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2019

## "A Fresh Look": Title VII's New Promise for LGBT Discrimination Protection Post-Hively

Devon Sherrell

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### Recommended Citation

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## **“A FRESH LOOK”: TITLE VII’S NEW PROMISE FOR LGBT DISCRIMINATION PROTECTION POST-*HIVELY***<sup>†</sup>

### ABSTRACT

*While about half of the states have passed antidiscrimination statutes that protect against sexual orientation discrimination, in the other half LGBT individuals face threats to their livelihoods and their dignity simply for being who they are. The U.S. Supreme Court does not recognize LGBT status as a class subject to heightened scrutiny and legislative efforts to pass nationwide discrimination protections for LGBT individuals, including an attempted amendment to the Civil Rights Act, have been unsuccessful. Further, until 2017, every federal circuit held that Title VII of the Civil Rights Act, prohibiting employment discrimination based on sex, did not include protection against sexual orientation discrimination. However, the Seventh Circuit took a “fresh look” at Title VII and recently reversed course, holding in *Hively v. Ivy Tech Community College* that Title VII’s sex discrimination prohibition extends to sexual orientation discrimination, perhaps paving the way for national employment discrimination protection for LGBT individuals.*

*While the *Hively* decision demonstrates Title VII’s promise as a strong method for achieving national LGBT employment protections, some commentators believe the Supreme Court’s decision in *Burwell v. Hobby Lobby* allowing certain private employers to assert statutory religious freedom claims would allow private employers to seek religious exemptions to Title VII’s sexual orientation protections. This Comment argues, however, that such claims will likely be unsuccessful because Title VII meets the Religious Freedom Restoration Act’s strict scrutiny standard. Further, reliance on Title VII provides other advantages including obviating the need for LGBT individuals to rely on nonuniform state and local protections and the possibility that federal courts may expand *Hively*’s rationale to other federal statutes prohibiting sex discrimination.*

*Ultimately, this Comment concludes that the Seventh Circuit’s interpretation of Title VII serves as the best defense against sexual orientation discrimination even in the face of religious objection and that litigants should focus on expanding the *Hively* rationales to other federal circuits to develop more contemporary opinions and possibly greater consensus before the Supreme Court ultimately resolves the issue.*

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<sup>†</sup> This Comment received the Mary Laura “Chee” Davis Award for Writing Excellence.

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## INTRODUCTION

*“Every single American[—]gay, straight, lesbian, bisexual, transgender[—]every single American deserves to be treated equally in the eyes of the law and in the eyes of our society. It’s a pretty simple proposition.”*

—President Barack Obama<sup>1</sup>

In 2009, Kimberly Hively, an adjunct instructor at Ivy Tech Community College in Indiana for fourteen years, kissed her girlfriend goodbye in the campus parking lot before work.<sup>2</sup> The next day, she was reprimanded for unprofessionalism.<sup>3</sup> For the next four years, despite her substantial qualifications and the fact that she had never received a negative review, she was consistently denied promotions, was never granted a single interview for the six full-time positions she applied for, and ultimately lost her teaching position in 2014.<sup>4</sup> She filed a pro se complaint with the EEOC and a pro se complaint to the U.S. District Court for the Northern District of Indiana, charging the college with discriminating against her for being a lesbian.<sup>5</sup> However, she faced an uphill battle—neither federal law nor Indiana law prevented the college from discriminating against her because of her sexual orientation.<sup>6</sup> Hively’s experience is not an isolated one—over a quarter of LGBT employees nationwide report experiencing discrimination or harassment in the workplace and nearly half of the LGBT population lives in areas where they can be discriminated against for simply being who they are.<sup>7</sup>

LGBT rights have expanded significantly over the past decade; however, employment discrimination against LGBT people remains a pervasive and widespread national problem.<sup>8</sup> Although twenty-two states have passed or

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<sup>1</sup> President Barack Obama, Remarks at the Human Rights Campaign’s Annual National Dinner (Oct. 1, 2011).

<sup>2</sup> Darran Simon, *Lesbian Plaintiff in Work Discrimination Suit Sticking to Fight*, CNN (Apr. 5, 2017, 4:34 PM), <https://www.cnn.com/2017/04/05/us/lgbt-employees-appeals-court-plaintiff/index.html>.

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

<sup>4</sup> Camille Patti, Note, *Hively v. Ivy Tech Community College: Losing the Battle but Winning the War for Title VII Sexual Orientation Discrimination Protection*, 26 TUL. J.L. & SEXUALITY 133, 135 (2017).

<sup>5</sup> *Id.*; see also *Hively v. Ivy Tech Cmty. Coll.*, 830 F.3d 698, 699 (7th Cir. 2016), *rev’d en banc*, 853 F.3d 339, 341 (7th Cir. 2017).

<sup>6</sup> Patti, *supra* note 4; *Hively*, 830 F.3d at 714.

<sup>7</sup> See Brad Sears & Christy Mallory, *Employment Discrimination Against LGBT People: Existence and Impact*, in BLOOMBERG BNA, GENDER IDENTITY AND SEXUAL ORIENTATION DISCRIMINATION IN THE WORKPLACE: A PRACTICAL GUIDE 40-3 (Christine Michelle Duffy ed., 2014); *Non-Discrimination Laws, MOVEMENT ADVANCEMENT PROJECT*, [http://www.lgbtmap.org/equality-maps/non\\_discrimination\\_laws](http://www.lgbtmap.org/equality-maps/non_discrimination_laws) (last visited Mar. 26, 2019).

<sup>8</sup> Sears & Mallory, *supra* note 7.

amended state civil rights or employment statutes to prohibit LGBT discrimination, in twenty-eight states, a gay person can get “married on Saturday and then fired on Monday for just that act.”<sup>9</sup> The prevalence of such discrimination and its negative impacts on LGBT people has been recognized and documented by courts; in complaints to administrative agencies; and in newspapers, books, and other media.<sup>10</sup> Still, while Congress has attempted several times to provide employment discrimination protections for LGBT people, it has ultimately been unsuccessful.<sup>11</sup>

Employment discrimination on the basis of sexual orientation and gender identity is widespread and poses significant physical and psychological harm to LGBT individuals.<sup>12</sup> One national survey found that 42% of LGB-identified individuals had experienced at least one form of employment discrimination because of their sexual orientation<sup>13</sup> and another found that 78% of transgender individuals had experienced workplace discrimination.<sup>14</sup> This discrimination can lead to harmful personal effects on LGBT individuals and overall wage and employment disparities.<sup>15</sup> Fear of discrimination may lead LGBT employees to conceal their sexual or gender identities leading to less job satisfaction, less trust among fellow employees, and even physical symptoms of stress and isolation.<sup>16</sup> Those who have experienced discrimination firsthand report greater rates of absenteeism and mental health issues like depression.<sup>17</sup> Further, studies show gay men are paid less on average than their straight peers and transgender individuals face significantly higher unemployment rates and poverty rates than all groups surveyed.<sup>18</sup> Because discrimination has such a proven negative impact on LGBT individuals, ensuring that all LGBT employees are protected by legislation should be a serious policy rationale for expanding antidiscrimination protections.

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<sup>9</sup> *Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339, 342 (7th Cir. 2017); see *Hively*, 830 F.3d at 714 n.6; Moira Donegan, *Jeff Sessions Wants to Make Sure that You Can Be Fired for Being Gay*, NEW REPUBLIC (Jul. 27, 2017), <https://newrepublic.com/minutes/144081/jeff-sessions-wants-make-sure-can-fired-gay>.

<sup>10</sup> See Sears & Mallory, *supra* note 7.

<sup>11</sup> Patti, *supra* note 4.

<sup>12</sup> See BRAD SEARS & CHRISTY MALLORY, DOCUMENTED EVIDENCE OF EMPLOYMENT DISCRIMINATION & ITS EFFECTS ON LGBT PEOPLE 1–2 (2011), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Sears-Mallory-Discrimination-July-20111.pdf>.

<sup>13</sup> *Id.* at 4.

<sup>14</sup> *Id.* at 2.

<sup>15</sup> *Id.* at 13–14.

<sup>16</sup> *Id.* at 13.

<sup>17</sup> *Id.* at 15–16.

<sup>18</sup> *Id.* at 14.

In response to these disparities and Congress's repeated failure to act on employment discrimination against LGBT people, activists and legal scholars have been left to shoulder the daunting task of putting forth arguments for workplace protection absent express statutory authority.<sup>19</sup> For decades, LGBT litigants have consistently argued, and federal courts of appeals have consistently rejected, that Title VII of the Civil Rights Act prohibits sexual orientation employment discrimination pursuant to its protections against sex discrimination in the workplace.<sup>20</sup> Indeed, until 2017, every federal circuit had ruled expressly that sexual orientation is not included in the discrimination protections of Title VII—until the Seventh Circuit's recent en banc decision in *Hively v. Ivy Tech Community College*.<sup>21</sup>

In *Hively*, the Seventh Circuit, sitting en banc, took “a fresh look” at the statute and held that Title VII's prohibition against “sex discrimination” encompasses sexual orientation discrimination.<sup>22</sup> This interpretation follows a similar reading of Title VII by the EEOC in 2015.<sup>23</sup> The *Hively* decision creates a circuit split among the U.S. Courts of Appeals that the U.S. Supreme Court has yet to resolve. Soon after *Hively*, the Second Circuit sitting en banc in *Zarda v. Altitude Express, Inc.*<sup>24</sup> similarly held that Title VII expressly prohibits sexual orientation discrimination for the same rationales.<sup>25</sup> Given *Hively*'s persuasive reasoning and the possibility that the Supreme Court will interpret Title VII in a similar manner, it is important to understand the implications of the Supreme Court reading sexual orientation into Title VII's sex discrimination prohibition in terms of its effect on other federal statutes and potential challenges that may ensue.

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<sup>19</sup> Such possible solutions have included relying on state antidiscrimination laws, drafting new federal legislation, and pushing for heightened scrutiny under the Fourteenth Amendment. See J. Banning Jasiunas, Note, *Is ENDA the Answer? Can a “Separate but Equal” Federal Statute Adequately Protect Gays and Lesbians from Employment Discrimination?*, 61 OHIO ST. L.J. 1529, 1530 (2000).

<sup>20</sup> Keith Cunningham-Parmeter, *Marriage Equality, Workplace Inequality: The Next Gay Rights Battle*, 67 FLA. L. REV. 1099, 1134 (2015); see *Christiansen v. Omnicom Grp., Inc.*, 852 F.3d 195, 199 (2d Cir. 2017); *Evans v. Ga. Reg'l Hosp.*, 850 F.3d 1248, 1255 (11th Cir. 2017); *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 762 (6th Cir. 2006); *Medina v. Income Support Div.*, 413 F.3d 1131, 1135 (10th Cir. 2005); *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1063 (9th Cir. 2002); *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 261 (3d Cir. 2001); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999); *Hopkins v. Balt. Gas & Elec. Co.*, 77 F.3d 745, 751 (4th Cir. 1996); *U.S. Dep't of Hous. & Urban Dev. v. FLRA*, 964 F.2d 1, 2 (D.C. Cir. 1992); *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989); *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979).

<sup>21</sup> 853 F.3d 339, 347 (7th Cir. 2017); cases cited *supra* note 20.

<sup>22</sup> *Hively*, 853 F.3d at 340–41.

<sup>23</sup> *Baldwin v. Foxx*, EEOC Appeal No. 0120133080, 2015 WL 4397641, at \*4 (July 15, 2015).

<sup>24</sup> 883 F.3d 100 (2d Cir. 2018).

<sup>25</sup> *See id.* at 108.

One set of such challenges is likely to arise in the form of claims by private employers seeking exemptions from the application of Title VII to sexual orientation employment discrimination claims on the basis of religious objection. The Religious Freedom Restoration Act of 1993 (RFRA) initially allowed individuals to be exempted from federal laws that substantially burden the free exercise of religion subject to a strict scrutiny analysis.<sup>26</sup> In *Burwell v. Hobby Lobby*, the Supreme Court held that private, closely held, for-profit business corporations, too, are protected by RFRA and may be exempted from federal laws that substantially burden the corporation's sincerely held religious beliefs, provided the law is not narrowly tailored to serve a compelling governmental interest.<sup>27</sup> Since LGBT discrimination is often based on religion, it is not hard to imagine, then, that a private corporation asserting a sincerely held religious objection to LGBT status may attempt to use RFRA to be exempted from Title VII's sex discrimination prohibition. Were such an exception granted, Title VII's workplace protections for LGBT employees could be seriously undermined on a practical level.

This Comment argues, however, that both the Supreme Court's language in *Hobby Lobby* and other Supreme Court precedent suggest that Title VII's sex discrimination provision would ultimately pass the strict scrutiny analysis required under RFRA. Thus, an interpretation that Title VII prohibits sexual orientation discrimination serves as the best avenue for securing nationwide employment discrimination protection for LGBT people even in the face of religious objection. Additionally, courts could—and should—extend the reasoning of *Hively* to other federal statutes prohibiting sex discrimination, potentially providing sweeping antidiscrimination protections for LGBT people.

This Comment argues that expansion of Title VII based on the rationales set forth in *Hively* would pave the way for broad antidiscrimination protections even in the face of religious objection because Title VII meets the strict scrutiny standard required under RFRA. Part I discusses the histories of RFRA and Title VII by tracing their legislative histories and development through case law to examine how the statutes may interact with one another. Part II consolidates these concurrent histories to make three main arguments: first, Title VII meets

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<sup>26</sup> 42 U.S.C. § 2000 (2012); see *Eternal Word Television Network, Inc. v. Sec'y, U.S. Dep't of Health & Human Servs.*, 818 F.3d 1122, 1139 (11th Cir.), *vacated on other grounds*, No. 14-12696-CC, 2016 WL 11503064, at \*1-2 (11th Cir. May 31, 2016). Additionally, nonprofit, religious organizations such as churches and parochial schools have historically been given "special solicitude" under the First Amendment's free exercise protections. See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 189 (2012).

<sup>27</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2761, 2768, 2775, 2791 (2014).

the strict scrutiny analysis required by RFRA; second, Title VII obviates the need for LGBT individuals to rely on nonuniform laws and policies; and third, the rationales behind protecting sexual orientation under Title VII extend to other federal statutes prohibiting sex discrimination. Finally, Part III argues that since the Supreme Court has affirmatively decided to not yet resolve the circuit split created by *Hively*,<sup>28</sup> litigants should focus on expanding *Hively*'s rationales to other federal circuits by applying *Hively*'s rationales to existing circuit precedent.

## I. THE HISTORIES OF RFRA AND TITLE VII

Examining the histories of RFRA and Title VII is necessary to understanding how the statutes may interact with one another. RFRA was drafted and passed in response to the development of the Supreme Court's free exercise jurisprudence, particularly as a strong response to the Supreme Court's weakening of constitutional protection for religious freedom in *Employment Division v. Smith*.<sup>29</sup> The Supreme Court later expanded RFRA's scope in *Hobby Lobby* to allow private, for-profit businesses to assert RFRA claims.<sup>30</sup> Similarly, although Title VII's sex discrimination prohibition initially lacked robust force, Supreme Court precedent expanding its scope led to its coverage of a broad range of situations.<sup>31</sup> This broader scope informed the Seventh Circuit's decision in *Hively* holding that Title VII's sex discrimination prohibition includes protection against sexual orientation discrimination.<sup>32</sup>

Section A below briefly examines the history of the Supreme Court's free exercise jurisprudence culminating in the passage of RFRA. It then highlights one of the most recent and important RFRA developments in the Court's *Hobby Lobby* decision. Section B next traces the history of Title VII's sex discrimination prohibition particularly through Supreme Court case law expanding its scope. Section B concludes by discussing how this more robust reading of Title VII led the Seventh Circuit in *Hively* to find two separate

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<sup>28</sup> *Evans v. Ga. Reg'l Hosp.*, 138 S. Ct. 557, 557 (2017) (mem.) (denying certiorari from an Eleventh Circuit case holding that Title VII does not protect against sexual orientation discrimination).

