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What Happens Next? Will Protection Against Gender Identity and Sexual Orientation Workplace Discrimination Expand During President Obama's Second Term?

Sarah M. Stephens

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What Happens Next? Will Protection Against Gender Identity and Sexual Orientation Workplace Discrimination Expand During President Obama's Second Term?

Sarah M. Stephens*

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I. Introduction

On January 21, 2013, during his inauguration, President Obama insisted on equality for “our gay brothers and sisters,” words few ever expected to hear in a president’s inaugural address.¹ The Obama

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1. Ewan MacAskill, *Obama's second inauguration: 'We are made for this moment,'* THE GUARDIAN (Jan. 21, 2013), <http://www.guardian.co.uk/world/2013/jan/21/obama-sets-goals-unite-inauguration-speech>.

administration's record on equal rights is likewise unprecedented. Since President Obama first took office in early 2009, there have been dozens of changes in federal agencies² benefitting Lesbian, Gay, Bisexual, and Transgender (hereinafter, "LGBT") people and their families. For example: 1) The federal government expanded its Equal Employment Opportunity policy that explicitly prohibits discrimination on the basis of sexual orientation, to include, for the first time, gender identity;³ 2) Nearly every hospital in the United States is now required to have a written policy that explicitly allows a patient to designate whomever he or she wants to visit them in hospitals, including LGBT families;⁴ 3) Virtually any housing program touched by the federal government is prohibited from discriminating on the basis of sexual orientation or gender identity due to a rule issued by the U.S. Department of Housing and Urban Development,⁵ thus providing protection for LGBT people in important programs like Section 8 Housing Vouchers and Fair Housing Authority backed mortgages; and 4) In the health insurance marketplaces that will be set up in 2014 under the Affordable Care Act, health insurance plans will not be allowed to discriminate on the basis of sexual orientation or gender identity.⁶

Further, federal agencies have issued guidance to state and local officials clarifying their non-discrimination obligations under applicable federal law. While guidance from an agency is not legally binding,⁷ it does have the ability to direct national policy, and in many cases these policy guidance documents have life-altering impacts on LGBT people and families. One such guidance document from the U.S. Department of Education ensures that local school officials are aware that students have a

2. Federal agencies are charged with interpreting and implementing federal law. They are directly influenced by the President's policy as federal agencies are generally controlled by the President through cabinet secretaries, whom the President appoints.

3. See ACLU, *Administration Adds Gender Identity To Equal Employment Opportunity Policies* (Jan. 5, 2010), <http://www.aclu.org/lgbt-rights/administration-adds-gender-identity-equal-employment-opportunity-policies>.

4. See 42 C.F.R. § 482.13.

5. See 24 C.F.R. § 5.105.

6. See 42 C.F.R. § 155.120; see also http://www.feminist.org/news/newsbyte/uswire_story.asp?id=14140 (describing a memo released by the DOD, outlining a plan to extend benefits to same-sex partners of military members to ensure fairness and equal treatment and to take care of service members and their families to the extent allowable under the law).

7. See OFFICE OF THE FEDERAL REGISTER, A GUIDE TO THE RULEMAKING PROCESS, https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf (explaining that agencies have the authority to create rules to carry out policy mandates, which have the force and effect of law and are codified in the Code of Federal Regulations).

federal right to organize Gay Straight Alliances and other student organizations on their campuses and cannot be denied access to the use of school facilities for the purposes of holding organization meetings.⁸

In addition, the Obama administration has taken a more liberal approach than any previous administration in its stance on treating LGBT individuals equally regardless of whether such treatment is required by law and even where doing so is in contravention to current law. For example, in 2011, President Obama instructed the Justice Department to stop defending the Defense of Marriage Act.⁹ He also signed the Don't Ask, Don't Tell Repeal Act of 2010 into law.¹⁰ Administration officials testified in support of the Employment Non-Discrimination Act in the House and the Senate in the 111th Congress.¹¹ Finally, in May of 2012 President Obama announced his support for marriage equality nationwide.¹²

In light of the Obama Administration's previous actions on behalf of LGBT individuals and their families, additional LGBT policy advances are likely in his second term.¹³ This Article looks at whether such policy advances are likely to be made in the area of employment discrimination protection. Federal law, as currently interpreted, does not provide protection for employees discriminated against on the basis of sexual

8. See Arne Duncan, *Key Policy Letters from the Education Secretary and Deputy Secretary*, U.S. DEP'T. OF EDUC. (June 14, 2011), available at www2.ed.gov/policy/elsec/guid/secletter/110607.html; see also NATIONAL GAY AND LESBIAN TASK FORCE, *Movement Analysis: The Impact of 2012 Presidential Election on the LGBT Policy Agenda*, (Nov. 7, 2012), available at http://www.thetaskforce.org/downloads/reports/reports/move_analysis_2012_elec_obama.pdf, 4–5.

9. See Defense of Marriage Act (“DOMA”), Pub. L. No. 104-199, 1 U.S.C. § 7, 28 U.S.C. §.1738C (1996); see also Z. Byron Wolf, *President Obama Instructs Justice Department to Stop Defending Defense of Marriage Act calls Clinton Signed Law “Unconstitutional,”* ABC NEWS (Feb. 23, 2011, 12:39 pm) <http://abcnews.go.com/blogs/politics/2011/02/president-obama-instructs-justice-department-to-stop-defending-defense-of-marriage-act-calls-clinton/>. The Supreme Court agreed that DOMA was unconstitutional in its July 2013 opinion, holding DOMA violated the Equal Protection Clause of the Fifth Amendment to the Constitution. See *United States v. Windsor*, 133 S.Ct. 2675 (2013).

10. See Don't Ask, Don't Tell Repeal Act of 2010 (H.R. 2965, S.4023) (repealing DADT 10 U.S.C. § 654).

11. See HUMAN RIGHTS CAMPAIGN, *Obama Administration Policy, Legislative and Other Advancements on behalf of LGBT Americans*, <http://www.hrc.org/resources/entry/obama-administration-policy-and-legislative-advancements-on-behalf-of-lgbt> (last visited June 24, 2013).

12. *Id.*

13. *Id.*

orientation and there is arguably little protection against discrimination on the basis of gender identity.¹⁴

Despite an overwhelming majority of the population in favor of legal protection,¹⁵ LGBT individuals continue to experience discrimination in large numbers. A survey of almost 6,500 transgender individuals found that nearly half of respondents had experienced an adverse employment action, such as denial of a job, denial of a promotion, or termination of employment, as a result of their transgender status and/or gender nonconformity.¹⁶ Fifty percent reported harassment by someone at work,¹⁷ forty-five percent stated that co-workers had referred to them using incorrect gender pronouns “repeatedly and on purpose,”¹⁸ and fifty-seven percent confessed that they delayed their gender transition in order to avoid discriminatory actions and workplace abuse.¹⁹ In one survey, thirty-eight percent of openly lesbian, gay, or bisexual employees reported discrimination while ten percent of those who were not open regarding their sexual orientation reported discrimination.²⁰ Up to forty-one percent of LGBT employees have been verbally or physically harassed or had their workplaces vandalized.²¹

Title VII of the Civil Rights Act of 1964 declares it unlawful to discriminate against a person in employment because of such individual's

14. *See infra* Part II.

15. *See* Victoria Schwartz, *Title VII: A Shift from Sex to Relationships*, 35 HARV. J.L. & GENDER 209, 210–11 (2012) (“[A] 2007 poll found that only one-third of American adults were aware that federal law . . . does not provide protection for employees on the basis of sexual orientation. At the same time, public opinion polls suggest that Americans do not find the idea of protection against employment discrimination based on sexual orientation particularly controversial. A 2008 Gallup poll found that support for homosexuals having equal rights in job opportunities jumped from fifty-six percent in 1977 to eighty-nine percent in 2011.”).

16. *See* Jaime M. Grant, et al., *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey* (Feb. 3, 2011), http://www.thetaskforce.org/downloads/reports/reports/ntds_full.pdf.

17. *See id.* at 58.

18. *Id.* at 62.

19. *See id.* at 63; *see also* Jason Lee, *Lost in Transition: The Challenges of Remediating Transgender Employment Discrimination under Title VII*, 35 HARV. J. OF L. & GENDER 423, 424–425 (2012).

20. Jennifer Pizer, Christy Mallory, Brad Sears, & Nan Hunter, *Evidence of Persistent and Pervasive Workplace Discrimination Against LGBT People: The Need for Federal Legislation Prohibiting Discrimination and Providing for Equal Employment Benefits*, 45 LOY. L.A. L. REV. 715, 723 (2012), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Pizer-Mallory-Sears-Hunter-ENDA-LLR-2012.pdf>.

