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Born Free: Toward an Expansive Definition of Sex

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BORN FREE: TOWARD AN EXPANSIVE DEFINITION OF SEX

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ABSTRACT

The State of New York recently issued its first physician-certified "intersex" birth certificate, correcting a 55-year-old's original birth certificate. This is a positive step towards eliminating the traditional binary approach to a person's birth sex, but it creates potential uncertainties in the employment discrimination context. Over the past several years, the definition of what constitutes "discrimination on the basis of sex" has both expanded (with the legalization of same-sex marriage) and narrowed (restricting the use of gender specific bathrooms). Until recently it appeared that a broader definition of the term "sex" would become the judicial—and possibly legislative—norm in a variety of contexts. However, several obstacles have emerged to jeopardize true equality for the LGBTQIA community, including (1) inconsistent judicial opinions regarding the meaning of "sex," (2) the increased ability of employers to utilize religion or "any other factor" as a defense to discrimination claims, (3) regressive executive policies regarding the definition of "sex," and (4) uncertainty about the extent to which transgender individuals may remain in the military. Although each of these issues warrants thorough analysis and has sparked scholarly debate, in this Article we focus on another critical inequality: wage disparity. Specifically, we are concerned with the problem posed for DSD and transgender individuals, given the Equal Pay Act's requirement that plaintiffs demonstrate they are paid differently from the "opposite sex" for a wage disparity claim. The Equal Pay Act (EPA) is outdated and discriminatory in its application, and it unnecessarily subjects an entire segment of the workforce—LGBTQIA individuals—to continued discrimination. The EPA requires that plaintiffs prove their cases through reference to an opposite sex comparator, but then defers

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to the employer's subjective definition of who "the opposite sex" is. This makes LGBTQIA plaintiffs' cases essentially unwinnable. Uncertainty for the LGBTQIA community is further compounded by the expansion of the employer's right, under both the Equal Pay Act and Title VII, to invoke religion, conscience, or "any other factor" as an affirmative defense to discrimination claims. In this Article, we discuss the interplay between a plaintiff's sex-specific protections (against sex-based employment discrimination under Title VII and against wage disparity under the Equal Pay Act) and an employer's affirmative defenses (under Title VII, the EPA, and current interpretations of the Religious Freedom Restoration Act). Our discussion concludes with recommendations for an expansive definition of the word "sex" and the adoption of the recently proposed Equality Act to help alleviate all forms of sex-based discrimination in the employment context.

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Introduction

Despite antidiscrimination laws in the employment context, many workers remain unprotected because courts have narrowly interpreted these statutes' use of the word "sex." We explore how these laws unnecessarily restrict a person's right to equal employment and enable employers to use anachronistic reasoning to disadvantage an entire population.

Most employment discrimination claims are brought under Title VII of the Civil Rights Act of 1964 ("Title VII").[1] Specific claims of wage disparity can also be brought under the Equal Pay Act ("EPA"), which requires that plaintiffs prove additional elements beyond those required by Title VII.[2] In this Article, we address the EPA's "opposite sex" requirement for wage disparity relief, which we believe is outdated and discriminatory in its application. The EPA requires that plaintiffs prove their cases through reference to an opposite sex comparator, but then defers to the employer's

1. 42 U.S.C.A. § 2000e (Westlaw through Pub. L. No. 115-90).
2. 29 U.S.C.A. § 206 (Westlaw through Pub. L. No. 115-90).

subjective definition of who is "the opposite sex." This makes LGBTQIA plaintiffs' cases essentially unwinnable.

Recent interpretations of antidiscrimination laws and religious freedom laws have only exacerbated this issue. For example, the affirmative defenses available to an employer under Title VII and the EPA—including an employer's right to use religion, conscience, or "any other factor"—and an employer's right to religious freedom under the Religious Freedom Restoration Act ("RFRA") have received expansive readings. This creates new avenues for discrimination against LGBTQIA employees.

The State of New York recently issued its first physician-certified "intersex" birth certificate, correcting a 55-year old's original birth certificate.[3] In doing so, New York has made a positive step toward eliminating the traditional binary understanding of a person's birth sex. But this step may also create problems for LGBTQIA individuals attempting to bring claims of sex discrimination and wage disparity. As a way of demonstrating the potential for sex discrimination against DSD[4] individuals, we will use the New York birth certificate in the following hypothetical:

> *Sam is a DSD person who has both male and female genitalia, but does not identify with either sex. Sam was born in New York and benefits from the state's changes to its birth certificate policy—Sam's birth certificate describes them as "intersex." Sam is an adult. Sam is hired at the Ward Photography studio, but is paid less than the other employees, both males and females. Ward Photography has thirty employees and is owned and operated by a husband and wife team.*

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3. *See, e.g.*, Susan Scutti, *"The Protocol of the Day Was to Lie": NYC Issues First US "Intersex" Birth Certificate*, CNN, Jan. 2, 2017, https://www.cnn.com/2016/12/30/health/intersex-birth-certificate/index.html. The city issued a corrected birth certificate for Sara Kelly Keenan, certified by a physician who indicated that "non-binary" was the appropriate umbrella term for gender variance. *Id.* Keenan was born with male genes, female genitalia, and mixed internal reproductive organs. *Id.*