<sup>29</sup> Robert F. Drinan & Jennifer I. Huffman, *The Religious Freedom Restoration Act: A Legislative History*, 10 J.L. & RELIGION 531, 531 (1993); see *Emp't Div. v. Smith*, 494 U.S. 872, 879 (1990).

<sup>30</sup> *Hobby Lobby*, 134 S. Ct. at 2761, 2768, 2775, 2791.

<sup>31</sup> *Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339, 345 (7th Cir. 2017); see Robert C. Bird, *More than a Congressional Joke: A Fresh Look at the Legislative History of Sex Discrimination of the 1964 Civil Rights Act*, 3 WM. & MARY J. WOMEN & L. 137, 140–41 (1997) (Title VII's absence of legislative history allowed the Supreme Court to broaden its protections).

<sup>32</sup> *Hively*, 853 F.3d at 351–52.



rationales for interpreting the sex discrimination prohibition to protect against sexual orientation discrimination.

A. *Free Exercise Jurisprudence, RFRA, and Hobby Lobby*

The Supreme Court's free exercise jurisprudence has historically been punctuated by three shifting standards of review.<sup>33</sup> During the Supreme Court's first half-century of analyzing free exercise claims after 1879, it applied rational basis review to claims challenging laws that burdened free exercise, yielding no religious exemptions to general laws.<sup>34</sup> Then, beginning with *Cantwell v. Connecticut* in 1940, the Supreme Court incorporated the First Amendment to the states and began applying intermediate scrutiny to free exercise claims.<sup>35</sup> While this standard provided heightened protection for religious freedom claimants, in four cases in 1961 involving Sunday blue laws and Sabbath day laws, the Supreme Court repeatedly held that individuals who recognized the Sabbath on Saturday instead of Sunday were not entitled to exemptions from the criminal penalties of the Sunday laws.<sup>36</sup> These decisions sparked a serious public response and were widely criticized as affronts to religious liberty, particularly because the Sunday laws were obviously inspired by Christianity and maintained Christian religious significance to the majority of individuals.<sup>37</sup> In 1963 the Supreme Court responded to this public criticism in *Sherbert v. Verner*,<sup>38</sup> another Saturday Sabbatarian case, where it applied a strict scrutiny standard analysis to a free exercise claim for the first time.<sup>39</sup> The new standard required the challenged law to serve a compelling state interest and to be narrowly tailored to serve the government's purpose.<sup>40</sup> While some religious freedom claimants won under this standard,<sup>41</sup> the Supreme Court in several

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<sup>33</sup> See JOHN WITTE, JR. & JOEL A. NICHOLS, *RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT* 121 (4th ed. 2016).

<sup>34</sup> *Id.* at 121–22 (describing rational basis review as “low-level scrutiny”).

<sup>35</sup> *Id.* (describing intermediate scrutiny as “heightened scrutiny” and “free exercise scrutiny”).

<sup>36</sup> *Id.* at 206; see *Braunfeld v. Brown*, 366 U.S. 599, 605–06 (1961); *Gallagher v. Crown Kosher Super Mkt.*, 366 U.S. 617, 624, 630 (1961).

<sup>37</sup> WITTE, JR. & NICHOLS, *supra* note 33, at 206.

<sup>38</sup> 374 U.S. 398 (1963).

<sup>39</sup> Jesse H. Choper, *A Century of Religious Freedom*, 88 CALIF. L. REV. 1709, 1714–15 (2000) (noting that *Sherbert* is the first time the Supreme Court invalidated a government regulation solely based on the Free Exercise Clause, applying a strict scrutiny standard); see also *Sherbert*, 374 U.S. at 406–08; WITTE, JR. & NICHOLS, *supra* note 33, at 206.

<sup>40</sup> See *Sherbert*, 374 U.S. at 406; see also WITTE, JR. & NICHOLS, *supra* note 33, at 206 (describing the use of strict scrutiny in the *Sherbert* decision).

<sup>41</sup> See *Hobbie v. Unemp't Appeals Comm'n*, 480 U.S. 136, 139–40 (1987) (noting that the government violated the *Sherbert* standard when it denied unemployment benefits to an employee who was dismissed for refusing to work certain shifts due to religious reasons); *Wisconsin v. Yoder*, 406 U.S. 205, 228–29 (1972)

different cases either applied a lower standard of review than *Sherbert* or held that *Sherbert* did not apply to certain government actions, particularly in tax, military, and prison cases.<sup>42</sup> The *Sherbert* strict scrutiny standard was the prevailing method of analysis in free exercise cases until the Supreme Court's decision in *Employment Division v. Smith* in 1990.<sup>43</sup> In *Smith*, the Supreme Court returned to a lower standard of review, holding that laws that are facially neutral and generally applicable do not violate the First and Fourteenth Amendments even where they may burden religious practice.<sup>44</sup> *Smith* was perceived by many groups as a significant blow to religious freedom rights because it seriously weakened constitutional protections for religious claimants.<sup>45</sup>

The Supreme Court's decision in *Smith* galvanized a diverse movement of religious groups and civil rights organizations that feared the holding constituted a serious degradation of fundamental religious freedom rights.<sup>46</sup> These fears were ultimately well-founded as several lower court rulings after *Smith* found that religious exemptions to various general laws were not required based on *Smith*'s lower standard of review.<sup>47</sup> Once it was clear the Supreme Court would not reconsider *Smith*, several religious and civil rights organizations initiated a legislative approach ultimately culminating in the drafting and passage of RFRA.<sup>48</sup>

RFRA restored *Sherbert*'s strict scrutiny standard in religious exemption cases.<sup>49</sup> The statute provides that the government may burden a person's free

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(noting that the government's compulsory school attendance law did not meet the *Sherbert* standard when imposed on an Amish individual whose faith prohibited school attendance past the eighth grade).

<sup>42</sup> Richard F. Duncan, *Free Exercise and Individualized Exemptions: Herein of Smith, Sherbert, Hogwarts, and Religious Liberty*, 83 NEB. L. REV. 1178, 1180–81 (2005); see *Jimmy Swaggart Ministries v. Bd. of Equalization*, 493 U.S. 378, 391–92 (1990) (noting that the *Sherbert* standard does not apply to a tax where the complainant's faith does not forbid payment of the tax); *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450–51 (1988) (noting that the *Sherbert* standard does not apply when a government action has an incidental effect on a religious practice, even if it is severe); *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349 (1987) (holding that a "reasonableness" test applies to prison regulations instead of the *Sherbert* standard); *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986) (noting First Amendment review is more deferential to the government over military regulations than laws designed for civilians); *United States v. Lee*, 455 U.S. 252, 258–61 (1982) (noting that the government's imposition of social security tax meets the *Sherbert* standard even when imposed on an Amish claimant whose faith forbids payment or receipt of social security benefits).

<sup>43</sup> *Drinan & Huffman, supra note 29; see also Emp't Div. v. Smith*, 494 U.S. 872, 884–85 (1990); WITTE, JR. & NICHOLS, *supra note 33*, at 124.

<sup>44</sup> *Smith*, 494 U.S. at 879, 885, 888–90.

<sup>45</sup> *Drinan & Huffman, supra note 29*, at 532.

<sup>46</sup> *Id.* at 531–32.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 535; see 42 U.S.C. § 2000bb-1(b) (2012).

exercise only if it demonstrates that application of the burden serves a compelling governmental interest and is the least restrictive means of furthering that interest.<sup>50</sup> Congress intended the Supreme Court to “look to free exercise cases decided prior to *Smith* for guidance,”<sup>51</sup> and did not intend to “unsettle other areas of the law.”<sup>52</sup> Although the Supreme Court held RFRA unconstitutional as applied to state and local government action in *City of Boerne v. Flores*,<sup>53</sup> it has consistently reaffirmed the statute’s validity as applied to federal government action.<sup>54</sup> Although *City of Boerne* prompted a number of states to pass their own state-level religious freedom statutes applying heightened scrutiny to state laws burdening religious exercise,<sup>55</sup> the federal RFRA “reinstates the law as it was prior to *Smith*” without creating new religious exemption rights under federal law.<sup>56</sup>

In 2006, however, the Supreme Court applied a stricter reading of RFRA in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*,<sup>57</sup> arguably going beyond the *Sherbert* standard in holding that the government must justify its actions in relation to *the individual claimant*.<sup>58</sup> And while initially RFRA’s protections covered only individuals and religious organizations in the practice of their religion,<sup>59</sup> the Supreme Court later in *Hobby Lobby*, largely relying on *Gonzales*, held that RFRA also protects the free exercise rights of private, for-profit, close corporations.<sup>60</sup> Justice Ruth Bader Ginsburg’s dissent in *Hobby Lobby* noted her fear that the decision could allow private employers to engage in discrimination by claiming it is required by the convictions of their faith.<sup>61</sup> In response, the Supreme Court stated that while RFRA and modern corporate law allow for “the pursuit of profit in conformity with the owners’ religious

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<sup>50</sup> 42 U.S.C. § 2000bb-1(b)(1)–(2).

<sup>51</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2791 (2014) (citing S. REP. NO. 103-111, at 8 (1993), as reprinted in 1993 U.S.C.C.A.N. 1892, 1898).

<sup>52</sup> *Id.* (citing S. REP. NO. 103-111, at 12 (1993), as reprinted in 1993 U.S.C.C.A.N. 1892, 1902).

<sup>53</sup> 521 U.S. 507 (1997). The Court held that Congress’s Fourteenth Amendment enforcement power did not enable Congress to determine what actions constitute violations of the Fourteenth Amendment, a role exclusively occupied by the Judiciary. *Id.* at 519–20.

<sup>54</sup> See *Hobby Lobby*, 134 S. Ct. at 2751; *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 439 (2006).

<sup>55</sup> See *infra* Section II.B.

<sup>56</sup> *Hobby Lobby*, 134 S. Ct. at 2791.

<sup>57</sup> 546 U.S. at 439.

<sup>58</sup> *Id.* at 430.

<sup>59</sup> 42 U.S.C. §§ 2000a(a), 2000a-1 (2012); see, e.g., *Gonzales*, 546 U.S. at 432, 434, 437–39 (church asserted cognizable RFRA exemption claim); *Hankins v. Lyght*, 441 F.3d 96, 103, 106, 109 (2d Cir. 2006) (same).

<sup>60</sup> See *Hobby Lobby*, 134 S. Ct. at 2761, 2768.

<sup>61</sup> *Id.* at 2805 (Ginsburg, J., dissenting) (citing multiple cases in which private employers attempted to discriminate by claiming such discrimination was religious exercise).

principles,”<sup>62</sup> the *Hobby Lobby* decision does not provide a shield for discrimination cloaked as religious practice.<sup>63</sup> Still, some commentators fear that the *Hobby Lobby* opinion paves the way for private employers to discriminate against LGBT people by claiming religious objection.<sup>64</sup> Although the Seventh Circuit recently held that Title VII protects against sexual orientation discrimination in employment,<sup>65</sup> private employers might attempt to seek religious exemptions from Title VII under RFRA.<sup>66</sup> Thus, it is also important to examine the development of Title VII to determine how its jurisprudence may interact with RFRA’s strict scrutiny standard.

### B. Title VII and Hively

Title VII of the Civil Rights Act prohibits employment discrimination on the basis of “race, color, religion, sex, or national origin.”<sup>67</sup> Historically, some courts held that the statute’s legislative history revealed that the sex discrimination prohibition was included in Title VII as a “joke,” because of its inclusion by a conservative congressman<sup>68</sup> or that the provision lacked a significant enough legislative history to even consider when interpreting the statute.<sup>69</sup> Although this view of Title VII’s legislative history—or its lack thereof—was often benign or non-dispositive within case law, at times it caused courts to apply a narrower reading of the provision than Title VII’s typical degree of application to other protected classes.<sup>70</sup> However, this narrow reading

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<sup>62</sup> *Id.* at 2771 (majority opinion).

<sup>63</sup> *Id.* at 2783.

<sup>64</sup> See Diana Beltré Acevedo, Note, *Employment Discrimination: How Hobby Lobby Enables a RFRA Affirmative Defense Against Title VII’s Protections for LGBT People in the Workplace*, 86 REV. JUR. U.P.R. 1191, 1195 (2017); Richard J. D’Amato, Note, A “Very Specific” Holding: Analyzing the Effect of Hobby Lobby on Religious Liberty Challenges to Housing Discrimination Laws, 116 COLUM. L. REV. 1063, 1065 (2016); Travin Gasper, Comment, *A Religious Right to Discriminate: Hobby Lobby and “Religious Freedom” as a Threat to the LGBT Community*, 3 TEX. A&M L. REV. 395, 396 (2015).

<sup>65</sup> See *Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339, 340–41 (7th Cir. 2017).

<sup>66</sup> See Acevedo, *supra* note 64, at 1208.

<sup>67</sup> 42 U.S.C. § 2000e–2(a)(1) (2012).

<sup>68</sup> This interpretation was rooted in the belief that the congressman included the sex discrimination prohibition in an effort to kill the bill and because the record contained little debate when the amendment was brought to a vote. See Bird, *supra* note 31, at 137 (citing *Rabidue v. Osceola Ref. Co.*, 584 F. Supp. 419, 428 n.36 (E.D. Mich. 1984)).

<sup>69</sup> See Bird, *supra* note 31 (noting the Supreme Court’s acknowledgement of a lack of legislative history underlying Title VII).

<sup>70</sup> Bird, *supra* note 31, at 142; see *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984) (refusing to expand Title VII to protect transsexuals in part because of a “total lack of legislative history”); *Corne v. Bausch & Lomb, Inc.*, 390 F. Supp. 161, 163 (D. Ariz. 1975) (refusing to apply Title VII to claims of repeated sexual harassment because the legislative history showed no congressional intent to include sexual harassment).

ultimately gave way to Supreme Court precedent expanding upon Title VII's sex discrimination protections.<sup>71</sup>

The Supreme Court has noted that despite the sex discrimination prohibition's scant legislative history, the provision "evinces a congressional intent to 'strike at the entire spectrum of disparate treatment of men and women' in employment."<sup>72</sup> In fact, the Court has interpreted Title VII "to cover far more than the simple decision of an employer not to hire a woman for Job A, or a man for Job B."<sup>73</sup> The Court has held that Title VII covers sexual harassment in the workplace (including same-sex harassment),<sup>74</sup> discrimination based on assumptions about a person's longevity,<sup>75</sup> and discrimination based on a person's failure to conform to certain gender stereotypes.<sup>76</sup> Although the enacting Congress likely did not anticipate Title VII covering any of these situations, Justice Antonin Scalia noted in *Oncale v. Sundowner Offshore Services* that "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."<sup>77</sup> This rationale has played an important role in the expansion of Title VII's sex discrimination prohibition and serves as a primary argument for expanding the prohibition to include protections against LGBT discrimination.<sup>78</sup>

However, despite the Court's precedent expanding Title VII's sex discrimination prohibition beyond what the enacting Congress envisioned, every federal circuit had refused to interpret Title VII to cover sexual orientation discrimination until the Seventh Circuit's decision in *Hively*.<sup>79</sup> In *Hively*, a

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<sup>71</sup> See *Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339, 345 (7th Cir. 2017); Bird, *supra* note 31, at 137.