21. *Id.*

sex. In recent years, federal courts have expanded the interpretation of Title VII's prohibition of sex discrimination to include gender based discrimination, recognizing that sex includes personality attributes, socio-sexual roles, and behavioral expressions, such as masculinity and femininity. The Supreme Court announced, "in forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."²² Further, the Supreme Court has held that same-sex sexual harassment is actionable under Title VII.²³ Nevertheless, protection against discrimination on the basis of gender identity remains limited and Title VII does not provide any protection against discrimination based on sexual orientation. In this article, I will explore the likelihood that an expansion of protection against gender identity and sexual orientation discrimination will take place during President Obama's second term in office. First, I will discuss recent Supreme Court, circuit court, and Equal Employment Opportunity Commission precedent analyzing Title VII in order to establish the status of current sexual orientation and gender identity discrimination protection jurisprudence. Second, as an alternative to judicial interpretation, I will discuss the possibility that anti-discrimination federal legislation will be passed, such as in the form of the Employment Non-Discrimination Act (the "ENDA") or an amendment to Title VII. In order to do so, I will analyze the current make-up of Congress, campaign rhetoric and propaganda the winning candidates used during the 2012 election cycle, and Congress's history on equal protection issues, including its failure to pass previous versions of the ENDA. Next, I will argue that the best hope for expanded protection on the federal level during Obama's second term in office may lie in a new interpretation of Title VII jurisprudence. Finally, I will conclude by arguing that the best method to achieve long-lasting discrimination protection lies in amending Title VII's definition of sex to prohibit all gender and sexuality based discrimination—even if such an advancement is unlikely to happen during the President's remaining time in office.

22. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (internal quotations omitted).

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

II. State of the Law

A. Case Law

For the most part, employment in the United States is at-will and unless expressly forbidden by state or federal law,²⁴ or private contract, employers can generally terminate an employee for any reason or no reason at all.²⁵ This means that in those states where state law fails to protect LGBT individuals, their employers may freely discriminate against them unless courts find that they are already protected by Title VII or until some new federal law is passed.

Title VII provides in relevant part, “[i]t shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or

24. See Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 253 (July 2, 1964) (codified as amended at 42 U.S.C. § 2000e-2000e-17 (2006) (noting that the Equal Employment Opportunity Commission enforces the prohibitions against employment discrimination in Title VII of the Civil Rights Act of 1964; see also Equal Pay Act of 1963 (as amended, 29 U.S.C. § 206); Age Discrimination in Employment Act of 1967 (as amended, 29 U.S.C. § 621); Rehabilitation Act of 1973 § 501, 504, 29 U.S.C. § 701; Americans with Disabilities Act of 1009 Titles I and V, 42 U.S.C. § 12101; Genetic Information Non-Discrimination Act Title II, 29 U.S.C. § 216(e); Civil Rights Act of 1964, 42 U.S.C. § 1981. These laws collectively prohibit discrimination on the basis of race, color, sex, religion, national origin, age, disability, and genetic information, as well as prohibit retaliation for protected activity. Additionally, since 1978, under the Civil Service Reform Act, as amended, federal government applicants and employees shall not be discriminated against on the basis of race, color, sex, religion, national origin, age, disability, marital status, political affiliations, or on conduct which does not adversely affect the performance of the applicant or employee—including sexual orientation or gender identity status. The Office of Special Counsel and the Merit Systems Protection Board enforce the prohibitions against federal employment discrimination codified in the CSRA and more recent EEO policies. Further, the Department of Justice provides a system for adjudicating complaints of sexual orientation and gender identity discrimination by its employees. This separate process does not include the same rights offered under Title VII and the EEOC regulations set forth under 29 C.F.R. Part 16144. The complaints are processed utilizing the same EEO complaint process and time frames, including an ADR program, an EEO investigation, and an issuance of a final Agency decision; however, the Dept. of Justice process allows for fewer remedies and does not include the right to request a hearing before an EEOC Administrative Judge or the right to appeal the final Agency decision to the Commission.

25. See Lisa J. Bernt, *Finding the Right Jobs for the Reasonable Person in Employment Law*, 77 U. MO. KAN. CITY L. REV. 1, 7 (2008) (“[E]mployment-at-will is still the default rule in almost every jurisdiction in the United States.”).

national origin.”²⁶ “Title VII was initially included as part of the Civil Rights Act of 1964 as a measure designed to combat racial discrimination.”²⁷ The day before the House of Representatives was due to vote on the Act, Representative Howard Smith, a staunch opponent of the bill, introduced a floor amendment adding “sex” to the list of impermissible bases for employment discrimination as a last-ditch effort to blunt legislative support and prevent the bill’s passage.²⁸ Representative Smith’s plan backfired and Title VII was enacted with the sex provision intact.²⁹ “The amendment’s late adoption, however, prevented legislators from engaging in a robust debate regarding the inclusion of ‘sex’ as a protected class and resulted in a paucity of legislative guidance as to the intended scope of the protection.”³⁰

No federal statute proscribes employment discrimination on the basis of sexual orientation or gender identity, nevertheless, over the last several decades there have been a number of claims made in federal court premised on the idea that sexual orientation and gender identity discrimination are sex discrimination under Title VII and employers should not be allowed to discriminate against an employee simply because he or she believes that the employee seeks intimate relationships with individuals of the “wrong” sex. Lower courts are reluctant to find that these types of claims can be made under existing law. Courts have pointed to the absence of relevant and affirmative congressional intent to apply Title VII in this manner and concluded that Title VII does not prohibit discrimination on the basis of either sexual orientation or gender identity.³¹ While some courts have allowed sex-stereotyping claims by LGBT employees, others have refused.³²

As a result, forty-nine years after the passage of Title VII, courts are still struggling to determine the meaning of “sex.” In many contexts, the definition of what constitutes sex discrimination has expanded over the

26. 42 U.S.C. § 2000e-2(a)(1) (2006).

27. Jason Lee, *Lost in Transition: The Challenges of Remediating Transgender Employment Discrimination Under Title VII*, 35 HARVARD J.L. & GENDER 423, 430 (2012).

28. *See id.* at 430.

29. *See id.*

30. *Id.*

31. *See Employment Discrimination—Congress Considers Bill To Prohibit Employment Discrimination On The Basis Of Sexual Orientation And Gender Identity—Employment Nondiscrimination Act of 2009, H.R. 3017, 111th Cong. (2009)*, 123 HARV. L. REV. 1803, 1805 (2010).

32. *See id.*

years. This discussion focuses on how the changing definition of “sex” has impacted the rights of those discriminated against on the basis of gender identity or sexual orientation.

i. Gender Identity

In the seminal case of *Price Waterhouse v. Hopkins*,³³ the Supreme Court held that discrimination for failing to conform with gender-based expectations violates Title VII’s prohibition against sex-based discrimination.³⁴ In that case, an employer refused to make a female senior manager a partner in the business, at least in part because she did not act as some of the other partners thought that a woman should act.³⁵ She was informed that to improve her chances for partnership, she should “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.”³⁶ In finding for the employee, the Court stated, “[i]n the 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” in violation of Title VII’s prohibition of sex-based discrimination.³⁷ “[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for ‘[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.’”³⁸

Following the logic and the language of the Supreme Court’s opinion in *Price Waterhouse*, in *Schwenk v. Hartford*³⁹ the Ninth Circuit concluded that discrimination against transgender females is actionable discrimination “because of sex.”⁴⁰ In that case, the Ninth Circuit found that a prison guard knew that a prisoner considered herself a transsexual and that the guard had targeted the prisoner only after acquiring that knowledge, and that the guard

33. *See* 490 U.S. 228 (1989).

34. *See id.*

35. *See id.* at 230–31, 235.

36. *Id.* at 235.

37. *See id.* at 250.

38. *Id.* at 251 (noting neither Justice White, nor Justice O’Connor, each of whom concurred in the judgment, had any quarrel with that proposition) (quoting *L.A. Dept. of Water and Power v. Manhart*, 435 U.S. 702, 707 (1978) and *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971)).

39. 204 F.3d 1187, 1201–02 (9th Cir. 2000).

40. *See id.*

was motivated, at least in part, by the prisoner's gender—that is, by the prisoner's feminine, rather than a typically masculine, appearance or demeanor.⁴¹ On these facts, the Ninth Circuit concluded that the guard's attack against the prisoner constituted discrimination because of gender within the meaning of both the Gender Motivated Violence Act, 42 U.S.C. § 13981, and Title VII.⁴² The Ninth Circuit concluded that discrimination against transgender females is actionable discrimination “because of sex” under *Price Waterhouse* because:

[I]n the mind of the perpetrator the discrimination is related to the sex of the victim: here, for example, the perpetrator's actions stem from the fact that he believed that the victim was a man who ‘failed to act like’ one Discrimination because one fails to act in the way expected of a man or woman is forbidden under Title VII.⁴³

Under the same sex stereotyping analysis, courts in a number of jurisdictions have held that transsexual people can successfully argue claims under Title VII's prohibition against sex discrimination.⁴⁴ For example, in *Smith v. City of Salem*⁴⁵ the plaintiff was diagnosed with

41. *See id.*

42. *See id.*

43. *Id.* at 1202.

