adopt the per se theory when a plaintiff has transitioned, whether by surgery or by hormone therapy. Still, the per se theory may not help someone that chooses not to undergo a transition. When plaintiffs do not transition, *Price Waterhouse* and the sex stereotyping theory is still available. If the facts of the complaint allow, transgender employees should argue for per se sex discrimination and courts should fully adopt the per se theory, as outlined in *Schroer*.

### *C. The Passage of the Equality Act and State Nondiscrimination Protections Will Fully Protect Transgender Employees in the Workplace.*

When arguing Title VII claims, transgender plaintiffs must be able to show that discrimination occurred either through sex stereotyping or that discrimination occurred on the basis of sex.<sup>219</sup> Having both theories available

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<sup>216</sup> EEOC Ruling Provides Guidance on Applying Title VII's Discrimination Prohibition to Transgender Employees, DUANEMORRIS (May 7, 2012), [http://www.duanemorris.com/alerts/EEOC\\_ruling\\_applying\\_title\\_vii\\_discrimination\\_prohibition\\_transgender\\_employees\\_4448.html](http://www.duanemorris.com/alerts/EEOC_ruling_applying_title_vii_discrimination_prohibition_transgender_employees_4448.html) [<https://perma.cc/2DPA-6C8L>].

<sup>217</sup> See *supra* Part III.B.2.

<sup>218</sup> This is the example given by the D.C. District Court in *Schroer*, 577 F. Supp. 2d at 306.

<sup>219</sup> See *supra* Parts IV.A, IV.B.

to plaintiffs is helpful after discrimination has occurred, but there remain few options for what can be done before discrimination happens to a transgender employee, especially in states that do not have nondiscrimination protections.<sup>220</sup> In order for transgender employees to be fully protected in the workplace, both the Equality Act and state nondiscrimination reforms are desperately needed. Having an overall comprehensive approach to protecting the transgender community will lessen the chance that transgender employees will experience discrimination.

1. *Passing the Equality Act Would Amend Title VII and Provide Federal Nondiscrimination Protections to Transgender Employees.*

The Equality Act, in its current form, would amend Title VII to explicitly include gender identity in its list of protected categories.<sup>221</sup> An explicit federal law is needed to give transgender employees and employers certainty and peace of mind that discrimination on the basis of gender identity would be prohibited.<sup>222</sup> Currently, the Equality Act is stalled in a House subcommittee; however, it would strike a balance between transgender employees' rights and religious exemptions that religious organizations and schools already have.<sup>223</sup>

For decades, the LGBTQ community fought for the right to marry, which is now enjoyed by LGBTQ couples in all 50 states.<sup>224</sup> However, being able to get married does not solve the legal discrimination being experienced by transgender Americans in the workplace. An employee, regardless of gender identity, should never have to worry whether they will be fired for being who they are.

Being out at work is a crucial aspect of life for many LGBTQ employees. If these employees are not "out," they risk being accidentally or purposefully "outed" by a coworker, which could turn into their last day at work. If a coworker or boss asks the employee about weekend plans or where they were going on their vacation time, a trans employee may have to lie in order to cover up their identity to avoid harassment or discrimination. The employee may also avoid socializing with their coworkers, in order to avoid uncomfortable questions. They may feel as if they cannot trust their employer or may be more isolated from their coworkers because of it.

Additionally, if a trans employee hides who they are at work, they could be missing out on important health care benefits for both themselves and their partners. Only 38% of transgender workers are out at work; this speaks more to the unwelcoming work environments trans employees are experiencing

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<sup>220</sup> See *supra* notes 87, 89.

<sup>221</sup> Equality Act, H.R. 3185, 114th Cong. (2015).

<sup>222</sup> See Ford, *supra* note 69.

<sup>223</sup> See generally Johnson, *supra* note 66.

<sup>224</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2591 (2015).

every single day.<sup>225</sup> The Equality Act would protect trans employees with legal backing (and some piece of mind) that they can be out in the workplace and be totally honest with their employer, which would lead to higher levels of workplace satisfaction.

Unfortunately, even with bipartisan support, the Equality Act will most likely meet a fate similar to ENDA's before it.<sup>226</sup> Although it would be the most comprehensive federal policy to combat LGBTQ discrimination in a variety of areas and has over 140 cosponsors in the House and thirty-nine in the Senate,<sup>227</sup> it still remains unlikely to pass due to the current Republican-dominated Congress.<sup>228</sup> If a federal nondiscrimination bill will not come to fruition, the burden then shifts to the states and municipalities to create their own protections. Certain states do have protections for transgender employees, but not all of them are effective.<sup>229</sup> While Congress drags its feet, individual states have a greater opportunity to protect their citizens by passing comprehensive nondiscrimination reform at the state level. State legislatures should step up and take the initiative to pass nondiscrimination laws that include gender identity and/or expression to protect transgender employees.