<sup>72</sup> *Meritor Sav. Bank, F.S.B. v. Vinson*, 477 U.S. 57, 64 (1986).

<sup>73</sup> *Hively*, 853 F.3d at 345.

<sup>74</sup> *Id.* (citing *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79–80 (1998)).

<sup>75</sup> *Id.* (citing *City of Los Angeles, Dep't of Water & Power v. Manhart*, 435 U.S. 702, 719 (1978)).

<sup>76</sup> *Id.* at 342 (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239–40 (1989)).

<sup>77</sup> *Oncale*, 523 U.S. at 79.

<sup>78</sup> See *Hively*, 853 F.3d at 344.

<sup>79</sup> *Id.* at 341–42; cases cited *supra* note 20. The primary argument against interpreting Title VII to include protection against sexual orientation discrimination has centered on perceived congressional intent to cover only basic notions of sex. See Patti, *supra* note 4, at 134. However, it is hard to square this interpretation with Supreme Court precedent and may lead to absurd results. *Id.* at 135. For example, complainants may need to mask their sexual orientation discrimination claims to avoid dismissal even where they have basic, cognizable sex discrimination claims. *Id.* Additionally, lower courts that refuse to expand Title VII to protect sexual orientation but acknowledge Supreme Court precedent regarding gender stereotyping often focus only on discrimination based on the perception of traditional gender expression instead of gay identity. See Brian Soucek, *Perceived Homosexuals: Looking Gay Enough for Title VII*, 63 AM. U. L. REV. 716, 740 (2014). Thus, a gay complainant that bucks traditional gender stereotypes more so than a similarly situated complainant may survive dismissal where another similarly situated complainant would not.

lesbian employee filed an employment discrimination claim alleging her employer refused to promote her several times and ultimately terminated her on the basis of her sexual orientation.<sup>80</sup> While the Seventh Circuit initially held that sexual orientation was not protected by Title VII,<sup>81</sup> it later reheard the case en banc.<sup>82</sup> On rehearing, the Seventh Circuit applied Supreme Court precedent expanding the scope of Title VII to find that sexual orientation discrimination carries several of the same qualities as other discriminatory conduct prohibited by Title VII's sex discrimination provision.<sup>83</sup> Particularly, the Seventh Circuit noted two separate rationales for reading Title VII to include a prohibition against sexual orientation discrimination: the comparative method and the associational theory.<sup>84</sup>

The *Hively* court's first line of reasoning, the comparative method, involves "isolating the significance of the plaintiff's sex to the employer's decision."<sup>85</sup> The comparative method has been used to examine Title VII sex discrimination claims "as far back as 1971," in *Phillips v. Martin Marietta Corp.*<sup>86</sup> In *Phillips*, the Supreme Court held that Title VII does not allow an employer to discriminate against women with preschool age children when it does not discriminate against men with preschool-age children.<sup>87</sup> Later, in *Price Waterhouse v. Hopkins*, the Court held that Title VII prohibited an employer from refusing to promote a woman for expressing masculine traits when it would not have refused to promote men for expressing masculine traits.<sup>88</sup> In *Hively*, the Seventh Circuit applied this comparative method and held that, assuming the plaintiff's allegations that she was fired because of her sexual orientation were true, if "only the variable of the plaintiff's sex" were to change, she would not have been terminated for being in a relationship with a woman.<sup>89</sup> Thus, any adverse job decision based on the fact that the complainant "dates or marries a same-sex partner" is a decision "purely and simply based on sex," and is prohibited sex discrimination.<sup>90</sup>

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<sup>80</sup> *Hively*, 853 F.3d at 341.

<sup>81</sup> *Hively v. Ivy Tech Cmty. Coll.*, 830 F.3d 698, 702 (7th Cir. 2016), *rev'd en banc*, 853 F.3d 339, 341 (7th Cir. 2017).

<sup>82</sup> *Hively*, 853 F.3d at 343.

<sup>83</sup> *See id.* at 341.

<sup>84</sup> *Id.* at 345.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 345–46.

<sup>87</sup> *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971).

<sup>88</sup> 490 U.S. 228, 250–51 (1989). Although *Hopkins* is a plurality opinion, six Justices agreed that an employer acting on the basis of sex stereotyping has violated Title VII. *See id.* at 259 (White, J., concurring in judgment); *id.* at 261 (O'Connor, J., concurring in judgment).

<sup>89</sup> *Hively*, 853 F.3d at 345–47.

<sup>90</sup> *Id.* at 347.

The comparative method has proven to be the “gold standard” in antidiscrimination law,<sup>91</sup> and garnered significant traction in marriage equality litigation.<sup>92</sup> Before the Court in *Obergefell v. Hodges* held that marriage is a fundamental right, some courts specifically applied the comparative method in cases challenging same-sex marriage prohibitions to find that sexual orientation discrimination was inextricably tied to sex discrimination.<sup>93</sup> Additionally, while the Supreme Court has not applied the comparative method to sexual orientation discrimination claims directly, some Justices have questioned the logical fallacies associated with treating sexual orientation discrimination differently from sex discrimination.<sup>94</sup> For example, during oral argument in *Obergefell*,<sup>95</sup> Chief Justice John Roberts asked: “If Sue loves Joe and Tom loves Joe, Sue can marry him and Tom can’t. And the difference is based upon their different sex. Why isn’t that a straightforward question of sexual discrimination?”<sup>96</sup> Justice Anthony Kennedy also posed a similar question during oral argument in *Hollingsworth v. Perry*,<sup>97</sup> asking whether same-sex marriage prohibitions should be treated as gender-based classifications.<sup>98</sup> Although ultimately the Supreme Court did not explicitly hold on the sex discrimination claims in *Obergefell*, and the issue was not raised by the petitioners in *Perry*, the Supreme Court’s willingness to question sexual orientation discrimination within a comparative sex discrimination framework suggests *Hively*’s comparative reasoning may prove persuasive to the Supreme Court or to federal appellate courts in other circuits, particularly given the comparative method’s historical use in sex discrimination claims.<sup>99</sup>

The *Hively* court’s second line of reasoning, the associational theory, holds that “a person who is discriminated against because of the protected characteristic of one with whom she associates is actually being disadvantaged because of her own traits.”<sup>100</sup> The Seventh Circuit in *Hively* noted that the associational theory has developed primarily through Supreme Court case law

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<sup>91</sup> Cunningham-Parmeter, *supra* note 20, at 1133.

<sup>92</sup> *Id.* at 1137.

<sup>93</sup> See *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1206 (D. Utah 2013) (holding that state law prohibiting same-sex marriage is constitutionally impermissible sex discrimination); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 996 (N.D. Cal. 2010) (“Sexual orientation discrimination can take the form of sex discrimination.”).

<sup>94</sup> Cunningham-Parmeter, *supra* note 20, at 1138; Patti, *supra* note 4, at 144.

<sup>95</sup> 135 S. Ct. 2584 (2015).

<sup>96</sup> Transcript of Oral Argument at 62, *Obergefell*, 135 S. Ct. 2584 (No. 14-566).

<sup>97</sup> 133 S. Ct. 2652 (2013).

<sup>98</sup> Transcript of Oral Argument at 12, *Perry*, 133 S. Ct. 2652 (No. 12-144).

<sup>99</sup> Cunningham-Parmeter, *supra* note 20, at 1133, 1135.

<sup>100</sup> *Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339, 347 (7th Cir. 2017).

challenging anti-miscegenation through discrimination claims.<sup>101</sup> In *Loving v. Virginia*,<sup>102</sup> the Supreme Court held that despite the fact that miscegenation statutes punished white and black participants in interracial marriage equally, the fact that the statute drew lines based on race at all violated the Fourteenth Amendment.<sup>103</sup> Some circuits have applied *Loving*'s logic to Title VII's race discrimination prohibition, finding that "an employer may violate Title VII if it takes adverse action against an employee because of the employee's association with a person of another race."<sup>104</sup> In *Hively*, the Seventh Circuit expanded this theory to sexual association, noting that "the text of the statute draws no distinction . . . among the different varieties of discrimination it addresses."<sup>105</sup> Thus, where the plaintiff has suffered adverse employment action based on her association with a member of the same sex, she has suffered sex discrimination prohibited by Title VII.<sup>106</sup>

The EEOC has applied the associational theory "since the earliest days of Title VII," and it has been enforcing Title VII prohibitions on discrimination based on interracial association as early as 1975.<sup>107</sup> Further, courts have universally concluded that Title VII protects employees in interracial relationships and that such relationships are not limited to marriage.<sup>108</sup> Because the Supreme Court's decision in *Hopkins* commands that all protected classes covered by Title VII be treated the same,<sup>109</sup> the *Hively* court's sexual associational rationale provides strong persuasive authority, particularly given the universal recognition of the associational theory in terms of race.

The concurrent histories of RFRA and Title VII's sex discrimination prohibition offer insights into how the statutes may interact with one another. Given *Hively*'s persuasive reasoning and the Supreme Court's expansion of Title VII in the past, litigants, scholars, and judges should begin to seriously consider the implications of expansive employment protections for LGBT people under Title VII. This consideration requires recognizing that many private employers

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<sup>101</sup> *Id.*

<sup>102</sup> 388 U.S. 1 (1967).

<sup>103</sup> *Id.* at 12.

<sup>104</sup> *Holcomb v. Iona Coll.*, 521 F.3d 130, 132 (2d Cir. 2008); *see also* *Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick, & GMC Trucks, Inc.*, 173 F.3d 988, 994 (6th Cir. 1999) (cognizable Title VII claim where plaintiff alleges employer terminated him because his child was biracial); *Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 892 (11th Cir. 1986) (cognizable Title VII claim where plaintiff alleges employer discriminated against him because of his participation in an interracial marriage).

<sup>105</sup> *Hively*, 853 F.3d at 349.

<sup>106</sup> *Id.* at 347.

<sup>107</sup> *Hively v. Ivy Tech Cmty. Coll.*, 830 F.3d 698, 715 (7th Cir. 2016), *rev'd en banc*, 853 F.3d at 341.

<sup>108</sup> *Hively*, 830 F.3d at 715.

<sup>109</sup> *Price Waterhouse v. Hopkins*, 490 U.S. 228, 243–44 n.9 (1989).



may object to employing LGBT people because of religious convictions. Such employers are likely to seek exemptions from Title VII through RFRA claims. Thus, LGBT litigants and activists must consider the potential relationship between RFRA and Title VII, the ability for Title VII to practically obviate the confusion and inefficiency associated with nonuniform antidiscrimination laws and state iterations of RFRA, and the possibility that expanding the definition of Title VII's sex discrimination prohibition encourages expanding the definition of sex discrimination in other federal statutes.

## II. TITLE VII PROVIDES THE BEST DEFENSE AGAINST LGBT DISCRIMINATION ON THE BASIS OF RELIGIOUS OBJECTION

LGBT people continue to face pervasive discrimination in employment, housing, public accommodations, health care, and education.<sup>110</sup> While the lack of LGBT discrimination protections has been repeatedly noted by courts, legislatures, and administrative agencies, Congress and the majority of state legislatures have failed to provide statutory protections against LGBT discrimination.<sup>111</sup> The lack of sufficient legislative and administrative discrimination protections has caused LGBT activists and litigants to weigh a variety of options for rectifying discrimination—both political and judicial.<sup>112</sup>

Possible political solutions have included drafting new federal legislation amending the Civil Rights Act<sup>113</sup> and relying on state antidiscrimination laws that expressly protect against sexual orientation discrimination.<sup>114</sup> These solutions have made little headway because Congress has repeatedly failed to pass federal legislation prohibiting sexual orientation discrimination<sup>115</sup> and because only about half of the national LGBT population lives in states that prohibit sexual orientation employment discrimination.<sup>116</sup> Judicial solutions have included arguing that sexual orientation status should be protected by the

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<sup>110</sup> Sejal Singh & Laura E. Durso, *Widespread Discrimination Continues to Shape LGBT People's Lives in Subtle and Significant Ways*, CTR. FOR AM. PROGRESS (May 2, 2017, 8:10 AM), <https://www.americanprogress.org/issues/lgbt/news/2017/05/02/429529/widespread-discrimination-continues-shape-lgbt-peoples-lives-subtle-significant-ways/>.

<sup>111</sup> See Sears & Mallory, *supra* note 7 (noting that the federal government recognizes the widespread nature of employment discrimination against LGBT people).

<sup>112</sup> See Jasiunas, *supra* note 19, at 1534–35.

<sup>113</sup> See *id.* at 1530.

<sup>114</sup> See *id.* at 1529–31.

<sup>115</sup> Patti, *supra* note 4, at 134.

<sup>116</sup> JEROME HUNT, CTR. FOR AM. PROGRESS, A STATE-BY-STATE EXAMINATION OF NONDISCRIMINATION LAWS AND POLICIES 5 (2012).

Equal Protection Clause of the Fourteenth Amendment<sup>117</sup> and arguing for more expansive interpretations of federal antidiscrimination statutes.<sup>118</sup> These judicial solutions have been ineffective in the area of employment discrimination largely because federal courts have not applied heightened scrutiny review on the basis of sexual orientation<sup>119</sup> and because the Fourteenth Amendment does not apply to private parties.<sup>120</sup> However, while arguments for interpreting Title VII to include protection against sexual orientation discrimination have been largely ineffective, the Seventh Circuit's recent interpretation in *Hively* demonstrates new promise for this method.<sup>121</sup>

Considering *Hively* in light of these historically unsuccessful solutions, Title VII likely provides the best defense against sexual orientation discrimination nationwide even in the face of religious objection. First, private religious employers will not be able to discriminate against LGBT people on the basis of religion because Title VII meets the strict scrutiny standard required by RFRA. Second, Title VII provides a uniform national prohibition against sexual orientation employment discrimination, thus eliminating the need for reliance on nonuniform state and local antidiscrimination statutes, especially where they may be inhibited by state RFRA. Finally, the Seventh Circuit's rationales for interpreting sex discrimination in Title VII to include sexual orientation discrimination apply with equal force to other federal statutes prohibiting sex discrimination in a variety of areas, potentially paving the way for sweeping antidiscrimination protections for LGBT people.

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<sup>117</sup> Beginning in the 1990s, activists and scholars began arguing that statutes that make use of sexual orientation classifications should be subjected to heightened scrutiny under the Fourteenth Amendment like other suspect classes such as race and national origin. The Court has never explicitly extended more exacting scrutiny analysis to laws discriminating on the basis of LGBT status. See Edward Stein, *Evaluating the Sex Discrimination Argument for Lesbian and Gay Rights*, 49 UCLA L. REV. 471, 478–80 (2001) (noting equality-based arguments focused on the Fourteenth Amendment); Rachel Johnson Hammersmith, Comment, *Equality Trumps Religion: Why Indiana's Religious Freedom Restoration Act Is Inherently Promoting Discrimination Based on Sexual Orientation*, 48 U. TOL. L. REV. 109, 121–22 (2016) (same).

<sup>118</sup> Litigants have consistently argued for including sexual orientation discrimination within the purview of “sex discrimination” in the Civil Rights Act. See cases cited *supra* note 20.

<sup>119</sup> Note, *The Benefits of Unequal Protection*, 126 HARV. L. REV. 1348, 1362 (2013).

<sup>120</sup> U.S. CONST. amend. XIV, § 1.

<sup>121</sup> See *Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339, 340–41 (7th Cir. 2017). The Second Circuit's adoption of the same interpretation in *Zarda v. Altitude Express, Inc.* bodes well for expanding *Hively*'s interpretation to other federal circuits. 883 F.3d 100, 112, 121, 124 (2d Cir. 2018).