44. *See, e.g., Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000) (reinstating Equal Credit Opportunity Act claim on behalf of biologically male plaintiff who alleged that he was denied an opportunity to apply for a loan because he was not dressed in “masculine attire”); *Rentos v. OCE-Office Systems*, 1996 U.S. Dist. LEXIS 19060 (S.D.N.Y. 1996) (refusing to dismiss transsexual woman's claim that she had been discriminated against on the basis of sex in violation of the New York State Human Rights Law and the New York City Human Rights Law); *Enriquez v. West Jersey Health Sys.*, 777 A.2d 365 (N.J. Super. 2001) (concluding that state law prohibiting sex discrimination in employment protects transsexual people); *Maffei v. Kolaeton Industry, Inc.*, 626 N.Y.S.2d 391 (N.Y. Sup. Ct. 1995) (finding that a city ordinance prohibiting “gender” discrimination protects transsexuals and disagreeing with the reasoning of federal cases which hold that Title VII does not protect transsexuals); *Miles v. New York Univ.*, 979 F. Supp. 248, 249 (S.D.N.Y. 1997) (deciding Title IX prohibits sexual harassment of a transsexual woman); *Declaratory Ruling on Behalf of John/Jane Doe* (Conn. Human Rights Comm'n 2000) (relying on *Price Waterhouse*, *Schwenk*, *Rosa*, and other recent federal court decisions in holding that the Connecticut state statute prohibiting discrimination on the basis of sex encompasses discrimination against transgender individuals); *Doe v. Yunits*, 2000 WL 33162199 (Mass. Super. 2000), *aff'd sub nom, Doe v. Brockton Sch. Comm.*, No. 2000-J-638 (Mass. App. 2000) (denying defendant's motion to dismiss transsexual student plaintiff's complaint requesting injunctive relief allowing her to wear clothing customarily worn by female teenagers).

45. 378 F.3d 566, 571 (6th Cir. 2004).

Gender Identity Disorder and began to present at work as female.⁴⁶ Smith's co-workers commented that her appearance and mannerisms were not masculine enough and Smith's employer subjected her to numerous psychological evaluations before suspending her.⁴⁷ Smith filed suit under Title VII alleging that her employer had discriminated against her because of sex "both because of her gender non-conforming conduct and more generally because of her identification as a transsexual."⁴⁸ The Sixth Circuit concluded that discrimination against a plaintiff who is a transsexual and therefore fails to act and/or identify with his or her gender is the same as discrimination directed against the plaintiff in *Price Waterhouse*.⁴⁹ In doing so, the *Smith* court explained "sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as 'transsexual,' is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity."⁵⁰ The Sixth Circuit adopted this principle a year later in *Barnes v. City of Cincinnati*,⁵¹ when it affirmed the trial court's holding that a pre-operative male-to-female transsexual law enforcement officer was discriminated against on the basis of sex in violation of Title VII, based on the officer's allegations of adverse treatment for his failure to conform to sex stereotypes relative to how a man should look and behave on the police force.⁵²

In 2007, the Tenth Circuit Court of Appeals delineated between claims based on sex stereotyping and those based on transgender status.⁵³ The court found that although Title VII does not protect an individual based on his or her transgender status alone, he or she can sustain a claim based on sex stereotyping.⁵⁴ In *Etsitty v. Utah Transit Authority*,⁵⁵ the Utah Transit Authority terminated Etsitty for her position as a bus driver because of her transition from male to female, which the Utah Transit Authority argued that the public would see as "inappropriate" and which the organization felt

46. *Id.*

47. *See id.*

48. *Id.*

49. *Id.*

50. *Id.* at 575.

51. 401 F.3d 729 (6th Cir. 2005).

52. *See id.* at 738 (affirming the ruling of the district court).

53. *See Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1222–23 (10th Cir. 2007) (distinguishing between stereotyping based on sex and transgender status).

54. *See id.* (allowing a claim based on sex stereotyping to proceed).

55. 502 F. 3d 1215 (10th Cir. 2007).

created an image issue.⁵⁶ The Tenth Circuit recognized that Title VII protects transgender persons who are discriminated against because they do not conform to gender stereotypes regardless of the employee's status as a transgender person.⁵⁷ Nevertheless, the former employee's claim failed in *Etsitty* because the court found there was insufficient evidence to prove discrimination based upon gender stereotypes.⁵⁸

The D.C. district court, however, held that transgender individuals need not argue sex stereotyping in order to sustain a claim for discrimination under Title VII.⁵⁹ In *Schroer v. Billington*, the district court held that transgendered people are already protected by Title VII's ban on sex discrimination.⁶⁰ The court found that Schroer was entitled to relief based on the language of Title VII itself, reasoning that discrimination on the basis of an individual's transition from one sex to another constituted discrimination because of sex.⁶¹

The decision in D.C. was followed by the more conservative holding by the Eleventh Circuit in *Glenn v. Brumby*.⁶² Glenn was diagnosed with Gender Identity Disorder ("GID") and in 2007, Glenn informed her immediate supervisor that she planned to transition from male to female.⁶³ Glenn's immediate supervisor notified the General Assembly's Legislative Counsel, Sewell Brumby, who was the head of the office in which Glenn worked.⁶⁴ After confirming that Glenn intended to transition, Brumby fired her on the spot.⁶⁵ Glenn brought suit, alleging that her firing violated the Constitution's equal protection guarantee.⁶⁶ The court held that defendant violated the Equal Protection Clause's prohibition of sex-based discrimination when he fired a transgender or transsexual employee because of her gender non-conformity.⁶⁷ The court also held that defendant

56. *Id.* at 1219–20.

57. *See id.* at 1223–24 (deciding Title VII protects transgendered individuals who are not listed as a transgendered individual for employment purposes).

58. *See id.* at 1227 (ruling there was not enough evidence to make a finding of discrimination).

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

60. *See id.* at 306.

61. *See id.* at 306–08.

62. 663 F.3d 1312, 1312–16 (11th Cir. 2011).

63. *Id.* at 1316.

64. *Id.*

65. *See id.*

66. *See id.*

67. *See Glenn v. Brumby*, 663 F.3d 1312, 1312–1316 (11th Cir. 2011).

had advanced no reason that could qualify as governmental purpose, much less an “important” governmental purpose, and even less than that a “sufficiently important government purpose” that was achieved by firing plaintiff because of her gender non-conformity.⁶⁸

The Eleventh Circuit stated that consideration of gender stereotyping will inherently be a part of what drives discrimination against a transgendered individual.⁶⁹ The employer testified that he had fired the complainant because he considered it inappropriate for her to appear at work dressed as a woman and that he found it unsettling and unnatural that she would appear wearing women’s clothing.⁷⁰ According to the Eleventh Circuit, this testimony “provides ample direct evidence” to support the conclusion that the employer acted on the basis of the plaintiff’s gender nonconformity and therefore granted summary judgment to her.⁷¹ The court explained: “the very acts that define transgender people as transgender are those that contradict stereotypes of gender appropriate appearance and behavior. There is thus a congruence between discriminating against transgender and transsexual individuals and discrimination on the basis of gender-based behavioral norms.”⁷² Accordingly, the court found that discrimination against a transgender individual because of her gender nonconformity is sex discrimination, whether it’s described as being on the basis of sex or gender.⁷³

Based on the above precedent, the full Equal Employment Opportunity Commission (“EEOC”) held in *Macy v. Dept of Justice*⁷⁴ that discrimination against an individual based on a belief that that person is transgender is prohibited sex discrimination, termed “gender identity discrimination,” under Title VII. *Macy* involved a transgender woman who applied for a civilian position in the Alcohol Tobacco and Firearm’s (“ATF”) Walnut Creek, California crime laboratory.⁷⁵ At the time of her

68. *Id.* at 1316.

69. *See id.* at 1316–17.

70. *Id.* at 1321.

71. *Id.*

72. *Glenn v. Brumby*, 663 F.3d 1312, 1321 (11th Cir. 2011).

73. *Id.* at 1316–17.

74. *Macy v. Dept. of Justice*, EEOC Appeal No. 0120120821, 2012 WL 1435995 (Apr. 20, 2012) (setting precedent because the decision was made by the full Commission; all five bi-partisan Commissioners agreed to its issuance. The EEOC based its ruling on Supreme Court precedent (i.e. *Price*) as well as on federal court cases involving transgender people from the 1st, 6th, 9th, 11th, and DC circuits—*Schroer*, *Glenn v. Brumby*, *Smith v. Salem*, *Schwenk v. Harford*, and *Rosa v. Park West Bank & Trust Co*).