## *2. State Legislatures Should Pass a Comprehensive Nondiscrimination Law to Protect All of Their Citizens.*

If and when Congress does not pass the Equality Act, state legislatures must be ready to act to pass comprehensive nondiscrimination laws. State representatives and senators should realize how important it is to protect transgender employees in order to encourage business growth in their respective states. Nondiscrimination protections help states become business friendly and make sure that there is a balance struck between protections from discrimination and religious freedom. Passing comprehensive

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<sup>225</sup> MOVEMENT ADVANCEMENT PROJECT ET AL., A BROKEN BARGAIN: DISCRIMINATION, FEWER BENEFITS AND MORE TAXES FOR LGBT WORKERS 26 (June 2013), <http://www.lgbtmap.org/file/a-broken-bargain-full-report.pdf> [https://perma.cc/G9BQ-2W7H].

<sup>226</sup> The 2015 version of the Equality Act was introduced on July 23, 2015. *H.R.3185 – Equality Act*, CONGRESS.GOV, <https://www.congress.gov/bill/114th-congress/house-bill/3185/committees> [https://perma.cc/3ZBM-HWVA]. On September 8, 2015, the bill was referred to the House Subcommittee on the Constitution and Civil Justice. *Id.* There has been no movement on the bill since. *See* H.R. 3185.

<sup>227</sup> *HRC Endorses Comprehensive New Legislation that Ensures Full Federal Equality for LGBT Americans*, HUM. RTS. CAMPAIGN (July 23, 2015), <http://www.hrc.org/blog/hrc-endorses-comprehensive-new-legislation-that-ensures-full-federal-equali> [https://perma.cc/5BXN-XHW4].

<sup>228</sup> *See* Philip Bump, *It's All but Official: This Will Be the Most Dominant Republican Congress Since 1929*, WASH. POST (Nov. 5, 2014), <https://www.washingtonpost.com/news/the-fix/wp/2014/11/05/its-all-but-official-this-will-be-the-most-dominant-republican-congress-since-1929> [https://perma.cc/CA3V-3CBR].

<sup>229</sup> *See supra* Part II.B.

nondiscrimination laws helps states become more economically viable and protects citizens from unjust discrimination and harassment in the workplace.

States are losing potentially billions in revenue due to their lack of nondiscrimination protections.<sup>230</sup> If discrimination is forcing out otherwise qualified transgender employees, it pushes them into unemployment and causes major turnover costs for the employer.<sup>231</sup> Businesses also become liable for lawsuits in states lacking nondiscrimination laws. They are more prone to this litigation, raising legal costs for potential businesses. Additionally, if discriminatory hiring is taking place, transgender employees could get paid less money, which also leads to underemployment or unemployment and a higher wage gap than their cisgender counterparts. States also want to be pro-business in their policies; passing nondiscrimination laws is pro-business, as it will greatly increase revenue and keep skilled and qualified transgender workers within their state.<sup>232</sup>

A common concern with nondiscrimination laws is that special rights, privileges, or benefits will be conferred upon LGBTQ people with the passage of these bills. Religious organizations and schools have had religious exemptions placed within bills before.<sup>233</sup> There is nothing special about why

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<sup>230</sup> See CROSBY BURNS, CTR. FOR AM. PROGRESS, THE COSTLY BUSINESS OF DISCRIMINATION: THE ECONOMIC COSTS OF DISCRIMINATION AND THE FINANCIAL BENEFITS OF GAY AND TRANSGENDER EQUALITY IN THE WORKPLACE 1 (Mar. 2012), [https://cdn.americanprogress.org/wp-content/uploads/issues/2012/03/pdf/lgbt\\_biz\\_discrimination.pdf](https://cdn.americanprogress.org/wp-content/uploads/issues/2012/03/pdf/lgbt_biz_discrimination.pdf) [<https://perma.cc/5E4B-H4U8>] (describing how the United States is losing up to \$64 billion a year in costs associated with “losing and replacing more than 2 million American workers who leave their jobs” due to discrimination, and that 90% of transgender individuals report experiencing some form of harassment, mistreatment, or discrimination on the job).

<sup>231</sup> Replacing a departing employee could cost the employer somewhere between \$5,000 and \$10,000 for an hourly employee; it could also cost the employer between \$75,000 and \$211,000 for a lost executive that makes \$100,000 a year. *Id.* at 2; see also Crosby Burns, *For Businesses, Anti-LGBT Discrimination Adds to Costs, But Fairness Adds to Profits*, THINKPROGRESS (Mar. 22, 2012), <http://thinkprogress.org/lgbt/2012/03/22/450020/for-businesses-anti-lgbt-discrimination-adds-to-costs-but-fairness-adds-to-profits/> [<https://perma.cc/W73H-3MLC>].