### A. *Title VII Meets the Strict Scrutiny Standard Required by RFRA*

The clash between religious liberty and equality for LGBT individuals has been of significant public interest.<sup>122</sup> While public discourse has centered on a seeming impasse between these two important American values, the same conflict has raged on in court cases across the country, both at the state and federal levels.<sup>123</sup> While these cases have dealt with a variety of subject matters, many involve private, for-profit businesses asserting that the right to free exercise enshrines the right to discriminate against LGBT people.<sup>124</sup> Were the Supreme Court to interpret Title VII to protect against sexual orientation discrimination, these challenges would undoubtedly continue—Justice Ruth Bader Ginsburg noted as much in her prescient dissent in *Hobby Lobby*.<sup>125</sup> Thus, in assessing Title VII's strength, it is necessary to examine whether its sex discrimination prohibition would meet statutory muster under RFRA. As discussed above, under RFRA, the religious claimant must first show that the government has placed a substantial burden on the free exercise of her religion.<sup>126</sup> Once the claimant has made this showing, the government must then show that the application of the burden serves a compelling governmental interest and is the least restrictive means of achieving that interest.<sup>127</sup>

An analysis of RFRA's strict scrutiny standard and Title VII's historical survival under strict scrutiny both in the context of RFRA and other strict scrutiny regimes suggest that Title VII would meet RFRA's strict scrutiny standard for several reasons. First, Title VII enforcement actions may not

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<sup>122</sup> See Cody Cain, *Religious Freedom vs. Gay Rights: Can We All Get Along?*, HUFFINGTON POST (July 6, 2015, 12:29 PM), [http://www.huffingtonpost.com/cody-cain/religious-freedom-vs-gay-\\_b\\_7718830.html](http://www.huffingtonpost.com/cody-cain/religious-freedom-vs-gay-_b_7718830.html); Tom Gjelten, *In Religious Freedom Debate, 2 American Values Clash*, NPR (Feb. 28, 2017, 4:47 AM), <http://www.npr.org/2017/02/28/517092031/in-religious-freedom-debate-2-american-values-clash>; Thomas Reese, *Time For Compromise on Gay Rights and Religious Freedom*, NAT'L CATH. REP. (Dec. 1, 2016), <https://www.nronline.org/blogs/faith-and-justice/time-compromise-gay-rights-and-religious-freedom>.

<sup>123</sup> See Gjelten, *supra* note 122.

<sup>124</sup> See *Masterpiece Cakeshop v. Colo. Civil Rights Comm'n*, No. 16-111, slip op. at 6 (U.S. June 4, 2018) (shop arguing that state antidiscrimination law requiring it not to discriminate based on sexual orientation violated free exercise rights); *Franciscan All., Inc. v. Burwell*, 227 F. Supp. 3d 660, 682 (N.D. Tex. 2016) (private healthcare providers arguing health regulation prohibiting discrimination on the basis of gender identity violated their religious rights pursuant to RFRA); *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 201 F. Supp. 3d 837, 840–41, 851 (E.D. Mich. 2016) (funeral home arguing EEOC burdened its free exercise under RFRA by requiring it not to discriminate against a transgender employee for wearing feminine clothing); *Elane Photography, LLC v. Willock*, 309 P.3d 53, 59, 63 (N.M. 2013) (photography company arguing state antidiscrimination law requiring it not to discriminate based on sexual orientation violated free exercise rights); *State v. Arlene's Flowers, Inc.*, 389 P.3d 543, 548, 550 (Wash. 2017) (flower shop arguing state antidiscrimination law requiring it not to discriminate based on sexual orientation violated free exercise rights).

<sup>125</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2804–05 (2014) (Ginsburg, J., dissenting).

<sup>126</sup> 42 U.S.C. § 2000bb-1(a), (c) (2012).

<sup>127</sup> 42 U.S.C. § 2000bb-1(b).

constitute a substantial burden on employers' free exercise. Second, RFRA's strict scrutiny standard is relatively weak compared to strict scrutiny in other contexts. Thus, even if Title VII enforcement actions constitute a substantial burden, Title VII meets RFRA's strict scrutiny standard because Title VII serves a compelling governmental interest in eradicating sex discrimination and antidiscrimination statutes like Title VII are narrowly tailored to serve that interest. Finally, the First Amendment's ministerial exception prohibits the government from interfering with intrareligious spiritual employment, providing a compromise under which private employers engaged in for-profit business may not discriminate against LGBT people but religious organizations serving religious purposes may not be forced to employ LGBT individuals. In fact, the Sixth Circuit, while simultaneously holding that Title VII expressly protects against discrimination based on transgender status, found that RFRA provides no affirmative defense to Title VII violations.<sup>128</sup>

### 1. Title VII Enforcement Actions and the Substantial Burden Requirement

The first step in the RFRA analysis requires questioning whether the federal law "substantially burdens" the claimant's free exercise of religion.<sup>129</sup> Federal courts undertake this analysis guided by post-*Sherbert*, pre-*Smith* case law.<sup>130</sup> Helpfully, some circuits have consolidated this case law to enumerate a two-prong test for examining whether a claimant has properly alleged a substantial burden; they hold that a federal law substantially burdens a claimant's free exercise if it: (1) forces a religious claimant to choose between following the precepts of his religion and forfeiting benefits otherwise generally available or abandoning one of the precepts of his religion to receive a benefit; or (2) places substantial pressure on an adherent to substantially modify his behavior and to violate his religious beliefs.<sup>131</sup> RFRA's plain language demonstrates a distinct difference between burdens and substantial burdens and courts have noted that financial burdens may be too slight to trigger strict scrutiny.<sup>132</sup> In *Hobby Lobby*,

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<sup>128</sup> EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 600 (6th Cir. 2018).

<sup>129</sup> 42 U.S.C. § 2000bb-1(a).

<sup>130</sup> *Hobby Lobby*, 134 S. Ct. at 2772, 2792.

<sup>131</sup> See *Mack v. Warden*, 839 F.3d 286, 304 (3d Cir. 2016); *Adkins v. Kaspar*, 393 F.3d 559, 570 (5th Cir. 2004).

<sup>132</sup> *Eternal Word TV Network, Inc. v. Sec'y, U.S. Health & Human Servs.*, 818 F.3d 1122, 1146–47 (11th Cir.) (finding that requiring nonprofit employers to fill out opt-out forms for the Affordable Care Act (ACA)'s contraceptive mandate was not a substantial burden), *vacated on other grounds*, No. 14-12696-CC, 2016 WL 11503064, at \*1–2 (11th Cir. May 31, 2016); see also *Little Sisters of the Poor Home for the Aged v. Burwell*, 794 F.3d 1151, 1174 (10th Cir. 2015) (noting that administrative tasks required to opt out of the ACA's contraceptive mandate did not constitute a substantial burden), *vacated and remanded on other grounds*, *Zubik v. Burwell*, 136 S. Ct. 1557, 1560 (2016).

the Court found that certain enforcement penalties under the Affordable Care Act (ACA) constituted a substantial financial burden; there, were the employer not to provide health insurance coverage for certain contraceptives in violation of its religious beliefs, it could be fined upwards of \$33 million per year, a “surely substantial” pressure on the employer.<sup>133</sup> By contrast, under Title VII enforcement actions, combined punitive and compensatory damages are capped at \$300,000 for large employers; the caps for small employers are even lower.<sup>134</sup> Thus, arguably any particular enforcement action under Title VII will not substantially burden an employer solely based on damages sums. However, given that the EEOC may also provide equitable relief under Title VII—most notably reinstatement—religious claimants will likely argue that they must substantially modify their behavior to employ LGBT individuals in violation of their religious beliefs or risk repeated enforcement actions.

The Sixth Circuit addressed this concern head-on in *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*—here, the employer argued that being required to allow a transgender employee to wear feminine clothing would compel him to be “directly involved in supporting the idea that sex is a changeable social construct rather than an immutable God-given gift.”<sup>135</sup> However, the court noted that a party may sincerely believe he is being coerced into violating his religion without being so engaged *as a matter of law*.<sup>136</sup> Thus, while equitable relief enforcing Title VII may cause some employers to believe they are being forced to retain or accommodate LGBT employees in violation of their religious beliefs, “bare compliance with Title VII” does not establish the kind of substantial burden prohibited by RFRA.<sup>137</sup>

However, although post-*Sherbert* case law never allowed for-profit businesses to assert religious freedom claims, the Court in *Wisconsin v. Yoder* noted that the threat of civil sanctions is enough to impose a substantial burden.<sup>138</sup> Thus, any punitive fine for noncompliance with government action that burdens free exercise may constitute a substantial burden even if asserted by a wealthy corporation. Given this possibility, and the possibility that other circuits may disagree with the Sixth Circuit’s interpretation of the relationship

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<sup>133</sup> *Hobby Lobby*, 134 S. Ct. at 2776.

<sup>134</sup> See OFFICE OF LEGAL COUNSEL, EEOC, EEOC ENFORCEMENT GUIDANCE ON RETALIATION AND RELATED ISSUES 59 (2016), <https://www.eeoc.gov/laws/guidance/upload/retaliation-guidance.pdf>.

<sup>135</sup> 884 F.3d 560, 588 (6th Cir. 2018).

<sup>136</sup> *Id.* (emphasis added).

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

<sup>138</sup> *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1069–70 (9th Cir. 2008) (citing *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972)).

between RFRA's substantial burden requirement and Title VII, it is necessary to determine whether Title VII's sex discrimination provision meets the remainder of the strict scrutiny analysis required by RFRA.

## 2. RFRA's Relatively Weak Strict Scrutiny Standard

Strict scrutiny analysis is not a mechanical test nor is it applied identically among different areas of federal jurisprudence; in fact, empirical evidence suggests that in some contexts strict scrutiny analysis is weaker than in other contexts despite carrying the same label.<sup>139</sup> Laws challenged under weaker strict scrutiny regimes stand a better chance at survival than laws challenged in more rigorous strict scrutiny contexts.<sup>140</sup> While in some contexts strict scrutiny analysis is so rigorous as to be considered "strict in theory, fatal in fact," free exercise claims for exemptions under the *Sherbert* and RFRA standard have been relatively easier to overcome.<sup>141</sup> Thus, Title VII likely meets RFRA's strict scrutiny standard in part because the standard is notably weaker than strict scrutiny analysis in other contexts.<sup>142</sup>

RFRA's strict scrutiny standard is modeled after *Sherbert*'s, and Congress intended federal courts to use post-*Sherbert*, pre-*Smith* case law in its application.<sup>143</sup> After *Sherbert*, the Court granted few religious-based exemptions to generally applicable laws even when applying the strict scrutiny standard.<sup>144</sup> In fact, under the *Sherbert* regime, federal appellate courts turned away 87% of free exercise exemption cases,<sup>145</sup> leading some commentators to proclaim the strict scrutiny standard applied in exemption cases as "strict in theory, feeble in fact."<sup>146</sup> Similarly, exemption claims under RFRA are relatively easy to overcome,<sup>147</sup> squaring with Congress's legislative intent to reinstate the law as it was prior to *Smith*.<sup>148</sup> Although the Supreme Court arguably strengthened RFRA in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal* by requiring the government to justify a law's burden on the individual claimant in

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<sup>139</sup> See Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 870 (2006).

<sup>140</sup> See *id.* at 815.

<sup>141</sup> See *id.* at 807, 859–60, 870.

<sup>142</sup> See *id.* at 859–60, 870.

<sup>143</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2791 (2014) (citing S. REP. NO. 103-111, at 8 (1993), as reprinted in 1993 U.S.C.A.N. 1892, 1898).

<sup>144</sup> Winkler, *supra* note 139, at 858–59.

<sup>145</sup> *Id.* at 859.

<sup>146</sup> Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1247 (1994).

<sup>147</sup> See Winkler, *supra* note 139, at 809.

<sup>148</sup> See *Hobby Lobby*, 134 S. Ct. at 2791.

the case,<sup>149</sup> lower courts have continued to apply RFRA's weaker standard.<sup>150</sup> Courts have done so not only by limiting what constitutes a substantial burden but also by continuing to rely on post-*Sherbert*, pre-*Smith* case law to establish exemptions.<sup>151</sup> Thus, *Gonzales* has not greatly affected judicial analysis in the lower courts and RFRA's weaker standard persists.<sup>152</sup> This weaker standard impacts both factors of the strict scrutiny analysis: whether the challenged law serves a compelling governmental interest and whether it is narrowly tailored to serve that interest.<sup>153</sup>

### 3. Examining Title VII Under the Strict Scrutiny Standard

Under RFRA's strict scrutiny framework, the government must first demonstrate that the federal law at issue serves a compelling interest.<sup>154</sup> Whether an interest qualifies as compelling is typically dependent upon the context in which the court applies the test.<sup>155</sup> Given that RFRA's strict scrutiny analysis is relatively weak, the government faces a lesser burden in demonstrating that a federal law serves a compelling interest.<sup>156</sup> Under this lesser burden, Title VII's sex discrimination prohibition clearly serves a compelling interest. The Supreme Court has repeatedly held that preventing sex discrimination constitutes a compelling interest even in the context of freedom of association,<sup>157</sup> where strict scrutiny analysis has historically been more difficult to overcome.<sup>158</sup> Further, the Sixth Circuit, in *Harris Funeral Homes*, held that even if Title VII were to impose a substantial burden on employers' religious beliefs, Title VII serves a compelling governmental interest and thus meets this prong of the RFRA analysis.<sup>159</sup>

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<sup>149</sup> *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 439 (2006).

<sup>150</sup> Ira C. Lupu, *Hobby Lobby and the Dubious Enterprise of Religious Exemptions*, 38 HARV. J.L. & GENDER 35, 63 (2015).

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 64.

<sup>153</sup> 42 U.S.C. § 2000bb-1(a) (2012); see Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1321 (2007).

<sup>154</sup> 42 U.S.C. § 2000bb-1(a).

<sup>155</sup> Fallon, Jr., *supra* note 153.

<sup>156</sup> *Id.* at 1306–07.

<sup>157</sup> See, e.g., Bd. of Dirs. Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 549 (1987) (state has compelling interest in eliminating discrimination against women where it may infringe freedom of association); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 628–29 (1984) (state has compelling interest in preventing discrimination against women in public accommodations).

<sup>158</sup> See Winkler, *supra* note 139, at 867–68.

<sup>159</sup> *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 591–92 (6th Cir. 2018).

Additionally, in *Christian Legal Society v. Martinez*,<sup>160</sup> the Supreme Court explicitly upheld a law school's nondiscrimination policy, maintained pursuant to a state civil rights law, protecting against sexual orientation discrimination in a First Amendment strict scrutiny claim.<sup>161</sup> Although the Court's decision emphasized that the university's policy was constitutional partially because it regulated access to a limited public forum, Justice John Paul Stevens in a concurring opinion emphasized the viewpoint-neutral nature of the policy.<sup>162</sup> He noted that the policy withstood First Amendment scrutiny because it had only an incidental burden on free exercise in furtherance of its serious goal of preventing discrimination.<sup>163</sup> This is particularly important in the context of Title VII because its antidiscrimination protections are viewpoint neutral; they apply equally to all employers of a certain size.<sup>164</sup> While Title VII claims do not implicate the public forum doctrine like the claim in *Christian Legal Society*,<sup>165</sup> the fact that the Court explicitly upheld an LGBT antidiscrimination policy in compliance with a state antidiscrimination law against a religious freedom claim suggests that neutral antidiscrimination laws like Title VII that do not single out religious groups will withstand heightened scrutiny.