75. *Id.* at 1.

application, Macy was a police detective in Phoenix living as a man.⁷⁶ She interviewed for the position over the phone as a man and was told that the job was hers so long as she successfully completed a background check.⁷⁷ During the background check process Macy informed Aspen, the company contracted to perform the check, that she was in the process of transitioning from male to female and she requested that Aspen inform the Director of the Walnut Creek lab of the change.⁷⁸ Aspen did so and five days later, Macy received an email stating that due to budgetary reductions, the position was no longer available.⁷⁹ A month later, Macy contacted an agency EEO counselor to discuss her concerns and the counselor informed Macy that the position had not been cut, but that another individual who was farther along in the background check process had been hired.⁸⁰ Macy filed a complaint with the EEOC charging discrimination on the basis of sex and gender identity and sex stereotyping as the basis of her complaint.⁸¹

The EEOC found that as used in Title VII, the term “sex” “encompasses both sex—that is, the biological differences between men and women—and gender.”⁸² As the Eleventh Circuit noted in *Glenn v. Brumby*,⁸³ six members of the Supreme Court in *Price Waterhouse* agreed that Title VII barred “not just discrimination because of biological sex, but also gender stereotyping-failing to act and appear according to expectations defined by gender.”⁸⁴ As such, the terms “gender” and “sex” are used

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Macy v. Dept. of Justice*, EEOC Appeal No. 0120120821, 2012 WL 1435995 at 2 (Apr. 20, 2012).

81. *See id.* at 3 (finding that the Agency could only process Macy’s claim based on sex under Title VII and the EEOC’s Part 1614 regulations). Her claim based on “gender identity stereotyping” would be processed instead under the Agency’s “policy and practice,” including the issuance of a final Agency decision from the Agency’s Complaint Adjudication Office. However, upon appeal, the EEOC clarified that claims of discrimination based on transgender status also referred to as claims of discrimination based on gender identity, are cognizable under Title VII’s sex discrimination prohibition, and are therefore eligible for processing under Part 1614 of EEOC’s federal sector EEO complaints process.

82. *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.”).

83. 663 F.3d 1312, 1316 (11th Cir. 2011).

84. *See Macy*, 2012 WL 1435995 at 5.

interchangeably to describe the discrimination prohibited by Title VII.⁸⁵ “Congress’s intent to forbid employers to take gender into account in making employment decisions appears on the face of the statute.”⁸⁶ The EEOC reaffirmed that Title VII prohibits discrimination beyond merely biological based discrimination because the term “gender” encompasses not only a person’s biological sex but also the cultural and social aspects associated with masculinity and femininity.⁸⁷ The EEOC stated that gender discrimination occurs any time an employer treats an employee differently for failing to conform to any gender-based expectations or norms.⁸⁸ “When an employer discriminates against someone because the person is transgender, the employer has engaged in disparate treatment “related to the sex of the victim.”⁸⁹ This is true regardless of whether an employer discriminates against an employee because the individual has expressed his or her gender in a non-stereotypical fashion,⁹⁰ 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.⁹¹ In each of these circumstances, the employer is making a gender-based evaluation, thus violating the Supreme Court’s admonition that “an employer may not take gender into account in making an employment decision.”⁹²

Under *Macy*, regardless of whether there is any specific evidence of gender stereotyping in a particular case, treating a person differently

85. *See, e.g.*, *Price Waterhouse v. Hopkins*, 490 U.S. 228, 230 (1989) (emphasis added).

86. *Macy v. Dept. of Justice*, EEOC Appeal No. 0120120821, 2012 WL 1435995 1, 5 (Apr. 20, 2012).

87. *Id.*

88. *See id.*

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

90. Note that by focusing on an individual’s gender nonconformity, a court may end up “reconstructing the very sex stereotypes that the doctrine purports to disdain. The act of determining whether a plaintiff’s expressive gender deviates from his or her [birth] gender forces a court to wade through antiquated, clichéd, and stereotypical notions of traditional gender roles in order to manufacture [a static view of gender] for comparative purposes.” This risks lending legitimacy to conventional sex stereotypes. *See Jason Lee, Lost in Translation: The Challenges of Remediating Transgender Employment Discrimination Under Title VII*, 35 HARV. J. L. & GENDER 423, 444 (2012).

91. *See Macy v. Dept. of Justice*, EEOC Appeal No. 0120120821, 2012 WL 1435995 (Apr. 20, 2012) (holding that different treatment based solely on the basis of sex change or intended sex change is discrimination under Title VII).

92. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 244 (1989).

because the person has changed his or her sex or intends to change sex is automatically unlawful sex discrimination under Title VII, just as discrimination against a person who is one religion and converts to another is considered a type of religious discrimination.⁹³ The *Macy* decision made clear that transgender people do not need to rely on sex-stereotyping claims to support a charge of sex discrimination. The key fact is whether the employer relied on the employee's gender when making its decision to discriminate; so, if an employer takes into account a person's gender when deciding whether or not his and/or her identity or conduct is appropriate, then it is sex discrimination. Albeit untested, this is a positive outcome against gender identity discrimination. The progeny of *Price Waterhouse* has followed a different trajectory, however, for sexual orientation claims.

ii. Sexual Orientation

Although the Supreme Court has found that same sex sexual harassment is prohibited under Title VII,⁹⁴ courts have continuously held that Title VII's prohibition against sex discrimination does not encompass sexual orientation.⁹⁵ Nevertheless, *Price Waterhouse* did pave the way for

93. See *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011); *Schroer v. Billington*, 577 F. Supp. 2d 293, 306–07 (2008) (D.D.C. 2008).

94. In *Oncale v. Sundowner Offshore Servs, Inc.* the Supreme Court held workplace harassment can violate Title VII's prohibition against discrimination because of sex when the harasser and the harassed employee are of the same sex. "[M]ale-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." (J. Scalia, writing for the majority) 523 U.S. 75, 79 (1998). *Oncale* expressly acknowledged that our interpretation of Title VII's discriminatory protections expand as our understanding of discrimination evolves. See also *Fredette v. BVP Management Assoc.*, 112 F.3d 1503 (11th Cir. 1997) (finding that although Title VII does not provide protection from sexual orientation discrimination, it does prohibit same sex sexual harassment). In 2001, the Ninth Circuit Court of Appeals followed the Supreme Court's lead by holding that same sex harassment claims are actionable under Title VII based on the sexual stereotype reasoning in *Price Waterhouse*. *Nichols v. Azteca*, 256 F.3d 864 (9th Cir. 2001). See also, *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1064 (9th Cir. 2002) (Ninth Circuit says sexual orientation of parties is irrelevant in a sexual harassment claim until Title VII).

95. In *DeSantis v. Pacific Telephone & Telegraph Co.*, 608 F.2d 327, 329–32 (9th Cir. 1979) overruled on other grounds by *Nichols v. Azteca Rest. Enters.*, 256 F.3d 864, 875 (9th Cir. 2001), the Ninth Circuit said that Title VII does not prohibit discrimination on the basis of sexual orientation. The Ninth Circuit held that "Title VII's prohibition of 'sex' discrimination applies only to discrimination on the basis of gender and should not be judicially extended to include sexual preference such as homosexuality." *DeSantis*, 608 F.2d at 329–30. The court found that Title VII does not apply to sexual orientation because

some sexual orientation claims arising from sex stereotyping. In *Prowel v. Wise Business Forms, Inc.*,⁹⁶ the Third Circuit found that Title VII does not prohibit sexual orientation discrimination, but the court explained sexual orientation and sexual stereotyping discrimination claims are difficult to separate and that a sexual stereotyping claim is cognizable.⁹⁷ *Prowel* involved an employee who did not conform to male gender stereotypes and who was harassed by his co-workers because of his effeminacy, as well as his perceived homosexuality.⁹⁸ Eventually, Prowel was terminated from his factory job and sued his employer on the basis of sex discrimination under Title VII.⁹⁹ In that case, the circuit court vacated the district court's judgment dismissing Prowel's claim and held that Prowel could argue a sex discrimination claim based on sexual stereotyping, however the court warned that sexual orientation claims cannot be made under Title VII.¹⁰⁰

A number of other courts have likewise held that sexual orientation discrimination is not prohibited under Title VII. The Sixth Circuit in *Gilbert v. Country Music Association, Inc.* held that under Title VII, sexual orientation is not a prohibited basis for discriminatory acts.¹⁰¹ The court found that "a claim premised on sexual-orientation discrimination thus does not state a claim upon which relief may be granted."¹⁰² Since Gilbert's claims were solely based on sexual orientation discrimination, rather than sexual stereotyping allegations, he could not obtain relief under Title VII.¹⁰³ In *Dawson v. Bumble & Bumble*,¹⁰⁴ the Second Circuit held "[t]he law is well-settled in this circuit and in all others to have reached the question that . . . Title VII does not prohibit harassment or discrimination because of

1) earlier case law has determined that the congressional intent behind Title VII's prohibition of "sex" discrimination was to put women on an equal footing with men and (*see* *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 661 (9th Cir. 1977)); 2) later Congresses have not passed proposed bills extending Title VII to sexual orientation. *Id.* at 330.