<sup>232</sup> The state of Ohio ranked 23rd in CNBC’s “Top States for Business 2015,” which ranks all fifty states on how business friendly they are. *America’s Top States for Business 2015*, CNBC, <http://www.cnbc.com/2015/06/24/americas-top-states-for-business.html> [<https://perma.cc/4VTA-VSYH>]. Having nondiscrimination protections helped states gain quality of life points to move up in the rankings. See Scott Cohn, *America’s Top States for Business 2015: Our Methodology*, CNBC (May 27, 2015), <http://www.cnbc.com/2015/05/27/americas-top-states-for-business-2015-our-methodology.html> [<https://perma.cc/Y3QG-NKER>]. Ohio fell five spots to 23rd and ranked near the bottom for quality of life. *Compare America’s Top States for Business 2015, supra, with America’s Top States for Business 2014*, CNBC, <http://www.cnbc.com/2014/06/24/americas-top-states-for-business.html> [<https://perma.cc/TE7F-A2K3>]. Part of this is due to the lack of inclusive nondiscrimination protections. See Cohn, *supra*.

<sup>233</sup> State statutes have broad religious exemptions surrounding nondiscrimination. See e.g., DEL. CODE ANN. tit. 19, § 711(i)(1)–(2) (2015); NEV. REV. STAT. ANN. § 613.350(4)



people should not discriminate against one another in the realm of employment. Extending nondiscrimination laws does not bestow special rights; rather, it lets more people enjoy the protections that so many Americans take for granted in the workplace. In the twenty-eight states that have yet to pass a nondiscrimination law to protect LGBTQ individuals from workplace discrimination, the inclusion of a religious exemption in future legislation may help to strike a balance in the decades-long battle between religious freedom and civil rights concerns.<sup>234</sup>

State legislators should be taking notes from the Equality Act cosponsors by proposing and supporting nondiscrimination policies that will continue to strengthen their workforce. Combining nondiscrimination laws with other workplace policies gives transgender employees an equal opportunity to do their jobs and have an excellent work–life balance, while still providing for their families. Nondiscrimination reform is desperately needed. These twenty-eight states without protections<sup>235</sup> need to step up and do what is right on behalf of their citizens: pass nondiscrimination reforms to protect all transgender employees.<sup>236</sup>

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(LexisNexis 2013); N.J. STAT. ANN. § 10:5–12(a) (West 2016). A major issue in the LGTBQ community is access to bathrooms, which have also had religious exemptions applied to them. For a discussion of anti-LGBTQ religious exemptions, see *Anti-LGBT Religious Exemption Legislation Across the Country*, ACLU, <https://www.aclu.org/anti-lgbt-religious-exemption-legislation-across-country> [<https://perma.cc/8A8X-MX24>]. For a discussion on bathroom bills and the surrounding legal controversy of House Bill 2 in North Carolina, see Chris Geidner, *Feds Ask Court to Halt North Carolina’s Anti-Trans “Bathroom Bill” Provision*, BUZZFEED NEWS (July 5, 2016), [https://www.buzzfeed.com/chrisgeidner/feds-ask-court-to-halt-north-carolinas-anti-trans?utm\\_term=.nsO80aEkm#.gfdyQB9gR](https://www.buzzfeed.com/chrisgeidner/feds-ask-court-to-halt-north-carolinas-anti-trans?utm_term=.nsO80aEkm#.gfdyQB9gR) [<https://perma.cc/P55W-VWNC>], and also Michael Gordon et al., *Understanding HB2: North Carolina’s Newest Law Solidifies State’s Role in Defining Discrimination*, CHARLOTTE OBSERVER (Mar. 26, 2016), <http://www.charlotteobserver.com/news/politics-government/article68401147.html> [<https://perma.cc/SP37-5WY6>].

<sup>234</sup> See S. POVERTY L. CTR., ‘RELIGIOUS LIBERTY’ AND THE ANTI-LGBT RIGHT (2016), <https://www.splcenter.org/20160211/religious-liberty-and-anti-lgbt-right> [<https://perma.cc/2Q67-8GSZ>].

<sup>235</sup> See HUNT, *supra* note 31, at 3–4.