Further, in the context of religious freedom, the Court has held that preventing racial discrimination is a compelling interest sufficient to overcome free exercise rights.<sup>166</sup> Since "[t]he text of [Title VII] draws no distinction . . . among the different varieties of discrimination it addresses,"<sup>167</sup> and Title VII also protects against racial discrimination,<sup>168</sup> the government has a compelling interest in preventing sex discrimination even if it impedes free exercise rights under RFRA. Additionally, although *Gonzales* and *Hobby Lobby* have arguably strengthened RFRA's weak strict scrutiny standard, religious claimants since those decisions have fared better mostly in cases involving the ACA's contraceptive mandate.<sup>169</sup> Religious claimants have been successful in these cases because courts have repeatedly found that the government's interest in enforcing the contraceptive mandate is too weak to overcome religious freedom

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<sup>160</sup> *Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 561 U.S. 661 (2010).

<sup>161</sup> *Id.* at 696–97.

<sup>162</sup> *Id.* at 699–700.

<sup>163</sup> *See id.* at 701.

<sup>164</sup> 42 U.S.C. § 2000e-2(a)(1) (2012).

<sup>165</sup> *Christian Legal Soc'y*, 561 U.S. at 691.

<sup>166</sup> *See Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983) (applying the strict scrutiny standard of review mandated by *Sherbert*).

<sup>167</sup> *Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339, 349 (7th Cir. 2017).

<sup>168</sup> 42 U.S.C. § 2000e-2(a)(1).

<sup>169</sup> Lupu, *supra* note 150, at 67.



rights.<sup>170</sup> Thus, arguably *Hobby Lobby* has only strengthened RFRA in terms of the contraceptive mandate and it does not diminish the government's compelling interest in preventing sex discrimination. In fact, the Court's language in *Hobby Lobby* expressly supports such a finding; it noted, "the Government has a compelling interest in providing an equal opportunity to participate in the workforce," and that its decision "provides no such shield" to "discrimination in hiring . . . cloaked as religious practice."<sup>171</sup> Thus, given the Court's repeated recognition that preventing sex discrimination is a compelling governmental interest, its upholding of a state sexual orientation antidiscrimination policy against a heightened scrutiny First Amendment claim, and the Court's express preclusion that *Hobby Lobby* diminishes such governmental interests,<sup>172</sup> Title VII satisfies the first step of the strict scrutiny analysis.

Once the government has demonstrated that the law at issue serves a compelling interest, it must show that the law "is the least restrictive means" for achieving that interest.<sup>173</sup> The Supreme Court has repeatedly held that antidiscrimination statutes preventing sex discrimination are the least restrictive means for achieving the government's interest in eradicating sex discrimination.<sup>174</sup> Further, some federal courts have already expressly found in RFRA-based religious exemption cases that sex discrimination prohibitions are the least restrictive means for furthering the government's compelling interest in preventing sex discrimination.<sup>175</sup> In fact, the Sixth Circuit noted in *Harris Funeral Homes* that Title VII is "precisely tailored" to achieve the government's compelling interest in eradicating sex discrimination.<sup>176</sup> Since there is no least restrictive means for preventing discrimination other than blanket prohibition of the discrimination itself,<sup>177</sup> Title VII's sex discrimination prohibition is the least restrictive means for preventing sex discrimination and satisfies the second step of the analysis.

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<sup>170</sup> *Id.*

<sup>171</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2783 (2014).

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

<sup>173</sup> 42 U.S.C. § 2000bb-1.

<sup>174</sup> *See* N.Y. State Club Ass'n, Inc. v. City of New York, 487 U.S. 1, 7-8 (1988); Bd. of Dirs. Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 549 (1987); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 626 (1984).

<sup>175</sup> *See* *Redhead v. Conference of Seventh-Day Adventists*, 440 F. Supp. 2d 211, 222 (E.D.N.Y. 2006); *Jasniowski v. Rushing*, 678 N.E.2d 743, 751 (Ill. App. Ct. 1997).

<sup>176</sup> *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 595 (6th Cir. 2018) (quoting *Hobby Lobby*, 134 S. Ct. at 2783).

<sup>177</sup> *See* Alex J. Luchenitser, *A New Era of Inequality? Hobby Lobby and Religious Exemptions from Anti-Discrimination Laws*, 9 HARV. L. & POL'Y REV. 63, 83 (2015).

#### 4. *The Ministerial Exception and Intrareligious Employment Decisions*

Given that Title VII's sex discrimination prohibition serves a compelling government interest and is the least restrictive means for achieving that interest, RFRA will not provide an exemption to private, for-profit businesses permitting sexual orientation discrimination. However, *religious* organizations that operate primarily for *religious* purposes are not and will not be required to comply with Title VII's sex discrimination prohibition with respect to ministerial employees.<sup>178</sup> Title VII expressly includes a ministerial exception allowing religious organizations to discriminate in employment against those of different religions.<sup>179</sup> Courts have interpreted the exception, in conjunction with the First Amendment, to allow such discrimination even where it falls disproportionately on protected classes under federal law.<sup>180</sup> The ministerial exception provides a compromise between religious freedom rights and LGBT rights because it affords maximum employment protection to LGBT people in the private sector while upholding the rights of religious organizations undertaking religious purposes to freely choose their spiritual leaders.

One potential issue related to the ministerial exception and its effect on Title VII arises out of the Supreme Court's decision in *Presiding Bishop v. Amos*.<sup>181</sup> In *Amos*, the Court held that a church was expressly exempted by Title VII's ministerial exception from Title VII's prohibition on religious discrimination when it terminated a building engineer for failing to adhere to the church's religious principles.<sup>182</sup> Arguably, were *Amos* to be extended to private employers, such employers could cloak LGBT discrimination under the guise of discrimination based on nonadherence to the employer's religious principles. However, the ministerial exception has only ever applied to religious employers serving religious purposes as it is designed to "alleviate significant governmental interference with the ability of *religious organizations* to define and carry out their *religious missions*."<sup>183</sup> Further, this possibility is arguably

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<sup>178</sup> *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188 (2012).

<sup>179</sup> 42 U.S.C. § 2000e-1 (2012).

<sup>180</sup> See *Hosanna-Tabor*, 565 U.S. at 188 (upholding the ministerial exception against countervailing disability discrimination claims); *Werft v. Desert Sw. Annual Conference*, 377 F.3d 1099, 1100–01 (9th Cir. 2004) (noting that the ministerial exception precluded the court from hearing disability discrimination claim by former pastor of church); *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1165 (4th Cir. 1985) (holding that ministerial exception precluded the court from entertaining sex discrimination claim by woman seeking position on pastoral staff).

<sup>181</sup> *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987).

<sup>182</sup> *Id.* at 330, 339.

<sup>183</sup> *Id.* at 335 (emphasis added).

precluded by *Christian Legal Society*. In *Christian Legal Society*, the Supreme Court held that the Christian Legal Society Chapter of the University of California, a religious organization carrying out a religious mission, was not entitled to an exemption from the university's nondiscrimination policy protecting against sexual orientation and religious discrimination.<sup>184</sup> Although the student organization argued that its religious mission required discriminating against individuals who did not adhere to its religious tenets, the Court emphasized the viewpoint neutral nature of the nondiscrimination policy.<sup>185</sup> In his concurring opinion, Justice John Paul Stevens noted that although the policy may have a disparate impact on religious student organizations, its general applicability warranted a finding that it survived a constitutional heightened scrutiny analysis.<sup>186</sup> Thus, even if the Court were to expand *Amos* to private employers, the viewpoint-neutral nature of Title VII will likely not allow such employers to mask LGBT discrimination as permissible discrimination on the basis of nonadherence to the employer's religious principles.

Given these considerations, not only does Title VII provide the best opportunity for compromise between the rights of religious employers and LGBT employees, it operates in line with *Sherbert* precedent and RFRA precedent. Thus, Title VII properly meets RFRA's strict scrutiny standard and would provide protection for LGBT employees even in the face of religious exemption claims. Title VII's relationship with RFRA is important because it ultimately will bear a significant impact on Title VII's practical applicability; this is particularly so because *Hively's* interpretation of Title VII could possibly extend employment discrimination protection to LGBT employees nationally, obviating the need for LGBT employees to rely on nonuniform state and local laws or private corporate policies.

#### *B. Title VII Obviates the Need for Reliance on Nonuniform Laws and Policies*

There currently exists a national landscape of uncertainty and nonuniformity in state, local, and private-based employment protections for LGBT people. Over half of the American LGBT population lives in areas where discrimination on the basis of sexual orientation and gender identity is completely legal.<sup>187</sup> Despite this staggering statistic, the majority of Americans actually believe that

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<sup>184</sup> *Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 669 (2010).

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

<sup>186</sup> *Id.* at 700 (Stevens, J., concurring).

<sup>187</sup> HUNT, *supra* note 116.

such discrimination is illegal nationwide.<sup>188</sup> However, protections at the federal level are either nonexistent, inconsistent, or incomplete, leaving much of the task of protecting against LGBT employment discrimination to state and local governments or private businesses.<sup>189</sup> Further, state and local protections are seriously varied; in some cases they are nonexistent, unenforceable, or face the specter of restricted applicability under state-level RFRA's.<sup>190</sup> Additionally, although many large multistate corporations have shouldered some of the burden of protecting LGBT employees by adopting company-wide nondiscrimination policies, such policies provide inadequate remedies and enforcement mechanisms.<sup>191</sup> This nonuniformity has produced a landscape of confusion and inefficiency surrounding LGBT employment protections and religious-based exemptions to such protections.<sup>192</sup> Considering Congress's repeated failures to pass comprehensive national LGBT employment protections, *Hively's* interpretation of Title VII stands as the best option for eliminating this unnecessary confusion, alleviating its harmful impacts on both LGBT individuals and multistate employers. This section proceeds first by discussing the mismatched legislative landscape among various states in terms of state antidiscrimination statutes and state RFRA's. Then, it examines the ameliorative effects that curing such nonuniformity would have on LGBT individuals and on multistate businesses.

### *1. Nonuniformity of Antidiscrimination Statutes and RFRA Statutes Among the States*

Only twenty-one states have employment antidiscrimination laws that expressly protect sexual orientation.<sup>193</sup> Another twenty-one states have their own religious freedom restoration statutes applying heightened scrutiny to state laws that burden free exercise.<sup>194</sup> That number increases to thirty-one when including state court decisions applying heightened religious freedom

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<sup>188</sup> Michael T. Zugelder, *Toward Equal Rights for LGBT Employees: Legal and Managerial Implications for Employers*, 43 OHIO N.U. L. REV. 193, 194 (2017).

<sup>189</sup> Jennifer C. Pizer et al., *Evidence of Persistent and Pervasive Workplace Discrimination Against LGBT People: The Need for Federal Legislation Prohibiting Discrimination and Providing for Equal Employment Benefits*, 45 LOY. L.A. L. REV. 715, 742 (2012).

<sup>190</sup> *Id.* at 755–57; see also Ira C. Lupu, *Moving Targets: Obergefell, Hobby Lobby, and the Future of LGBT Rights*, 7 ALA. C.R. & C.L. L. REV. 1, 48–49 (2015).

<sup>191</sup> Pizer et al., *supra* note 189, at 759.

<sup>192</sup> *Id.* at 720.

<sup>193</sup> See *State Maps of Laws & Policies*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/state-maps/employment> (last updated Jan. 28, 2019).

<sup>194</sup> See *State Religious Freedom Restoration Acts*, NCSL (May 4, 2017), <http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx>.

protections.<sup>195</sup> There are four states with both a religious freedom restoration statute and an employment antidiscrimination statute that protects against sexual orientation discrimination.<sup>196</sup> Of these four, only New Mexico has explicitly examined the relationship between its state RFRA and its antidiscrimination statute,<sup>197</sup> but held that its RFRA was inapplicable in suits between private parties.<sup>198</sup> Additionally, only two states include carve-outs in their state RFRA prohibiting the use of the RFRA to avoid compliance with civil rights statutes.<sup>199</sup> Therefore, it is unclear whether religious freedom rights under a state RFRA would trump a state antidiscrimination statute protecting sexual orientation in many cases. Given this varying landscape of state law, LGBT people may be protected from employment discrimination when in one state but be subjected to explicit discrimination when in another.

Scholars and other legal professionals have long noted the importance of uniformity in state law.<sup>200</sup> In fact, one of the founding purposes of the American Bar Association and the American Law Institute was to promote uniformity of laws throughout the several states and for centuries the National Conference of the Uniform Commissioners on Uniform State Laws has attempted to achieve this.<sup>201</sup> Uniformity in the law provides significant advantages by eliminating uncertainty within the legal system, promoting efficiency,<sup>202</sup> and upholding the

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<sup>195</sup> Juliet Eilperin, *31 States Have Heightened Religious Freedom Protections*, WASH. POST (Mar. 1, 2014), [https://www.washingtonpost.com/news/the-fix/wp/2014/03/01/where-in-the-u-s-are-there-heightened-protections-for-religious-freedom/?utm\\_term=.e5500b773c5a](https://www.washingtonpost.com/news/the-fix/wp/2014/03/01/where-in-the-u-s-are-there-heightened-protections-for-religious-freedom/?utm_term=.e5500b773c5a).

<sup>196</sup> They are Connecticut, Illinois, New Mexico, and Rhode Island. See CONN. GEN. STAT. ANN. § 52-571b (West 2013); CONN. GEN. STAT. ANN. § 46a-81c (West 2009); 775 ILL. COMP. STAT. ANN. 5/2-102 (West 2016); 775 ILL. COMP. STAT. ANN. 35/10 (West 2016); N.M. STAT. ANN. §§ 28-1-1–28-1-15 (West 2011); N.M. STAT. ANN. §§ 28-22-1–28-22-5 (West 2011); 42 42 R.I. GEN. LAWS ANN. §§ 42-80.1-1–42-80.1-4 (West 2014); 28 R.I. GEN. LAWS ANN. § 28-5-5 (West 2006).

<sup>197</sup> See *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013).

<sup>198</sup> *Id.* at 76–77.

<sup>199</sup> While Texas and Indiana's RFRA statutes include carve-outs for civil rights protections, they have no state civil rights statutes protecting against LGBT discrimination. However, the carve-out in the Texas statute prohibits its use to avoid compliance with federal civil rights statutes. TEX. CIV. PRAC. & REM. CODE ANN. § 110.011 (West 2018). Indiana's RFRA statute expressly prohibits its use to discriminate on the basis of sexual orientation or gender identity. IND. CODE ANN. § 34-13-9-0.7 (West Supp. 2018).

<sup>200</sup> See, e.g., Albert J. Rosenthal, *Uniform State Laws: A Discussion Focused on Revision of the Uniform Commercial Code*, 22 OKLA. CITY U. L. REV. 257 (1997); William Schofield, *Uniformity of Law in the Several States as an American Ideal*, 21 HARV. L. REV. 583 (1908); Joseph J. Carroll, Comment, *Avoiding Backlash: The Exclusion of Domestic Partnership Language in the 2008 Amendments to the Uniform Probate Code and the Future for Same-Sex Intestacy Rights*, 85 TEMP. L. REV. 623 (2013).

<sup>201</sup> James J. White, *Ex Proprio Vigore*, 89 MICH. L. REV. 2096, 2097 (1991). See generally Herbert F. Goodrich, *The Story of the American Law Institute*, 1951 WASH. U. L.Q. 283 (1951) (noting the purpose of the founding of the American Law Institute was to address the uncertainty and complexity in American law produced by the making of law by several different state courts and federal courts).