96. 579 F.3d 285 (3rd Cir. 2009). In 2006, the Sixth Circuit held in *Vickers v. Fairfield Medical Center*, 453 F.3d 757 (6th Cir. 2006) (Sixth Circuit says that claim of sex discrimination in sexual harassment claim fails as a matter of law because the discrimination was because of sexual orientation).

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *See* 432 F. App'x. 516 (6th Cir. 2011).

102. *Id.* (quoting *Vickers v. Fairfield*, 453 F.3d at 762).

103. *Id.* at 519.

104. 398 F.3d 211 (2d Cir. 2005).

sexual orientation.”¹⁰⁵ “Like other courts, we have therefore recognized that a gender stereotyping claim should not be used to ‘bootstrap protection for sexual orientation into Title VII.’”¹⁰⁶

Despite the reluctance of some courts, the EEOC has found that claims by lesbian, gay, and bisexual individuals alleging sex-stereotyping state a sex discrimination claim under Title VII. In *Veretto v. U.S. Postal Service*,¹⁰⁷ the EEOC found that the U.S. Postal Service erred in dismissing a claim of sex stereotyping discrimination under Title VII.¹⁰⁸ In that case, a postal service worker alleged that he was harassed after his wedding announcement, stating his intention to wed a man, rather than a woman, was published in a local newspaper.¹⁰⁹ The EEOC said that while the U.S. Postal Service was correct that Title VII’s prohibition of discrimination does not include sexual orientation as a basis, Title VII does prohibit sex-stereotyping discrimination.¹¹⁰

In *Castello v. U.S. Postal Service*,¹¹¹ the EEOC, on appeal, found that Castello alleged a plausible sex stereotyping case, which would entitle her to relief under Title VII if she were to prevail.¹¹² Castello worked as a mail handler in New Orleans and filed a complaint that the agency subjected her to discriminatory harassment when the manager of distribution made sexually explicit comments to the Castello.¹¹³ In her complaint, she listed “sexual orientation/sex-female” as the discrimination factors.¹¹⁴ The U. S. Postal Service dismissed the complaint for failure to state a claim, because it determined that she was alleging harassment on the basis of sexual orientation and noted that sexual orientation was not a basis covered by the EEOC Regulations.¹¹⁵ On appeal, she asserted she was the victim of ongoing workplace harassment in violation of the agency’s Policy on Workplace Harassment.¹¹⁶ Castello alleged that she was subjected to a

105. 398 F.3d at 217 (2d Cir. 2005) (quoting *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000)).

106. *Id.* at 218.

107. EEOC Appeal No. 0120110873 (July 1, 2011).

108. *Id.*

109. *Id.*

110. *Dawson v. Bumble & Bumble*, 398 F.3d 211 (2d Cir. 2005).

111. *Castello v. U.S. Postal Serv.*, EEOC Appeal No. 0520110649 (Dec. 20, 2011).

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Castello v. U.S. Postal Serv.*, EEOC Appeal No. 0520110649 (Dec. 20, 2011).

hostile work environment when her supervisor made an offensive and derogatory comment about her having relationships with women.¹¹⁷ Essentially, Castello alleged that her supervisor's comment was motivated by his attitudes about stereotypical gender roles in relationships.¹¹⁸ The EEOC found that this was sufficient for Castello to allege a claim of sex stereotyping, even where the hostile comments regarded Castello's sexual orientation.¹¹⁹

Although it has provided an avenue for LGB individuals to file charges of discrimination, the EEOC's interpretation of "sex" is more limited where discrimination involves sexual orientation, rather than gender identity. The EEOC has not interpreted Title VII's prohibition against sex discrimination to include sexual orientation discrimination as a stand-alone claim, the way it has with gender identity discrimination. Further, no court has moved beyond a claim of sex stereotyping to allow a freestanding sexual orientation discrimination claim, thus leaving a gaping hole in the protection of LGB individuals from workplace discrimination.

B. Statutory Law

While the courts and federal agencies have been struggling to interpret the meaning of "sex," legislators have been trying to enact legislation, in the form of the Employment Non-Discrimination Act ("ENDA"), that more clearly prohibits discrimination. The ENDA would "provid[e] a comprehensive [f]ederal prohibition of employment discrimination on the basis of sexual orientation or gender identity."¹²⁰ The chief provision of the ENDA would make it unlawful for most employers covered by Title VII, including the states, to "fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual . . . because of such individual's actual or perceived sexual orientation or gender identity."¹²¹ The ENDA would also prohibit retaliation, and its enforcement mechanisms and remedies would largely be the same as those of Title VII.¹²²

ENDA was first introduced in Congress in 1994.¹²³ Different versions of employment protections for lesbian, gay, and bisexual people, however,

117. *Id.*

118. *Id.*

119. *Id.*

120. Recent Proposed Legislation, 123 HARV. L. REV. 1803 (2010).

121. *Id.*

122. *Id.*

123. NATIONAL GAY AND LESBIAN TASK FORCE, *Employment Non-Discrimination Act*

have been introduced since the early 1970s.¹²⁴ At the time the ENDA was first introduced, it only included protections for LGB people.¹²⁵ Representative Barney Frank (D-MA) sponsored the first transgender-inclusive version of the ENDA in April 2007. Five months later, he introduced a new version of the bill that omitted all mention of gender identity and extended protections only to gays, lesbians, and bisexuals. In explaining the decision, Frank stated that while “we have the votes to pass a bill today in the House that would ban discrimination in employment based on sexual orientation . . . sadly, we don’t yet have [the votes] on gender identity.”¹²⁶

Representative Frank again introduced a transgender-inclusive version of ENDA in the U.S. House of Representatives in 2009 with 137 co-sponsors; and the bill was subsequently referred to the Committees on Education and Labor, House Administration, Oversight and Government Reform, and the Judiciary.¹²⁷ In December of 2010, however, work on the ENDA bill was postponed in the House Committee on Education and Labor.¹²⁸ Frank reintroduced the bill with 148 co-sponsors on April 6, 2011; and a similar bill with thirty-nine co-sponsors was also introduced in the U.S. Senate on April 13, 2011.¹²⁹ The bills were referred to committee without further action.

Most recently, Representative Jared Polis introduced an ENDA bill in the House and Senator Jeff Merkley introduced an ENDA bill in the Senate

(*ENDA*), http://www.thetaskforce.org/issues/nondiscrimination/ENDA_main_page (last visited Aug. 19, 2013) (showing that the ENDA has been introduced in 1994, 1995, 1997, 1999, 2001, 2003, 2007, 2009, and 2011).

124. *Id.*; see also NATIONAL GAY AND LESBIAN TASK FORCE, *Nondiscrimination Legislation Historical Narrative*, available at <http://www.thetaskforce.org/issues/nondiscrimination/narrative> (last visited June 7, 2013) (discussing that Abzug and Koch introduced the Equality Act of 1974 on May 14, 1974, a sweeping federal bill to ban discrimination against lesbians, gay men, unmarried persons and women in employment, housing and public accommodations, and that their bill stands as the first-ever national legislative proposal to end discrimination against lesbians and gay men).

125. See NATIONAL GAY AND LESBIAN TASK FORCE, *supra* note 123.

126. Jason Lee, *Lost in Transition: The Challenges of Remediating Transgender Employment Discrimination under Title VII*, 35 HARV. J. OF L. & GENDER, 423, 425 (2012).

127. H.R. 3017, 111th Cong. (2009) <http://hdl.loc.gov/loc.uscongress/legislation.111hr3017> (last visited Aug. 19, 2013).

128. *Id.*

129. H.R. 1397, 112th Cong. (2011); S. 811, 112th Cong. (2011); see also Frank J. Cavico, Stephen C. Miller & Bahaudin Mujtaba, *Sexual Orientation and Gender Identity Discrimination in the American Workplace: Legal and Ethical Considerations*, 2 INT’L J. OF HUMANITIES & SOC. SCI. 1 (Jan. 2012); see also Shawn Clancy, *The Queer Truth: The Need to Update Title VII to Include Sexual Orientation*, 37 J. OF LEGIS. 119 (2011).

on April 25, 2013.¹³⁰ The U.S. Senate Committee on Health, Education, Labor and Pensions adopted the ENDA by a bipartisan vote of 15-7 on July 10, 2013.¹³¹

On the state level, sixteen states and the District of Columbia already ban discrimination based on sexual orientation and gender identity/expression.¹³² An additional five states ban discrimination on the basis of sexual orientation.¹³³

III. What Happens Next?

A. Likelihood of ENDA's Passage in Obama's Second Term

Unfortunately, it is unlikely that the ENDA will pass under the current Congress or the next without significant changes to the congressional make-up. Politically, the 113th Congress that was sworn in in January of 2013 is not much different than the 112th Congress it replaced.¹³⁴ Republicans continue to control the House of Representatives and Democrats continue to have a slight majority in the Senate. The balance of power is unchanged.