<sup>236</sup> If the states do not act on this important issue, companies should implement their own nondiscrimination policies that cover gender identity and/or expression. This would also follow the current trend of Fortune 500 companies: 66% have instituted a nondiscrimination policy that includes gender identity and/or expression, up from 3% in 2002. See Claire Zillman, *Changing Genders at Work: Inside the Fortune 500’s Quiet Transgender Revolution*, FORTUNE (July 13, 2015), <http://fortune.com/2015/07/13/transgender-fortune-500/> [<https://perma.cc/XN7D-PLZ2>]. Additionally, over one-third of Fortune 500 companies offer transgender-inclusive healthcare coverage, up from zero in 2002. *Id.*

## V. CONCLUSION

The discrimination that Jessi Dye experienced is something no employee should ever have to go through.<sup>237</sup> In twenty-eight states and the District of Columbia, transgender employees can still be legally fired for being transgender.<sup>238</sup> No employee should have to worry whether or not they are going to be fired for being and presenting who they are. Acts of discrimination on the basis of race, sex, national origin, and religion are not tolerated in the workplace because they are protected categories; similarly, acts of discrimination on the basis of gender identity and/or gender expression should not be tolerated because Title VII of the Civil Rights Act of 1964 prevents discrimination “on the basis of sex.”<sup>239</sup>

With a lack of fully inclusive protections at both the state and federal levels, it may be up to the local jurisdictions to pass comprehensive employment nondiscrimination laws. The Equality Act and ENDA are not likely to pass Congress in the near future, due to an uphill battle to gaining bipartisan sponsorship.<sup>240</sup> Unless there is a Democratic majority in the House and the Senate, combined with an incoming Democratic President, these two legislative avenues seem more like a missed opportunity for real reform.<sup>241</sup> Amending Title VII to include the transgender community also seems slim, given the hostile political climate.<sup>242</sup> With a lack of fully inclusive protections at both the state and federal level, it may be up to local jurisdictions to pass comprehensive employment nondiscrimination laws. Courts have a unique opportunity to almost amend Title VII without an actual amendment to the protected categories.<sup>243</sup> With courts ruling that gender identity discrimination is per se sex discrimination, Title VII will start to encompass gender identity, under the term ‘sex,’ in favor of transgender plaintiffs.

Absent legislative reform, the courts should allow plaintiffs to pursue a stereotyping theory of discrimination under *Price Waterhouse v. Hopkins*<sup>244</sup> or a per se theory of discrimination under *Schroer v. Billington*.<sup>245</sup> Having both sexual stereotyping and per se theories available significantly helps trans plaintiffs lay a foundation for their employment discrimination cases. Sex

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<sup>237</sup> See *supra* Part I.

<sup>238</sup> See HUNT, *supra* note 31, at 3–4.

<sup>239</sup> See 42 U.S.C. § 2000e-2 (2012).

<sup>240</sup> See *supra* Parts II.A, II.B.

<sup>241</sup> After the 2016 election, the President-elect, a majority of the House of Representatives, and a majority of the Senate are Republicans. As such, the Equality Act or an expansion of LGBTQ rights are not likely to gain any ground in the next few years. See Emanuella Grinberg, *What a Trump Presidency Could Mean for LGBT Americans*, CNN (Nov. 12, 2016), <http://www.cnn.com/2016/11/11/politics/trump-victory-lgbt-concerns/> [<https://perma.cc/2RWB-2AAU>].

<sup>242</sup> See *supra* Parts II.A, II.B.

<sup>243</sup> See *supra* Parts III, IV.C.

<sup>244</sup> See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989).

<sup>245</sup> See *Schroer v. Billington*, 577 F. Supp. 2d 293, 306 (D.D.C. 2008).

stereotyping, as evidenced in *Price Waterhouse*, can help to increase the likelihood that trans plaintiffs will succeed throughout the court system. A *per se* theory, under *Schroer*, should be considered sex discrimination under Title VII and is a strong option for trans plaintiffs. Congress's passage of the Equality Act, which would amend Title VII, is of the utmost importance in order for transgender plaintiffs to be fully covered in the realm of employment discrimination.

The current legal landscape may be a rocky one for transgender plaintiffs.<sup>246</sup> Additionally, it may be a while until the Supreme Court sees a trans plaintiff bring a cognizable Title VII claim. Because Congress is unlikely to amend Title VII and the Equality Act seems unlikely to pass Congress due to the political climate, the federal courts should follow in the footsteps of the EEOC and its fellow agencies to rule that gender identity discrimination is discrimination on the basis of sex. Bridging the Title VII gap through sweeping court rulings protects trans employees. Without it, transgender employees will continue to suffer from legal discrimination.

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<sup>246</sup>Gavin Grimm, a transgender male student at Gloucester High School in Virginia, will come before the United States Supreme Court in early 2017. The 4th Circuit ruled that Title IX protects the rights of transgender students to use restrooms and locker rooms that apply to their gender identity. *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709 (4th Cir.), *mandate recalled, stay granted*, 136 S. Ct. 2442 (2016) (mem.). The U.S. Supreme Court granted certiorari and will hear the case in early 2017. *Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm*, 137 S. Ct. 369 (2016) (mem.). With an eight-member bench and a future Republican appointee to the Supreme Court, transgender plaintiffs have a rough road ahead of them to secure their rights.