<sup>202</sup> Carroll, *supra* note 200, at 625–26.

legitimacy of the courts.<sup>203</sup> Although it may sometimes be preferable for states to voluntarily adopt uniform laws drafted by politically insulated conferences or committees, controversial issues producing disagreement among the states will not allow uniformity in all areas of state law.<sup>204</sup> In these areas, federal legislation may be the only appropriate and achievable response.<sup>205</sup> Because protecting against LGBT employment discrimination is a controversial point of disagreement among the states,<sup>206</sup> federal legislation like Title VII serves as the best avenue for securing nationwide employment discrimination protection for LGBT people, obviating the need for reliance on state and local antidiscrimination statutes that may not be available or may be limited in applicability by state RFRAs. Further, federal law has historically led the charge in creating and standardizing employment discrimination protections, causing many state judges to look to federal law to interpret their own state antidiscrimination statutes.<sup>207</sup> Thus, *Hively's* interpretation of Title VII would extend employment protections to LGBT individuals nationwide, likely enhance the protections some states already afford LGBT employees, and serve to ameliorate the harmful social and economic impacts discrimination and nonuniformity in discrimination protections have on both LGBT individuals and multistate businesses. This is particularly so because antidiscrimination legislation has visibly reduced discrimination.<sup>208</sup>

## 2. *Impact of National Antidiscrimination Legislation on LGBT Individuals*

Although antidiscrimination legislation sometimes results in low enforcement rates or low numbers of complaints that the legislation is being violated, its symbolic power is significant.<sup>209</sup> By illegalizing discrimination, legislation sends a strong social signal that discrimination is unacceptable.<sup>210</sup> This signal is even stronger when antidiscrimination legislation applies nationwide because it leads to increased public awareness and serves to promote

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<sup>203</sup> Schofield, *supra* note 200, at 592.

<sup>204</sup> Carroll, *supra* note 200, at 627.

<sup>205</sup> Nim Razook, *Uniform Private Laws, National Conference of Commissioners for Uniform State Laws Signaling and Federal Preemption*, 38 AM. BUS. L.J. 41, 61 (2000).

<sup>206</sup> See *supra* Section II.B.1 discussing the differences between LGBT discrimination protection laws among the states.

<sup>207</sup> Alex B. Long, "If the Train Should Jump the Track . . .": *Divergent Interpretations of State and Federal Employment Discrimination Statutes*, 40 GA. L. REV. 469, 478 (2006).

<sup>208</sup> Laura G. Barron & Michelle Hebl, *The Force of Law: The Effects of Sexual Orientation Antidiscrimination Legislation on Interpersonal Discrimination in Employment*, 19 PSYCHOL. PUB. POL'Y & L. 191, 194 (2013).

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

positive changes in attitude towards stigmatized groups.<sup>211</sup> Because these positive effects are greater the more widespread the antidiscrimination law, national LGBT antidiscrimination protections would likely increase positive support nationwide, ameliorating the personal negative effects employment discrimination has on LGBT individuals resulting from stigma.<sup>212</sup> Thus, Title VII's sexual orientation protections would diminish the harmful effects of nonuniform LGBT employment discrimination, particularly in states and localities without any discrimination protections for LGBT individuals at all. Title VII's protection would not only reduce the national prevalence of LGBT employment discrimination, it would also reduce some of the harmful effects LGBT discrimination has on businesses that conduct activities in multiple states or localities with mismatched discrimination protections.

### 3. *Impact of National Antidiscrimination Legislation on Multistate Businesses*

Nonuniformity in LGBT antidiscrimination law not only harms LGBT individuals, it places significant economic costs on multistate businesses and the market as a whole.<sup>213</sup> In fact, one report suggests LGBT workplace discrimination costs American businesses up to \$64 billion per year.<sup>214</sup> LGBT discrimination not only affects recruitment and retention rates (which increases turnover costs), it also stifles productivity by increasing absenteeism and physical and mental health problems of employees.<sup>215</sup> In response to these economic consequences, many large multistate businesses maintain company-wide nondiscrimination policies that include sexual orientation and gender identity.<sup>216</sup> In fact, 91% of Fortune 500 companies maintain sexual orientation nondiscrimination policies and 83% include gender identity in their nondiscrimination policies.<sup>217</sup> These nondiscrimination policies may not only

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<sup>211</sup> *Id.* at 195.

<sup>212</sup> *Id.* at 194–95.

<sup>213</sup> 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* 6 (2012).

<sup>214</sup> Harry Bradford, *Workplace Discrimination Costs Businesses \$64 Billion Every Year*, HUFFINGTON POST (Mar. 23, 2012, 8:43 AM), [https://www.huffingtonpost.com/2012/03/23/workplace-discrimination-costs-businesses-cap\\_n\\_1373835.html](https://www.huffingtonpost.com/2012/03/23/workplace-discrimination-costs-businesses-cap_n_1373835.html).

<sup>215</sup> BURNS, *supra* note 213, at 8–12.

<sup>216</sup> See HUMAN RIGHTS CAMPAIGN, *CORPORATE EQUALITY INDEX 2018: RATING WORKPLACES ON LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND QUEER EQUALITY* 6 (2017); BRAD SEARS & CHRISTY MALLORY, *ECONOMIC MOTIVES FOR ADOPTING LGBT-RELATED WORKPLACE POLICIES* 2 (2011), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Mallory-Sears-Corp-Statements-Oct2011.pdf>.

<sup>217</sup> HUMAN RIGHTS CAMPAIGN, *supra* note 216.

mitigate the negative economic consequences of LGBT workplace discrimination, they could increase business from consumers who place importance on the social responsibility of the businesses they are buying from.<sup>218</sup> National nondiscrimination policies can also lead to increased stock prices for businesses, and may lower insurance costs.<sup>219</sup> However, requiring multistate private businesses to shoulder the burden of limiting the market impacts of LGBT discrimination on a national level also imposes significant financial costs on private market players.<sup>220</sup> These include compliance costs because of the need for additional training and record-keeping; cash costs including staffing, additional employee benefits, and monitoring processes; opportunity costs resulting from the diversion of resources to implementation and enforcement from other productive activities; and execution risk because sustainable nondiscrimination policies often require a serious shift in corporate culture.<sup>221</sup> Thus, to place as little of these costs on private enterprise as possible and to minimize the harmful market effects of discrimination, uniform national LGBT antidiscrimination protection under *Hively's* interpretation of Title VII is necessary. Inversely, Title VII's LGBT discrimination protections may increase nondiscrimination's pro-market effects by improving coworker relationships, improving stock prices, opening businesses up to a socially conscious set of consumers, and decreasing insurance costs.<sup>222</sup>

Given that LGBT employment discrimination protections constitute a matter of considerable discourse and division among the states, federal LGBT employment discrimination protection under Title VII best mitigates the harmful effects of nonuniformity in state and local discrimination prohibitions. LGBT antidiscrimination laws are highly variable among states and local governments leading to confusion; the existence of state RFRA's and lack of clarity over their relationships with discrimination protections add to this confusion.<sup>223</sup> Thus, Title VII's uniform protection is particularly needed because of the notable harm nonuniformity poses to both LGBT individuals and multistate businesses. Further, *Hively's* rationales are arguably analogous to other federal statutes

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<sup>218</sup> M.V. LEE BADGETT ET AL., THE BUSINESS IMPACT OF LGBT-SUPPORTIVE WORKPLACE POLICIES 19–23 (2013), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Business-Impact-LGBT-Policies-Full-Report-May-2013.pdf>.

<sup>219</sup> *Id.*

<sup>220</sup> See EUROPEAN COMM'N, THE COSTS AND BENEFITS OF DIVERSITY: A STUDY ON METHODS AND INDICATORS TO MEASURE THE COST-EFFECTIVENESS OF DIVERSITY POLICIES IN ENTERPRISES 10–11 (2003), <https://www.coe.int/t/dg4/cultureheritage/mars/source/resources/references/others/17%20-%20Costs%20and%20Benefits%20of%20Diversity%20-%20EU%202003%20ExSum.pdf>.

<sup>221</sup> *Id.*

<sup>222</sup> See BADGETT ET AL., *supra* note 218, at 13–14, 19–23.

<sup>223</sup> Pizer et al., *supra* note 189, at 755–57.



prohibiting sex discrimination; thus, expanding the definition of “sex discrimination” in other federal statutes to include sexual orientation discrimination would provide national discrimination protections for LGBT people not only in employment but in other areas including education, credit, and housing.

*C. Expanding the Hively Interpretation of “Sex Discrimination” to Other Federal Statutes*

The Seventh Circuit’s reading of Title VII in *Hively* largely centered on the expansive evolution of the definition of “sex discrimination” in Title VII.<sup>224</sup> Sex discrimination is prohibited by a number of other federal statutes including Title IX of the Education Amendments of 1972 (Title IX),<sup>225</sup> the Equal Credit Opportunity Act (ECOA),<sup>226</sup> and the Fair Housing Act.<sup>227</sup> When different statutes use the same term on the same subject, federal courts generally presume the term has the same meaning across the statutes.<sup>228</sup> This is particularly so when the statutes have the same or highly similar purposes.<sup>229</sup> Thus, because the other antidiscrimination statutes share the same language of “sex discrimination” and are primarily intended to eradicate sex discrimination, the definition of sex discrimination in each should be interpreted the same way and each would pass statutory muster under RFRA for the same reasons as Title VII.<sup>230</sup> By applying the rationales for expanding Title VII in *Hively* to existing precedent on other federal antidiscrimination statutes, litigants may argue for expansive LGBT discrimination protections; in fact, some courts have already expanded Title VII precedent to sex discrimination prohibitions in education under Title IX,<sup>231</sup> credit under the ECOA,<sup>232</sup> and housing under the Fair Housing Act,<sup>233</sup> suggesting federal courts may be willing to apply *Hively*’s rationales to other sex discrimination statutes.

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<sup>224</sup> See *Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339, 343–45 (7th Cir. 2017).

<sup>225</sup> 20 U.S.C. § 1681(a) (2012) (prohibiting sex discrimination in education programs receiving federal funding).

<sup>226</sup> 15 U.S.C. § 1691(a) (2012) (prohibiting creditors from discriminating against an applicant on the basis of sex).

<sup>227</sup> 42 U.S.C. § 3604 (2012) (prohibiting sex discrimination in “the sale or rental of housing”).

<sup>228</sup> See, e.g., *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 98–99 (1991).

<sup>229</sup> See, e.g., *Northcross v. Bd. of Educ. of the Memphis City Sch.*, 412 U.S. 427, 428 (1973).

<sup>230</sup> Because eradicating sex discrimination serves a compelling interest and antidiscrimination statutes have been repeatedly held to be the least restrictive means for eradicating discrimination, these other statutes would similarly meet RFRA’s strict scrutiny standard. See *supra* notes 129–86 and accompanying text.

<sup>231</sup> See *infra* Section II.C.1.

<sup>232</sup> See *infra* Section II.C.2.

<sup>233</sup> See *infra* Section II.C.3.

### 1. *Sex Discrimination Under Title IX*

Title IX prohibits educational programs that receive federal funding, from discriminating on the basis of sex.<sup>234</sup> Because Congress passed Title IX eight years after Title VII had been in effect, most courts explicitly adopt Title VII precedent to interpret Title IX.<sup>235</sup> In fact, several courts have made direct comparisons between Title VII's sex discrimination prohibition and Title IX's sex discrimination prohibition.<sup>236</sup> Particularly, courts have used Title VII case law to find that Title IX similarly provides actionable sex discrimination claims for same-sex sexual harassment and sex stereotyping in education,<sup>237</sup> which are both examples of the comparative method in *Hively* of isolating the complainant's sex and determining whether the discrimination would have occurred if her sex were different.<sup>238</sup> The U.S. Department of Education has taken this position as well, noting that under the sex stereotyping theory, students who are subjected to harassment based on their perceived LGBT status have suffered prohibited sex discrimination under Title IX.<sup>239</sup> In addition, federal courts have generally been more willing to expand the scope of sex discrimination under Title IX to protect against discrimination based on actual or perceived LGBT status than other antidiscrimination statutes.<sup>240</sup> Thus, *Hively* provides possibly already sympathetic federal courts with strong rationales for explicitly identifying sexual orientation discrimination as actionable sex discrimination in Title IX instead of adjudicating LGBT discrimination through sex stereotyping or sexual harassment claims, providing significant protection for LGBT individuals in education.

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<sup>234</sup> 20 U.S.C. § 1681(a) (2012).

<sup>235</sup> Courtney Weiner, Note, *Sex Education: Recognizing Anti-Gay Harassment as Sex Discrimination Under Title VII and Title IX*, 37 COLUM. HUM. RTS. L. REV. 189, 219–20 (2005).

<sup>236</sup> See *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 75 (1992); *Lipsett v. Univ. of P.R.*, 864 F.2d 881, 896–97 (1st Cir. 1988); *Mabry v. State Bd. of Cmty. Colls. & Occupational Educ.*, 813 F.2d 311, 316 (10th Cir. 1987).

<sup>237</sup> See *Grimm v. Gloucester Cty. Sch. Bd.*, 302 F. Supp. 3d 730, 746 (E.D. Va. 2018) (actionable sex stereotyping claim); *M.A.B. v. Bd. of Educ. of Talbot Cty.*, 286 F. Supp. 3d 704, 715 (D. Md. 2018) (actionable sex stereotyping claim); *Roe v. Gustine Unified Sch. Dist.*, 678 F. Supp. 2d 1008, 1026 (E.D. Cal. 2009) (actionable sexual harassment claim); *Doe v. Perry Cmty. Sch. Dist.*, 316 F. Supp. 2d 809, 833–34 (S.D. Iowa 2004) (actionable sexual harassment claim).

<sup>238</sup> See *Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339, 345 (7th Cir. 2017).

<sup>239</sup> Dear Colleague Letter from Russlynn Ali, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ. (Oct. 26, 2010), <http://www.ed.gov/news/press-releases/guidance-targeting-harassment-outlines-local-and-federal-responsibility>.

<sup>240</sup> See Weiner, *supra* note 235, at 227.

## 2. *Sex Discrimination Under the Equal Credit Opportunity Act*

Federal courts have similarly used Title VII case law to interpret the Equal Credit Opportunity Act.<sup>241</sup> The ECOA prohibits creditors from discriminating against applicants with respect to any aspect of a credit transaction on the basis of sex.<sup>242</sup> Though initially the ECOA was arguably intended to prohibit discrimination in the provision of credit to married women, many courts have interpreted the ECOA's purpose as eliminating discrimination for all credit applicants.<sup>243</sup> Many federal agencies, including the Department of Justice and National Credit Union Administration, have also expressed concern that prospective homebuyers and other applicants may face discrimination in efforts to obtain loans, and thus be precluded from the benefits provided by access to credit.<sup>244</sup> Because of these concerns, many courts have extended the ECOA's protections to unmarried couples and to men.<sup>245</sup> Additionally, at least one federal circuit has applied the Title VII comparative method to find that transgender individuals could assert sex stereotyping claims under the ECOA.<sup>246</sup> Although little case law has developed the ECOA's sex discrimination provision, the fact that it is largely interpreted in line with Title VII<sup>247</sup> suggests that *Hively's* rationales are persuasive arguments for expanding the ECOA's sex discrimination provision to cover sexual orientation discrimination. This is particularly true for courts that interpret the ECOA's purpose as wholly eradicating discrimination in credit transactions for all applicants.<sup>248</sup> Because of the importance of access to credit both for individuals and for small businesses,<sup>249</sup> there are strong policy rationales for expanding *Hively's* reasoning to the ECOA to protect LGBT individuals from discrimination in the provision of credit.