There is slightly more diversity in the current make-up of Congress than ever before. There are six openly gay or bisexual individuals in the House of Representatives, and the Senate has its first Lesbian Senator—former Rep. Tammy Baldwin. The House has its first Hindu Representative and the Senate has its first Buddhist Senator.¹³⁵ Yet, the number of women and racial or ethnic minorities continues to increase at a snail's pace. Congress remains far whiter, wealthier, and more male than the nation's population. Nevertheless, it appears that the increasingly diverse Congress

130. H.R. 1755, 113th Cong. (2013); S. 815, 113th Cong. (2013).

131. See Exec. Session videotaped recording, available at <http://www.help.senate.gov/hearings/hearing/?id=495623c9-5056-a032-52e4-f47523519a5a> (last viewed Aug. 19, 2013).

132. NATIONAL GAY AND LESBIAN TASK FORCE, *State Nondiscrimination Laws in the U.S.* (June 21, 2013) http://www.thetaskforce.org/reports_and_research/nondiscrimination_laws.

133. *Id.*

134. See Jennifer E. Manning, CONGRESSIONAL RESEARCH SERVICE, *Membership of the 112th Congress: A Profile* (Mar. 1, 2011), available at <http://www.senate.gov/reference/resources/pdf/R41647.pdf>.

135. Elizabeth Tenety, *In 113th Congress: First Hindu, first Buddhist in Senate and (maybe) first 'none,'* THE WASHINGTON POST (Jan. 3, 2013), http://www.washingtonpost.com/blogs/under-god/post/in-113th-congress-first-hindu-first-buddhist-in-senate-and-maybe-first-none/2013/01/03/1ceea0e0-55bc-11e2-8b9e-dd8773594efc_blog.html.

members are forcing some of their colleagues to rethink the concept of equal rights, including those surrounding gay rights and homosexuality. The presence of openly gay men and women and their families was a factor that some believe was instrumental for states where same-sex marriage was legalized by legislatures.¹³⁶ Seeing those non-traditional families in the public eye may have helped put a human face on a concept that many legislators had thought about only in the abstract.¹³⁷

Yet even with the opportunities gay men, lesbians, and bisexuals say their membership in Congress presents, their reception has not been a completely warm one. One of the first acts of the current Republican-controlled House was to set aside funds to defend the 1996 law that prohibits the recognition of same-sex marriages because the Obama administration stopped supporting it.¹³⁸ Also, the make-up of Congress shows just how much of a climb gay rights supporters face. The Human Rights Campaign (“HRC”) said that it counts only 184 of 435 members of the House as solid supporters on the issue of gay rights.¹³⁹ By contrast, HRC counts 220—a majority—as opponents of gay rights.¹⁴⁰ In the Senate, the group says it considers forty-two members opposed to gay rights and forty-two in favor.¹⁴¹

Moreover, many politicians used their opposition to gay rights as a platform to gain votes in their election campaigns. For example, Representative Michele Bachman described being gay as “bondage” and “part of Satan.”¹⁴² In 2004, while Bachman served in the Minnesota state legislature, she proposed an amendment to the Minnesota Constitution to ban same-sex marriage.¹⁴³ Without the amendment, she said at the time, “sex curriculum would essentially be taught by the gay community” and “little K-12 children will be forced to learn that homosexuality is normal, natural, and perhaps they should try it.”¹⁴⁴ She has even claimed that the

136. See Jeremy Peters, *Openly Gay, and Openly Welcomed in Congress*, N.Y. TIMES (Jan. 25, 2013), http://www.nytimes.com/2013/01/26/us/politics/gay-lawmakers-growing-presence-suggests-shift-in-attitudes.html?_r=0.

137. *See id.*

138. *See id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. See Trudy Ring, *Antigay Watch List: The Worst Who Want Your Vote*, ADVOCATE.COM (Oct. 31, 2012), <http://www.advocate.com/politics/election/2012/10/31/halloween-horror-list-worst-who-want-your-vote?page=full>.

143. *See id.*

144. *Id.*

high rate of suicide among gay teens is due simply to being gay, not to bullying or discrimination.¹⁴⁵

Steve King who won a seat in 2012 representing his district in the state of Iowa in the House said he feared his state would become a “gay marriage Mecca” after a 2009 state Supreme Court decision struck down barriers to legal marriage by same-sex couples.¹⁴⁶ He went on a bus tour around the state encouraging voters to recall the justices who joined in that decision; the three who were up for retention votes in 2010 were indeed ousted.¹⁴⁷ King also has contended that marriage equality will be a step toward a society that takes children away from their parents to be raised in warehouses.¹⁴⁸

Florida Representative Allen West once said that people don’t get fired for being gay, so antidiscrimination laws are unnecessary.¹⁴⁹ He opposed repeal of “don’t ask, don’t tell” on the grounds that gay and lesbian service members “can change their behavior,” adding that repeal was the first step in a process that would eventually “break down the military.”¹⁵⁰ He also has said that “[t]he term ‘gay marriage’ is an oxymoron,” and with its legalization, along with abortion and the national debt, “it just becomes a matter of time before you don’t have society.”¹⁵¹

Marsha Blackburn, who represents her congressional district in Tennessee, co-chaired the committee that drafted 2012’s national Republican platform, considered the most anti-gay in history.¹⁵² Platform contributor Tony Perkins, president of the anti-gay Family Research Council, boasted of his friendship with Blackburn as key to getting so much of his hateful language adopted.¹⁵³ Among other things, the platform says, “[t]he court-ordered redefinition of marriage in several States . . . is an assault on the foundations of our society, challenging the institution which, for thousands of years in virtually every civilization, has been entrusted with the rearing of children and the transmission of cultural values.”¹⁵⁴ According to the platform, such an “activist judiciary . . . [is] a serious

145. *Id.*

146. *Id.*

147. *See id.*

148. *See id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *See id.*

153. *See id.*

154. *Id.*

threat to our country's constitutional order, perhaps even more dangerous than presidential malfeasance."¹⁵⁵ And President Obama's gay-friendly policies, including his administration's decision to stop defending the Defense of Marriage Act in court, amount to "a mockery of the President's inaugural oath."¹⁵⁶

These are just a few examples of the vitriolic and extremist campaign rhetoric that plagued the 2012 Congressional elections where politicians sought to divide the country into pro-gay or anti-gay camps. By taking such extreme stances on these issues, those politicians who won their campaigns have put themselves in the position of being unable to work together with more liberal legislators or to reach compromises to provide rights and protections to all of the nation's citizens. The bad blood means it will be that much harder to work together on any issue, much less one so emotionally charged.

Further, if the congressional record on these issues is any indication, then the future is bleak. Congress's record on the passage of protective legislation is spotty at best. Gains have been made in some areas. For example, hate crimes based on sexual orientation or gender identity are now punishable by federal law under the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act of 2009.¹⁵⁷ Don't Ask, Don't Tell was repealed in 2011, though almost all Republicans voted against the repeal.¹⁵⁸

If not for the recent intervention of the Supreme Court, the Defense of Marriage Act ("DOMA"), passed in 1996 and signed by then-President Bill Clinton, still would be good law.¹⁵⁹ Further, the reauthorization of the Violence Against Women Act—a bill that since its initial passing has traditionally received bipartisan support—was blocked numerous times in 2012 and 2013 before finally passing in February 2013.¹⁶⁰

Due to partisan discord, the 112th Congress was the most unproductive session since the 1940s.¹⁶¹ A number of the bills it passed

155. *Id.*

156. *Id.*

157. Matthew Shepard Hate Crimes Prevention Act of 2009, 18 U.S.C. § 249 (2009).

158. Chris Geidner, *News Analysis: Today's DADT Repeal Vote, by the Numbers*, METROWEEKLY.COM (Dec. 18, 2010)<http://www.metroweekly.com/poliglot/2010/12/today-s-dadt-repeal-vote-by-the.html>.

159. *United States v. Windsor*, 133 S.Ct. 2675 (2013).

160. Jennifer Bendery, *Violence Against Women Act Now Touted By Republicans Who Voted Against Bill*, HUFFINGTON POST (Mar. 7, 2013), http://www.huffingtonpost.com/2013/03/07/violence-against-women-act_n_2832014.html.

161. See Amanda Terkel, *112th Congress Set to Become Most Unproductive Since*

were small and noncontroversial. Meanwhile, significant pieces of legislation have been blocked. The politicians often filled their time in session with time-wasting, divisive political maneuvering. For example, House Republicans have held votes to repeal the Affordable Care Act more than forty times since gaining control of the chamber in 2011, despite the fact that such a measure has no chance of passing the Democratically controlled Senate or being signed by President Obama.¹⁶² Another egregious example is of the 115 times the Republican minority held up a bill's passage by threatening to filibuster it.¹⁶³ Those on both ends of the political spectrum have noted the lack of bipartisanship in Congress. In April of 2012, Thomas Mann of the left-leaning Brookings Institution and Norm Ornstein of the conservative American Enterprise Institute worked together to publish a *Washington Post* op-ed saying that the GOP deserves the blame for the dysfunction.¹⁶⁴

Ultimately, “given the extended use of filibuster and partisan bickering Congress, we will likely see much of the same gridlock and acrimony exhibited over the last two years. This means that . . . the most likely course for progress until after the mid-term elections in 2014 remains with the Obama Administration[,] the federal administrative agencies, [and the courts].”¹⁶⁵

B. Likelihood of Congressional Expansion of Title VII Protections

As an alternative to enacting ENDA, it has been proposed that a better remedy is for Congress to amend the “because of sex” provision of Title VII to prohibit discrimination “because of gender,” defined to include sexual orientation and gender identity.¹⁶⁶ “Sex” refers to an anatomical classification as male or female, while “gender” refers to socially

1940s, HUFFINGTON POST (Dec. 28, 2012), http://www.huffingtonpost.com/2012/12/28/congress-unproductive_n_2371387.html?

162. See Amanda Terkel, *House GOP Votes to Repeal Obamacare for 40th Time*, HUFFINGTON POST (Aug. 2, 2013), http://www.huffingtonpost.com/2013/08/02/gop-obamacare-vote_n_3695871.html

163. *Supra* n. 161.

164. *See id.*

165. Patrick Paschall, NATIONAL GAY AND LESBIAN TASK FORCE, *Movement Analysis: The Impact of the 2012 Presidential Election on the LGBT Policy Agenda*, http://www.thetaskforce.org/downloads/reports/reports/move_analysis_2012_elec_obama.pdf, at 4-5 (last visited June 24, 2013).

166. Jennifer Hendricks, *Instead of ENDA, A Course Correction for Title VII*, 103 NW. U. L. REV. COLLOQUY 209 (2008).

constructed norms associated with sex. As discussed above, courts have already interpreted Title VII to allow some kinds of claims based on gender rather than sex, but have refused to recognize sexual orientation as part of gender.¹⁶⁷ Congress could modify Title VII's prohibitions to force a different outcome in the courts—a move not unprecedented.

When the courts adopted a narrow interpretation of “sex” that excluded pregnancy, Congress responded through Title VII instead of enacting a separate law about pregnancy.¹⁶⁸ In *Geduldig v. Aiello*,¹⁶⁹ the Supreme Court infamously declared that pregnancy discrimination was not sex discrimination because it distinguished between “pregnant women and non-pregnant persons,” rather than between men and women.¹⁷⁰ Congress responded by defining “because of sex” to include “because of pregnancy.”¹⁷¹ By crafting the Pregnancy Discrimination Act (“PDA”) not as a separate discrimination law but as an amendment to Title VII, Congress symbolically rejected the reasoning of *Geduldig*. This eventually led the Court to uphold the Family Medical Leave Act (“FMLA”) as sex equality legislation, suggesting that Congress’s view has prevailed.¹⁷² Rather than enact a stand-alone Employment Non-Discrimination Act (“ENDA”) or add “sexual orientation” to the list of prohibited classifications within Title VII, it has been suggested that Congress should do what it did with the PDA:

Title VII should be revised in two respects: (1) the word “sex” in 42 USC sec. 2000e-2, which prohibits discriminatory employment practices, should be replaced by gender wherever it appears; (2) the first sentence in the definition of “because of sex,” found at 42 USC sec. 2000e(k) should be revised to say, “The terms ‘because of gender’ or ‘on the basis of gender’ include, but are not limited to, because of or on the basis of sexual orientation; gender identity; and pregnancy, childbirth, or related medical conditions.”¹⁷³

The most recent version of the ENDA lacks several of Title VII’s protections, such as the right to file disparate impact claims and or seek

167. *Id.*

168. *Id.* at 211.

169. 417 U.S. 484, 496–97 (1974).

170. Hendricks, *supra* note 166, at 211.

171. *Id.*

172. *Id.*

173. *Id.* at 212.

affirmative action as a remedy for proven discrimination.¹⁷⁴ Certain commentators criticize the ENDA for prohibiting disparate impact claims; whereas Title VII allows claims instituted pursuant to the disparate impact doctrine.¹⁷⁵ Another concern is whether voluntary affirmative action programs would be permissible under the ENDA. Section 4(f) of HR 1755 expressly forbids quotas and preferential treatment on the basis of perceived sexual orientation or gender identity.¹⁷⁶ The concern is that this might preclude employers from adopting voluntary affirmative action programs. Also, it would perpetuate the idea that gender identity or sexual orientation discrimination should be treated differently from other forms of discrimination. Amending Title VII, rather than passing the ENDA, could alleviate those concerns.

Another important reason to unite the ENDA with “because of sex” is to avoid perpetuating the problem of intersectionality.¹⁷⁷ If the ENDA is passed as a standalone statute rather than as a gender amendment to Title VII, if straight women and gay men have fared well, the lesbian plaintiff may lose on both the ENDA and Title VII counts.¹⁷⁸ Moreover, having separate statutes with separate remedial structures will make it even more important for the factfinder to isolate the claims, parse the evidence more finely, and ignore intersectionality.¹⁷⁹ Congress has a clear opportunity with the ENDA to avoid the problem by instead passing a gender amendment.¹⁸⁰

Cases will be more difficult to win if sex discrimination and sexual orientation discrimination are deemed so distinct that they do not even belong in the same statute. By introducing the ENDA as a separate piece of legislation, Congress is engaging in a symbolic contradiction. Title VII was originally enacted to protect against discrimination against especially vulnerable groups of people and to promote equality in the workplace. Not including sexual orientation discrimination in Title VII suggests that while employees should benefit from a workplace free from discrimination;

174. H.R. 1755, 113th Cong. (2013); S. 815, 113th Cong. (2013).

175. Hendricks, *supra* note 166, at 212–13.

176. *Supra* note 174.

177. Hendricks, *supra* note 166, at 214; *see also*, Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (1989).

178. Hendricks, *supra* note 166, at 214.

179. *Id.*

180. *Id.*

sexual orientation discrimination is distinct from other protected characteristics.

Finally, tying the ENDA to sex discrimination with a gender amendment to Title VII instead of a standalone statute could have important consequences for the scope of Congress's power to prohibit discrimination on the basis of sexual orientation and gender identity.¹⁸¹ The ENDA must be backed up by Congress's power to enforce the 14th Amendment.¹⁸² A freestanding the ENDA virtually guarantees that sexual orientation will fall into the "other" category of suspect classifications not protected by the 14th amendment applicable to civil rights laws.¹⁸³

Unfortunately, the same reasons which make it unlikely the ENDA will pass during President Obama's remaining time in office portend that Title VII will not be amended over the next four years. If Congress cannot work together to pass the ENDA, it is highly unlikely enough votes could be garnered to amend Title VII, no matter the public benefit.

C. *Could a Change in Judicial Interpretation Expand Protection?*

i. *Gender Identity*

If Congress does not pass the ENDA and does not modify the text or the meaning of Title VII legislatively, recourse for victims of gender identity or sexual orientation discrimination lies with the courts. "As a legal matter, *Macy* does not definitively determine that Title VII protects transgender people. Ultimately, the U.S. Supreme Court decides what a federal statute means—and the Court may eventually be asked whether "sex" in existing statutes includes the discrimination that transgender people face."¹⁸⁴ Until the Supreme Court rules, federal courts are free to disregard the determination by the EEOC if the court rules the EEOC's determination fails to adequately state or interpret existing law. However, although courts are not bound by the EEOC's decision, they often give the EEOC's guidance a great deal of deference and will enforce the EEOC's interpretation of the law.¹⁸⁵

181. *Id.* at 215.

182. *Id.*

183. *Id.*

184. NATIONAL GAY AND LESBIAN TASK FORCE, *Movement Analysis: The Impact of the 2012 Presidential Election on the LGBT Policy Agenda*, http://www.nglhf.org/downloads/reports/reports/move_analysis_2012_elec_obama.pdf at 6.

185. Rebecca Hanner White, *Deference and Disability Discrimination*, 99 MICH. L.

Additionally, federal agencies are fully bound by the EEOC decision.¹⁸⁶ Now, the EEO counselors which process claims in each federal agency are required to accept these complaints by transgender people as forbidden sex discrimination.¹⁸⁷ Many private sector employers are also bound by the decision if they are federal contractors.¹⁸⁸ Accordingly, regardless of whether lower courts enforce the EEOC's interpretation, many employers will have to enforce the holding of *Macy* until the Supreme Court says otherwise. Further, in an effort to avoid liability private employers may follow suit. For now at least, the tide has turned in favor of gender identity protection.

ii. Sexual Orientation

On the other hand, the EEOC has issued no similar guidance to protect victims of sexual orientation discrimination in employment. Therefore, courts will continue to dismiss claims made on the basis of sexual orientation discrimination unless the courts begin to analyze these cases in a new way. The answer may lie in the theory of relational discrimination.¹⁸⁹ Relational discrimination cases allege discrimination because of the

REV. 532, 571 (2000) (“In the sensitive area of race or sex discrimination, the Supreme Court may be unwilling to defer to an agency interpretation with which it disagrees.”).