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<sup>241</sup> See *Rosa v. Park W. Bank & Tr. Co.*, 214 F.3d 213, 215 (1st Cir. 2000); *Lewis v. ACB Bus. Servs., Inc.*, 135 F.3d 389, 406 (6th Cir. 1998).

<sup>242</sup> 15 U.S.C. § 1691(a) (2012).

<sup>243</sup> Laura Eckert, *Inclusion of Sexual Orientation Discrimination in the Equal Credit Opportunity Act*, 103 COM. L.J. 311, 318 (1998).

<sup>244</sup> *Id.* at 320 n.57.

<sup>245</sup> See *id.* at 318.

<sup>246</sup> See *Rosa*, 214 F.3d at 215.

<sup>247</sup> See, e.g., *id.*

<sup>248</sup> See, e.g., *Brothers v. First Leasing*, 724 F.2d 789, 793–94 (9th Cir. 1984) (noting the ECOA's initial purpose was to eradicate discrimination against women but that "Congress reaffirmed the goal of antidiscrimination in credit" by adding other protected classes); *Davis v. Strata Corp.*, 242 F. Supp. 2d 643, 650 (D.N.D. 2003).

<sup>249</sup> Eckert, *supra* note 243, at 319–20.

### 3. *Sex Discrimination Under the Fair Housing Act*

Much like the expansion of sex discrimination under Title VII to situations other than simple disparate treatment between men and women, federal courts have noted various other actions that constitute actionable sex discrimination under the Fair Housing Act such as sexual harassment and sex stereotyping. A number of federal circuits have applied Title VII case law holding sexual harassment to be actionable sex discrimination to find that the Fair Housing Act prohibits sexual harassment in housing.<sup>250</sup> In fact, the U.S. Department of Housing and Urban Development (HUD) has noted that Title VII case law warrants a finding that the Fair Housing Act analogously prohibits sexual orientation discrimination in housing at least when the discrimination is based on sex stereotyping.<sup>251</sup> Additionally, some litigants have already used the sex stereotyping theory to successfully assert Fair Housing Act sex discrimination claims.<sup>252</sup> Given HUD's official stance that the Fair Housing Act prohibits LGBT discrimination<sup>253</sup> and the willingness of federal courts to entertain Title VII comparative-style sex stereotyping housing discrimination claims,<sup>254</sup> the Seventh Circuit's expansion of sex discrimination to cover sexual orientation discrimination in Title VII<sup>255</sup> provides strong persuasive authority for courts to further expand LGBT housing protections under the Fair Housing Act.

Because Title IX, the ECOA, and the Fair Housing Act are all interpreted in line with Title VII precedent, the reasoning set forth in *Hively* provides strong rationales for expanding the definition of "sex discrimination" in these other statutes to protect against sexual orientation discrimination in a broad range of areas. Additionally, because these statutes share similar language and a similar purpose to Title VII, the fact that Title VII likely meets RFRA's strict scrutiny standard<sup>256</sup> means that these other antidiscrimination statutes would similarly meet the RFRA standard. Thus, even in the face of religious objection, the application of the statutes' antidiscrimination provisions will not be weakened

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<sup>250</sup> See *Quigley v. Winter*, 598 F.3d 938, 947–48 (8th Cir. 2010); *DiCenso v. Cisneros*, 96 F.3d 1004, 1008 (7th Cir. 1996); *Honce v. Vigil*, 1 F.3d 1085, 1088 (10th Cir. 1993).

<sup>251</sup> *Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act*, 81 Fed. Reg. 63,054, 63,058–59 (Sept. 14, 2016) (to be codified at 24 C.F.R. pt. 100).

<sup>252</sup> *Smith v. Avanti*, 249 F. Supp. 3d 1194, 1201 (D. Colo. 2017); *Kaeco-Tomaselli v. Butts*, No. 11-00670 LEK-BMK, 2012 WL 5996436, at \*3 (D. Haw. Nov. 30, 2012).

<sup>253</sup> See 24 C.F.R. § 5.105 (2016); *Equal Access in Accordance with an Individual's Gender Identity in Community Planning and Development Programs*, 81 Fed. Reg. 64,763, 64,781 (Sept. 21, 2016) (to be codified at 24 C.F.R. pt. 5).

<sup>254</sup> See cases cited *supra* note 252.

<sup>255</sup> *Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339, 340–41 (7th Cir. 2017).

<sup>256</sup> See *supra* Section II.A.

by private claims. Finally, reliance on these laws would ameliorate the harms posed by nonuniform antidiscrimination laws—reducing the confusion associated with nonuniformity and providing LGBT individuals, employers, and others with a landscape of equality that is not dependent on the state or municipality in which she is located. Given these possibilities, expanding the Seventh Circuit’s rationales in *Hively* provides the best defense against LGBT discrimination in the face of religious objection. Thus, litigants should strategically focus on expanding *Hively*—not only to other federal antidiscrimination statutes but also among federal circuits. Establishing a greater consensus among U.S. Courts of Appeals would not only geographically expand Title VII’s protections but could also better persuade the Supreme Court to apply *Hively*’s comparative method and associational method to Title VII to find that it prohibits LGBT discrimination.

### III. EXTENDING *HIVELY*’S RATIONALE TO OTHER FEDERAL CIRCUITS

The Seventh Circuit and the Second Circuit are the only federal circuits to hold that Title VII protects against sexual orientation discrimination; every other federal circuit has held that sexual orientation discrimination is not actionable under Title VII.<sup>257</sup> The circuit split created by *Hively* has yet to be resolved by the Supreme Court. The Supreme Court had the opportunity to resolve the split last Term by reviewing the Eleventh Circuit’s decision in *Evans v. Georgia Regional Hospital* where the Eleventh Circuit held that Title VII does not prohibit sexual orientation discrimination.<sup>258</sup> However, the Court denied the claimant’s petition for a writ of certiorari.<sup>259</sup> Though the denial did not contain an opinion, because of the recency of the circuit split, this may have been a “defensive denial” by which some of the Justices strategically avoided a determination on the merits by the current Court despite disagreement with the Eleventh Circuit’s interpretation.<sup>260</sup> Even if certiorari was not denied defensively, it may have been denied so that other federal circuits can develop more contemporary opinions on Title VII—a concept known as “percolation,”<sup>261</sup> which some Justices have argued better equips the Court to reach informed ultimate decisions.<sup>262</sup> Regardless of the Court’s rationale for denying certiorari

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<sup>257</sup> See cases cited *supra* note 20.

<sup>258</sup> *Evans v. Ga. Reg’l Hosp.*, 850 F.3d 1248, 1256–57 (11th Cir.), *cert. denied*, 138 S. Ct. 557 (2017).

<sup>259</sup> *Evans*, 138 S. Ct. at 557.

<sup>260</sup> Margaret Meriwether Cordray & Richard Cordray, *The Philosophy of Certiorari: Jurisprudential Considerations in Supreme Court Case Selection*, 82 WASH. U. L.Q. 389, 414 (2004).

<sup>261</sup> *Id.* at 438.

<sup>262</sup> Justice Ruth Bader Ginsburg noted that percolation “may yield a better informed and more enduring final pronouncement by this Court.” *Id.* (citing *Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J.,

on this issue, litigants and LGBT activists now have the opportunity to extend the Seventh Circuit's rationales in *Hively* to other federal circuits before the Supreme Court reaches a decision. They have already done so in the Second Circuit.<sup>263</sup> By examining the two rationales for expanding Title VII asserted by the Seventh Circuit in *Hively*—the comparative method and the associational method—as applied in other contexts by the different federal circuits, LGBT litigants may develop powerful, persuasive arguments for applying circuit precedent to interpret Title VII as prohibiting sexual orientation discrimination.<sup>264</sup>

#### A. *The Comparative Method in Other Federal Circuits*

As discussed above, the comparative method involves isolating the complainant's sex and determining whether changing only the variable of her sex would result in the same action by the employer; if not, the complainant has been discriminated against based on sex.<sup>265</sup> The comparative method is “tried-and-true” in Title VII jurisprudence.<sup>266</sup> The Supreme Court first applied the comparative method in 1971,<sup>267</sup> since then, the Court has expanded the comparative method to find that discrimination based on nonconformity with sex stereotypes is actionable sex discrimination.<sup>268</sup> Most federal circuits have since explicitly held that discrimination based on sex stereotyping or gender nonconformity is actionable sex discrimination under Title VII, interpreting *Hopkins* to establish the kind of “but for” comparative method explicitly laid out by the Seventh Circuit in *Hively*.<sup>269</sup> While the dissent in *Hively* argued that the comparative method is meant as an evidentiary tool rather than an interpretive

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dissenting)).

<sup>263</sup> The Second Circuit, sitting en banc in *Zarda v. Altitude Express, Inc.*, relied upon the same rationales from *Hively* to find that Title VII prohibits sexual orientation discrimination. See *Hively v. Ivy Tech Cmty. Coll.*, 883 F.3d 100, 112–28 (2d Cir. 2018).

<sup>264</sup> See *Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339, 345, 347 (7th Cir. 2017).

<sup>265</sup> *Id.* at 345; see *supra* Section I.B.

<sup>266</sup> *Hively*, 853 F.3d at 362.

<sup>267</sup> See *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971).

<sup>268</sup> *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250–51 (1989).

<sup>269</sup> See *Christiansen v. Omnicom Grp., Inc.*, 852 F.3d 195, 200–01 (2d Cir. 2017); *Evans v. Ga. Reg'l Hosp.*, 850 F.3d 1248, 1254 (11th Cir. 2017); *EEOC v. Boh Bros. Constr. Co.*, 731 F.3d 444, 453–54 (5th Cir. 2013); *Lewis v. Heartland Inns of Am., LLC*, 591 F.3d 1033, 1038–39 (8th Cir. 2010); *Schroer v. Billington*, 525 F. Supp. 2d 58, 62–63 (D.D.C. 2007); *Smith v. City of Salem, Ohio*, 378 F.3d 566, 573–74 (6th Cir. 2004); *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 264 (3d Cir. 2001); *Rosa v. Park W. Bank & Tr. Co.*, 214 F.3d 213, 215–16 (1st Cir. 2000) (interpreting the ECOA using Title VII case law); *Schwenk v. Hartford*, 204 F.3d 1187, 1201–02 (9th Cir. 2000) (interpreting the Gender Motivated Violence Act using Title VII case law); *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 143–44 (4th Cir. 1996).

tool,<sup>270</sup> several circuits have applied it interpretively to find that sex stereotyping is prohibited by Title VII.<sup>271</sup>

Although no circuits besides the Seventh and Second Circuits have yet applied the comparative method to find that LGBT discrimination is actionable under Title VII, some circuits may be poised to revisit the question.<sup>272</sup> Previously, Title VII jurisprudence in these circuits often centered on categorically separating the definitions of “sex” and “sexual orientation” or “transgender status” as distinct classes such that Title VII would only cover biological notions of sex.<sup>273</sup> However, several courts have noted the difficulty in delineating between discrimination based on sex and discrimination based on sexual orientation or gender identity because sex is often an inextricable factor in examining whether LGBT discrimination has occurred.<sup>274</sup> Expanding the definition of sex discrimination to encompass sexual orientation and gender identity eliminates the logical confusion associated with this tenuous distinction. This expansion also makes logical sense after *Hopkins* because in cases of sexual orientation discrimination, by isolating and changing the sex of the claimant and keeping other variables the same—most notably the sex of the claimant’s partner or the sex that the claimant is attracted to—the discrimination would not have occurred.<sup>275</sup> This logic is similar to Title VII sex stereotyping claims already embraced by the other circuits because they also involve isolating and changing the claimant’s sex and keeping other variables the same—such as clothing,<sup>276</sup>

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<sup>270</sup> *Hively*, 853 F.3d at 365 (Sykes, J., dissenting).

<sup>271</sup> Cases cited *supra* note 269.

<sup>272</sup> See *Wittmer v. Phillips 66 Co.*, 304 F. Supp. 3d 627 (S.D. Tex. 2018), *aff’d on other grounds*, No. 18-20251, 2019 WL 458405, at \*3 (5th Cir. Feb. 6, 2019) (the Fifth Circuit did not address whether sexual orientation discrimination is a cognizable claim under Title VII); *Harrington v. City of Attleboro*, No. 15-cv-12769-DJC, 2018 WL 475000, at \*6 (D. Mass. Jan. 17, 2018) (noting that actual or perceived sexual orientation discrimination is cognizable as sex stereotyping claim under Title VII); *Squire v. FedEx Freight, Inc.*, No. MJG-17-3597, 2018 WL 3036474, at \*5 (D. Md. June 19, 2008) (refusing to dismiss sexual orientation claim under Title VII).

<sup>273</sup> See *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1221–22 (10th Cir. 2007); *Simonton v. Runyon*, 232 F.3d 33, 36 (2d Cir. 2000); *Hopkins v. Balt. Gas & Elec. Co.*, 77 F.3d 745, 751–52 (4th Cir. 1996).

<sup>274</sup> See *Dawson v. Bumble & Bumble*, 398 F.3d 211, 217 (2d Cir. 2005) (noting the borders between sex and sexual orientation as classes are imprecise, making it difficult to determine whether a Title VII claimant has asserted a case of sex discrimination or sexual orientation discrimination); *Centola v. Potter*, 183 F. Supp. 2d 403, 408 (D. Mass. 2002) (“[T]he line between discrimination because of sexual orientation and discrimination because of sex is hardly clear.”); *Patti*, *supra* note 4, at 136 (citing *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 291 (3d Cir. 2009) (“[T]he line between sexual orientation discrimination and discrimination ‘because of sex’ can be difficult to draw.”)).

<sup>275</sup> See *Hively*, 853 F.3d at 345.

<sup>276</sup> *Prowel*, 579 F.3d at 291; *Ellingsworth v. Hartford Fire Ins. Co.*, 247 F. Supp. 3d 546, 553 (E.D. Penn. 2017).

physical mannerisms,<sup>277</sup> and hair style.<sup>278</sup> Notably, these variables constitute self-expression of identity. Because sexual identity and choice of spouse or life partner are some of the most important pieces of identity one can express,<sup>279</sup> expanding the comparative method to cover sexual orientation discrimination flows logically from sex stereotyping precedent in other circuits.

Though opponents of this interpretation have argued that it does not square with Congress's understanding of the definition of "sex" at the time of enactment,<sup>280</sup> the Supreme Court has made it clear that Title VII protects against discrimination beyond what the enacting Congress envisioned.<sup>281</sup> Courts' imperative to look beyond the original congressional intent of Title VII should encourage different circuits to examine their comparative method jurisprudence and logically expand it to cover sexual orientation discrimination. In fact, some federal courts in other circuits have already reached the same conclusion as the Seventh Circuit in *Hively* based on the comparative method.<sup>282</sup> Additionally, several federal courts in other circuits have noted the development in *Hively* and have pointed out that en banc decisions in their circuits could reverse binding precedent refusing to apply Title VII to LGBT discrimination claims.<sup>283</sup> Because of the logical use of the comparative method after *Hopkins* in these other circuits, litigants should focus on arguing to these circuits that they should adopt the application of the comparative method used by the Seventh Circuit in *Hively*.<sup>284</sup> By matching this argument with one based on the associational method used by the Seventh Circuit in *Hively*,<sup>285</sup> litigants can assert persuasive rationales for applying both sex stereotyping precedent and precedent on anti-miscegenation to LGBT discrimination claims under Title VII.

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<sup>277</sup> *Prowel*, 579 F.3d at 291; *Doe v. City of Belleville, Ill.*, 119 F.3d 563, 581 (7th Cir. 1997).

<sup>278</sup> *City of Belleville, Ill.*, 119 F.3d at 581.

<sup>279</sup> See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2589 (2015) (noting that sexual orientation is a defining piece of personal identity "central to individual dignity and autonomy").

<sup>280</sup> See *Hively*, 853 F.3d at 362 (Sykes, J., dissenting).

<sup>281</sup> See *Oncala v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998).

<sup>282</sup> See *Philpott v. New York*, 252 F. Supp. 3d 313, 317 (S.D.N.Y. 2017) (holding that sexual orientation discrimination is actionable under Title VII); *Boutillier v. Hartford Pub. Sch.*, 221 F. Supp. 3d 255, 269 (D. Conn. 2016) (same); *EEOC v. Scott Med. Health Ctr., P.C.*, 217 F. Supp. 3d 834, 839 (W.D. Penn. 2016) (same).

<sup>283</sup> See *Zarda v. Altitude Express, Inc.*, 855 F.3d 76, 82 (2d Cir. 2017), *rev'd en banc*, 883 F.3d 100 (2d Cir. 2018); *Horton v. Midwest Geriatric Mgmt., LLC*, No. 4:17CV2324 JCH, 2017 WL 6536576, at \*3 (E.D. Mo. Dec. 21, 2017); *Grimsley v. Am. Showa, Inc.*, No. 3:17-cv-24, 2017 WL 3605440, at \*4 (S.D. Ohio Aug. 21, 2017); *Burnett v. Union R.R.*, No. 17-101, 2017 WL 2731284, at \*3 (W.D. Penn. June 26, 2017).

<sup>284</sup> *Hively*, 853 F.3d at 345.

<sup>285</sup> *Id.* at 347.



### B. *The Associational Method in Other Federal Circuits*

The associational method holds that when a person is discriminated against because of the protected characteristic of someone she associates with, she is actually being disadvantaged because of her own characteristics.<sup>286</sup> The associational method first arose out of *Loving v. Virginia*, in which the Supreme Court held that anti-miscegenation statutes violated the Equal Protection Clause of the Fourteenth Amendment because they drew distinctions based on race despite punishing both white and black individuals in interracial marriages the same.<sup>287</sup> Based on *Loving's* logic, several circuits have held that when an employer discriminates against a person based on her association with members of a certain race, she has been discriminated against based on her own race in violation of Title VII.<sup>288</sup> Arguably the same logic should apply to association based on sex because Title VII treats each protected class "exactly the same."<sup>289</sup> The Seventh Circuit applied this logic in *Hively* to find that were the plaintiff a man instead of a woman associating romantically with another woman, she would not have faced the same discrimination.<sup>290</sup> Since many other circuits expressly apply the associational method with regards to race, the Court's command that Title VII protected classes be treated the same should serve as a strong rationale for expanding the associational method to sex discrimination as the Seventh Circuit did in *Hively*.

Although the dissent in *Hively* argued that *Loving* and Title VII associational method cases are limited to racial discrimination claims because of the historical difference between racial discrimination and sex discrimination,<sup>291</sup> the dissent does not acknowledge *Hopkins's* command to treat protected classes "exactly

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<sup>286</sup> *Id.*

<sup>287</sup> *Id.* (citing *Loving v. Virginia*, 388 U.S. 1, 12 (1967)).

<sup>288</sup> See *Floyd v. Amite Cty. Sch. Dist.*, 581 F.3d 244, 246–47, 249 (5th Cir. 2009) (Title VII prohibits employment discrimination based on an African-American school principal's association with white students); *Holcomb v. Iona Coll.*, 521 F.3d 130, 132 (2d Cir. 2008) (cognizable Title VII claim where plaintiff alleged employer discriminated against him because of his participation in an interracial marriage); *Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick, & GMC Trucks, Inc.*, 173 F.3d 988, 990 (6th Cir. 1999) (cognizable Title VII claim where plaintiff alleged employer terminated him because his child was biracial); *Drake v. Minn. Mining & Mfg. Co.*, 134 F.3d 878, 883–84 (7th Cir. 1998) (cognizable Title VII claim where plaintiffs alleged employer discriminated against them because of their association with African-American coworkers); *Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 889 (11th Cir. 1986) (cognizable Title VII claim where plaintiff alleged employer discriminated against him because of his participation in an interracial marriage).

<sup>289</sup> *Price Waterhouse v. Hopkins*, 490 U.S. 228, 243–44 n.9 (1989). The EEOC expressly adopted this position to find that sexual orientation discrimination is prohibited by Title VII. *Baldwin v. Foxx*, EEOC Appeal No. 0120133080, 2015 WL 4397641, at \*6–7 (July 15, 2015).

<sup>290</sup> *Hively*, 853 F.3d at 349.

<sup>291</sup> *Id.* at 368 (Sykes, J., dissenting).

the same” under Title VII.<sup>292</sup> The dissent also argued that the proper way to apply Title VII would be to determine whether the employer treated men who are attracted to men the same way as it treated women who are attracted to women.<sup>293</sup> However, the Seventh Circuit noted that this reading applies a rule that *Loving* explicitly rejected—namely that the dissent’s reading permits discrimination against people based on their attraction to persons of the same sex as long as the employer discriminates against all of its employees with same-sex attraction the same.<sup>294</sup> This is similar to the logic of historical anti-miscegenation as it ignores the implicit line-drawing based on a protected characteristic that must be made even when the discrimination applies equally to both sexes. Thus, because other circuit precedent explicitly applies the associational method to discrimination based on race and *Hopkins* commands that protected classes under Title VII be treated the same, litigants should argue in these other circuits that the logic of *Loving* and the associational method must be applied the same to sex discrimination.

Strong bodies of binding law exist in other circuits that warrant those circuits adopting *Hively*’s rationales for expanding Title VII. Based on the Supreme Court’s expansion of Title VII in *Hopkins*,<sup>295</sup> other circuits have used the comparative method interpretively to extend Title VII to prohibit sex stereotyping claims.<sup>296</sup> Because LGBT discrimination is often inextricable from sex stereotyping discrimination, litigants should focus on arguing in other circuits that Title VII outright prohibits LGBT discrimination. Similarly, binding law in other circuits applying *Loving* to prohibit associational race discrimination under Title VII should apply with equal force to associational sex discrimination because the Supreme Court has held that Title VII must be applied to all its protected classes exactly the same. Because the Supreme Court has at this point refused to resolve the circuit split created by *Hively*, LGBT litigants have a unique opportunity to expand *Hively*’s rationales to other federal circuits. Through this percolation, courts could expand Title VII’s protections to more LGBT individuals geographically and provide the Supreme Court with more persuasive logic and greater consensus, ultimately leading to a more solid and informed resolution of the issue in favor of LGBT rights.

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<sup>292</sup> See generally *id.* at 348–49 (majority opinion); *Hopkins*, 490 U.S. at 243–44 n.9.

<sup>293</sup> See *Hively*, 853 F.3d at 349.

<sup>294</sup> *Id.*

<sup>295</sup> *Hopkins*, 490 U.S. at 250.

<sup>296</sup> See cases cited *supra* notes 276–78.

### C. *Challenges and Alternatives to Expanding Title VII Through Federal Courts*

Until *Hively*, attempts to expand Title VII's sex discrimination provision to include sexual orientation through litigation were unsuccessful.<sup>297</sup> Most courts have rejected the sex discrimination argument either because they have treated sex and sexual orientation as categorically different or because including sexual orientation arguably contradicts congressional intent.<sup>298</sup> Additionally, judges often dismiss Title VII claims when the claimant is LGBT because of a fear that LGBT claimants will try to bootstrap sexual orientation discrimination claims under the sex discrimination provision, particularly when such judges are bound by circuit precedent categorically excluding sexual orientation discrimination claims under Title VII.<sup>299</sup> These cases of early dismissal demonstrate the challenges associated with expanding Title VII through litigation in federal courts. Although some circuits may be poised to revisit the issue, given the historical rejection of the Title VII sex discrimination argument, litigants and activists should continue to consider alternative methods for expanding LGBT antidiscrimination protections.

Congressional action to protect against LGBT discrimination is unlikely in the current political climate.<sup>300</sup> Further, in the face of public attacks, bias, and opposition from the Trump administration, acceptance of LGBT people has actually fallen for the first time in the United States.<sup>301</sup> Given the bleak prospects for passing federal legislation, aside from attempting to expand Title VII through litigation, the next best option for expanding LGBT discrimination protections is through state legislation. State law has historically led the charge for discrimination protections for LGBT people, challenging the claim that the federal government has always led in upholding civil rights.<sup>302</sup> In fact, state courts have created a body of precedent defining the scope and nuances of sexual orientation discrimination that federal courts may be able to draw upon when

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<sup>297</sup> See cases cited *supra* note 20.

<sup>298</sup> Jeremy S. Barber, Comment, *Re-Orienting Sexual Harassment: Why Federal Legislation Is Needed to Cure Same-Sex Sexual Harassment Law*, 52 AM. U. L. REV. 493, 500 (2002).

<sup>299</sup> *Id.* at 510–11.

<sup>300</sup> See Acevedo, *supra* note 64, at 1208. Although Democrats have taken control of the U.S. House of Representatives, any LGBT antidiscrimination measures would still need to pass a Republican-controlled Senate and be signed by President Donald Trump, which is unlikely given the GOP's alignment with social conservatives. See Juliet Linderman, *House Democrats Promise Action on LGBTQ Anti-Discrimination Bill*, HUFFINGTON POST (Oct. 29, 2018, 8:37 AM), [https://www.huffingtonpost.com/entry/house-democrats-promise-action-on-lgbtq-anti-discrimination-bill\\_us\\_5bd6fd39e4b0a8f17ef9d24b](https://www.huffingtonpost.com/entry/house-democrats-promise-action-on-lgbtq-anti-discrimination-bill_us_5bd6fd39e4b0a8f17ef9d24b).

<sup>301</sup> GLAAD, ACCELERATING ACCEPTANCE 2018: A SURVEY OF AMERICAN ACCEPTANCE AND ATTITUDES TOWARD LGBTQ AMERICANS (2018).

<sup>302</sup> *Developments in the Law: Employment Discrimination*, 109 HARV. L. REV. 1568, 1632–33 (1996).

reconsidering Title VII.<sup>303</sup> Additionally, states like Texas and Indiana have passed state-level RFRAs that expressly prevent claimants from using religious freedom claims to avoid civil rights protections.<sup>304</sup> Were activists to focus on expanding LGBT discrimination protections through state law, these statutes should serve as guideposts for ways to maximize both religious liberty and equal protection under the law.

Relying on state law obviously presents many of the problems of nonuniformity noted above.<sup>305</sup> However, because of the historical reluctance of federal courts to expand Title VII to include LGBT protections, state legislation is worth considering as the next best avenue for geographically expanding LGBT discrimination protections. By lobbying at the state level for antidiscrimination statutes that include LGBT protections and by lobbying for either adoption or amendment of state RFRAs to expressly include civil rights carve-outs, state legislation serves as the next best and realistic avenue for expanding LGBT discrimination protections aside from expansion of Title VII.

## CONCLUSION

*Hively* represents a landmark victory in the fight for equal rights. The Seventh Circuit's decision arguably stands as the first step in dismantling the current inequities based on "a paradoxical legal landscape in which a person can be married on Saturday and then fired on Monday for just that act."<sup>306</sup> *Hively* is particularly important at a time when religious freedom is wielded as a free license to discriminate against LGBT people.<sup>307</sup> This practice has led to a conflict between two core American values—freedom of religion and equal protection under the law.<sup>308</sup> A confusing *mélange* of mismatched Supreme Court precedent, nonuniform laws and policies, and disagreement among the federal circuits begs the question of which value holds higher stock in the law.

After the successful fight for marriage equality, protection against employment discrimination arguably represents the next frontier for LGBT

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<sup>303</sup> *Id.* at 1633.

<sup>304</sup> IND. CODE ANN. § 34-13-9-0.7(2) (West Supp. 2018); TEX. CIV. PRAC. & REM. CODE ANN. § 110.011 (West 2018).

<sup>305</sup> *See supra* Section II.B.

<sup>306</sup> *Hively v. Ivy Tech Cmty. Coll.*, 830 F.3d 698, 714 (7th Cir. 2016), *rev'd en banc*, 853 F.3d 339, 342 (7th Cir. 2017).

<sup>307</sup> *See* Stephen Seufert, *Can Religious Freedom Be Used to Discriminate?*, HUFFINGTON POST, [https://www.huffingtonpost.com/stephen-seufert/can-religious-freedom-be-used-to-discriminate\\_b\\_6997088.html](https://www.huffingtonpost.com/stephen-seufert/can-religious-freedom-be-used-to-discriminate_b_6997088.html) (last updated June 6, 2015).

<sup>308</sup> *See* Gjelten, *supra* note 122.

rights.<sup>309</sup> However, despite the important decision in *Hively* providing employment discrimination protections to LGBT people under Title VII, the Supreme Court's decision in *Hobby Lobby* threatens to allow private employers to skirt Title VII's protections by claiming religious objection to employing LGBT individuals under RFRA. This Comment argues that RFRA will not allow private employers to secure religious exemptions from Title VII to discriminate against LGBT individuals because Title VII meets the strict scrutiny standard imposed by RFRA.<sup>310</sup> Further, reliance on Title VII provides other benefits—its national scope obviates the need for LGBT individuals and multistate businesses to rely on nonuniform state and local laws,<sup>311</sup> and because some other important federal antidiscrimination statutes are interpreted using Title VII case law, expanding *Hively*'s rationales to these statutes could lead to sweeping LGBT discrimination protections in areas like education, credit, and housing.<sup>312</sup> Because these other statutes share similar language and a similar purpose, they also meet RFRA's strict scrutiny standard.<sup>313</sup>

Given these considerations, Title VII serves as the best defense against LGBT discrimination on the basis of religious objection. This Comment suggests the best strategy for maximizing the efficacy of *Hively*, particularly after the Supreme Court refused to resolve the issue last Term, is for litigants to extend *Hively*'s rationales to other federal circuits by encouraging them to take a "fresh look," relying on their existing bodies of case law.<sup>314</sup> By expanding Title VII in this way, litigants may extend Title VII's protections to more of the LGBT population and courts may develop contemporary opinions on Title VII consistent with Supreme Court precedent, allowing the Court to eventually reach a more informed decision in favor of LGBT rights.

DEVON SHERRELL\*

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<sup>309</sup> See Jennifer Calfas, *Employment Discrimination: The Next Frontier for LGBT Community*, USA TODAY, <https://www.usatoday.com/story/news/nation/2015/07/31/employment-discrimination-lgbt-community-next-frontier/29635379/> (last updated Aug. 1, 2015, 7:49 AM).

<sup>310</sup> See *supra* Section I.A.

<sup>311</sup> See *supra* Section I.B.

<sup>312</sup> See *supra* Section I.C.

<sup>313</sup> See *supra* Section I.C.

<sup>314</sup> See *supra* Part III.

\* Executive Symposium Editor, *Emory Law Journal*, Volume 68; Emory University School of Law, J.D., 2019; University of South Carolina, B.A., 2016. To my faculty advisor, Professor John Witte: I cannot thank you enough not only for your guidance and care in helping me craft this Comment but more importantly for always challenging me to think about the ways LGBT rights and religious freedom can coexist. To the staff of the *Emory Law Journal*, particularly Becca Reiman, Fiona O'Carroll, Anton Lesaca, and Sarah Lipinski: thank you for significantly improving the quality of this Comment through your hard work and keen eyes. To my parents, Will and Sherri: thank you for teaching me acceptance, compassion, and perseverance; but most of all,

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thank you for loving me enough to read this Comment all the way through even though it surely almost put you to sleep.