186. NATIONAL GAY AND LESBIAN TASK FORCE, *Movement Analysis: The Full Impact of the EEOC Ruling on the LGBT Movement's Agenda*, http://www.thetaskforce.org/downloads/reports/reports/eeoc_movement_analysis.pdf at 5 (“While the federal government has already taken steps to eradicate discrimination over the past several years, such as by updating the overall non-discrimination policy to include ‘gender identity’ and issuing the tremendously important ‘Guidelines on the Employment of Transgender Individuals,’ both done by the Office of Personnel Management, federal agencies have not universally updated their non-discrimination policies and anecdotal evidence of discrimination has continued to accumulate.”).

187. *Id.* at 4.

188. *Id.* at 5.

189. Victoria Schwartz, *Title VII: A Shift from Sex to Relationships*, 35 HARV. J.L. & GENDER 209 (2012). The Supreme Court did not explicitly find that sexual orientation is a suspect or a quasi-suspect classification under the Equal Protection Clause in *United States v. Windsor*, 133 S.Ct. 2675 (2013) and no lower court has held that sexual orientation discrimination is prohibited by law. It is unclear how lower courts may interpret the *Windsor* decision or whether an expansion of the Court's holding in *Windsor* would be affirmed on appeal. It will undoubtedly take a number of years for the implications of the *Windsor* holding to be fully assessed. The theory of relational discrimination, on the other hand, may be a theory that courts will be more willing to adopt as a theory of protection which builds on an existing protected category (i.e., sex) and the existing interpretation of the term “sex”, rather than creating a new category of protection.

claimant's relationship with another person.¹⁹⁰ Courts have recognized cognizable claims under Title VII's prohibition of race discrimination where a white employee or applicant was discriminated against because of his or her relationship with a person of another race.¹⁹¹ For example, in *Gresham v. Waffle House, Inc.*, the Northern District of Georgia found that the claimant had a cognizable claim under Title VII where she, a white female, alleged she had been discharged from her job because of her marriage to a black man.¹⁹² The court found, "if the plaintiff in the instant case, had been black, the alleged discrimination would not have occurred. In other words . . . but for [her] being white, the plaintiff[] in [this] case[] would not have been discriminated against."¹⁹³ In *Tetro v. Elliot Popham Pontiac, Oldsmobile, Buick & GMC Trucks*, the Sixth Circuit held that a "white employee who is discharged because his child is biracial is discriminated against on the basis of his race, even though the root animus for the discrimination is prejudice against the biracial child."¹⁹⁴ Courts have also held that relational discrimination is prohibited in national origin cases. For example, in *Reiter v. Center Consolidated School District*,¹⁹⁵ a Colorado district court held that discriminatory employment practices based on an individual's association with people of a particular race or national origin are prohibited under Title VII.¹⁹⁶

"Sex" is listed as parallel to the prohibitions against discrimination on the basis of race and national origin under Title VII. Therefore, the phrase "because of such individual's," which is interpreted relationally by the courts in the race context, should be interpreted in the same way in the context of the protected category of "sex."¹⁹⁷ Accordingly, in addition to the traditional protection for discrimination based on an individual's sex when viewed in isolation, applying the relational discrimination analysis

190. *Id.*

191. *Id.*

192. *Gresham v. Waffle House, Inc.*, 586 F. Supp. 1442, 1445 (N.D. Ga. 1984).

193. *Id.*; see also *Whitney v. Greater New York Corp. of Seventh-Day Adventists*, 401 F. Supp. 1363, 1366 (S.D.N.Y. 1975) and *Holiday v. Belle's Restaurants*, 409 F. Supp. 904, 908 (W.D. Pa. 1976) ("Every Circuit to consider the issue has since followed the Eleventh Circuit's lead and concluded that Title VII protects against relational discrimination, at least in the interracial context."); see also Victoria Schwartz, *Title VII: A Shift from Sex to Relationships*, 35 HARV. J. L. & GENDER 209, 223 (2012); *Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 892 (11th Cir. 1986).

194. 173 F.3d 988, 994 (6th Cir. 1999).

195. 618 F. Supp. 1458 (D. Colo. 1985).

196. *Id.* at 1460.

197. Schwartz, *supra* note 189, at 247.

would mean that courts would also take into account claims in which an individual is discriminated against based on his or her sex when viewed in relation to others.¹⁹⁸

One benefit of the relational interpretation analysis is that courts will not need to reinterpret “sex” to mean anything other than gender. “In fact, a gender-based interpretation is at the core of the argument. Rather than focusing on the meaning of the word “sex,” the question is reframed as whether one is being discriminated against based on one’s gender vis-a-vis the person with whom he or she is in a relationship.”¹⁹⁹ If the courts apply the theory of relational discrimination to the sexual orientation discrimination context and enforce the EEOC’s interpretation in gender identity cases, there will no longer be a need for an amendment to Title VII or passage of the ENDA.

In the last few years, the executive branch of the federal government has come out definitively in support of LGB equality, taking the position that heightened scrutiny is warranted for classifications that target lesbians and gay men, and supporting gay marriage equality.²⁰⁰ Further, twenty-one states already ban discrimination based on sexual orientation and/or gender identity/expression and seventeen states and the District of Columbia allow gay marriage or civil unions.²⁰¹ Statutory law is changing, legal interpretation is broadening, and this term the Supreme Court held that anti-gay marriage laws violated the equal protection of gay couples who wished to marry.²⁰² Collectively, these developments suggest a major transformation in the minds of the majority of Americans regarding the social meaning of LGB status. With federal and state policy and popular opinion in favor of protection, courts may be more willing to hear and adopt a new theory of protection, such as relational discrimination, in the near future.

198. *Id.* at 248.

199. *Id.*

200. *See supra* sec. I.

201. *See* NATIONAL GAY AND LESBIAN TASK FORCE, *State Non-Discrimination Laws in the U.S.* (June 21, 2013), http://www.thetaskforce.org/downloads/reports/issue_maps/non_discrimination_6_13_color.pdf; *see also* HUMAN RIGHTS CAMPAIGN, *Same-Sex Relationship Recognition Laws: State by State*, [https://www.hrc.org/files/assets/resources/Relationship_Recognition_Laws_Map\(1\).pdf](https://www.hrc.org/files/assets/resources/Relationship_Recognition_Laws_Map(1).pdf) (last visited June 24, 2013).

202. Katie R. Eyer, *Marriage This Term: On Liberty and the “New Equal Protection,”* 60 UCLA L. REV. DISC. 2 (2012).

IV. Recommendations & Conclusions

Regardless of whether the lower courts take an expansive view of the recent holding in *United States v. Windsor* or find room for protection by way of the theory of relational discrimination, eventually it will be necessary to codify court rulings in favor of gender identity or sexual orientation discrimination protection. Inevitably, the *Macy* ruling and others like it fail to answer many of the practical questions employers will face while trying to prevent, identify, and remedy discrimination in the workplace that are best answered directly by laws and their interpretive regulations and guidance. Such questions include those related to dress codes, what constitutes harassment, confidentiality, sex-segregated facilities, etc.²⁰³ As for the choice between the ENDA and a modification to Title VII, modifying Title VII would result in the best possible outcome because courts will be forced to provide the same analysis and remedies to claims for discrimination on the basis of race or national origin. It will also make a clear statement to the public that discrimination on the basis of gender identity or sexual orientation is seen the same as other forms of discrimination.

“An equally important purpose of passing laws for the rights of LGBT people is to change society’s culture and attitudes towards the community. Laws against discrimination . . . can change entire workplace cultures about what is appropriate and not appropriate in an employment setting. Given the pervasiveness and intransigence of the problem of discrimination against LGBT people—of whom seventy-eight percent report mistreatment, harassment, or discrimination at work²⁰⁴—a massive cultural change is needed. The cultural change triggered by the passage of a law is just as important as the creation of legal recourse and the ability to win a case in court. “The passage of a law, especially a federal law, creates an educational moment that motivates employers to make immediate changes in policies and conduct training to make sure discrimination doesn’t occur in the first place.”²⁰⁵

203. NATIONAL GAY AND LESBIAN TASK FORCE, *Movement Analysis: The Impact of the 2012 Presidential Election on the LGBT Policy Agenda*, http://www.nglhf.org/downloads/reports/reports/move_analysis_2012_elec_obama.pdf at 6-7

204. See Jaime M. Grant, et al., *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey* (Feb. 3, 2011), http://www.thetaskforce.org/downloads/reports/reports/ntds_full.pdf.

205. Eyer, *supra* note 202, at 7.

Even if no workplace advances are made at the legislative or judicial level, it is clear that the executive branch has committed to advancement of equality throughout the President's second term. The current administration's equal rights-friendly policies have resulted in other areas of protection, and more and more states are following suit, as are many large corporations. Progress is happening and I believe that it will continue in the near future.