4. In this Article, when discussing the lesbian, gay, bisexual, transgender, queer, intersex (DSD), and asexual community as a group, we will use the term "LGBTQIA" and describe individuals as "they" or "them." *See Answers to Your Questions About Individuals with Intersex Conditions*, AM. PSYCHOL. ASS'N (2006), https://www.apa.org/topics/lgbt/intersex.pdf. Because many experts and persons with intersex conditions indicate that the term "disorders of sex development or DSD" is the more appropriate and less stigmatizing term than "intersex," we will use it in this Article. *Id.* Experts estimate that one in every 1,500 persons is born with genitals that cannot be easily classified as either male or female. *Id.* Additionally, we use the terms "transgender" and "DSD" in their broadest sense, recognizing that the terms have been politicized and criticized for failing to adequately address the individual distinction of each person's experience and expression. Ido Katri, *Transgender Intrasectionality: Rethinking Anti-Discrimination Law and Litigation*, 20 U. PA. J.L. & SOC. CHANGE 51, 56–57 (2017).

> *The owners are devoutly religious and live in a small town, where they market their services to church groups in the local paper and on local radio stations. Many of their clients are churches or members of church congregations, all of whom believe that men can only marry women, that same-sex intimacy is a sin, and that a person's sex (and gender) is the one which they were assigned at birth. Moreover, any attempt to alter one's gender designation from birth is a sin. Although it is open to the public, the studio is selective in its hiring practices, generally only hiring those individuals the couple personally knows. In a move that differed from its usual practice, the studio hired Sam based on Sam's talented portfolio. The studio never thought to inquire about Sam's sex, and believed Sam to be male. After Sam had worked at the studio for a year, entitling Sam to a pay raise and other benefits, Sam disclosed that their birth certificate reflects their sex as "intersex." Sam then applied for the vacant managerial position at the studio and sought a raise commensurate with the men in managerial positions. The owners wished instead to terminate Sam's employment, believing Sam to be unable to further the best interests and the mission of the studio. Sam is considering the available legal options but is confronted with a bleak legal landscape: The EPA requires that they demonstrate they are being paid less than a member of the "opposite sex," and Title VII may not include protections for a DSD person.*[5] *Moreover, even if Sam is able to demonstrate discrimination, the studio may have a religious or constitutional defense allowing it to discriminate against Sam.*

The hypothetical example above demonstrates the current opaqueness of sex and gender discrimination. It also illustrates the need for continued judicial consistency, legislative guidance, and the broadening of societal norms to further equality in the workplace. In this Article, we examine the potential conflicts between the Supreme Court's broad interpretation of the definition of "sex" and its equally broad interpretation of employers' religious freedoms to—we argue—discriminate against the LGBTQIA community. We argue that the ambiguous language of RFRA (and the laws of many states that mirror or expand RFRA) provides a potential defense for employers in private litigation.

Transgender and DSD individuals are essentially excluded from challenging equal pay and sex-based discrimination laws because of two legal developments: first, the courts' overly-broad understanding of an employer's affirmative defenses and second, the statutes' unnecessary and

5. *See Answers to Your Questions About Individuals with Intersex Conditions*, *supra* note 4.

discriminatory definition of "sex." Although several states have attempted to combat this discrepancy in a way that would be favorable to the LGBTQIA community,[6] there is some concern that these state laws may be preempted by both Title VII and the EPA. Officially recognizing the entirety of the LGBTQIA community as a protected class (including protections against discrimination on the basis of sexual orientation, gender identity, transgender, and DSD status) would resolve many of these issues. Such a step would further national, social, and economic interests to have an inclusive and efficient workforce, and would be in line with the majority opinion of the U.S. population.[7] Accordingly, to move towards this goal, we recommend congressional support for the Equality Act or for other, greater statutory protections for the LGBTQIA community.

I. WHAT DO LGBTQIA, TRANSGENDER AND DSD MEAN?

Our discussion regarding sex discrimination necessarily entails a discussion of the definitional and societal terms surrounding sex. We must examine whether the term "sex" is synonymous with the term "gender" in a variety of contexts, including the employment context. The Transgender Law & Policy Institute defines "transgender" as "an umbrella term encompassing: pre-operative, post-operative, and non-operative transsexual people; cross-dressers; feminine men and masculine women; and more generally, anyone whose gender identity or expression differs from conventional expectations of masculinity or femininity."[8] Courts define "transgender" as an individual "who identifies with or expresses a gender identity that differs from the one which corresponds to the person's sex at birth."[9]

Although the terms "sex" and "gender" are often used interchangeably by courts and in common parlance, a person's birth sex, defined by their genitalia, may be incongruent with a person's gender, defined by the "attitudes, feelings, and behaviors that a given culture associates with a person's

6. *See State Public Accommodation Laws*, NAT'L CONF. OF ST. LEGISLATURES (July 13, 2016), http://www.ncsl.org/research/civil-and-criminal-justice/state-public-accommodation-laws.aspx (identifying states in which anti-discrimination laws have been passed).
7. *See* Alex Reed, *Redressing LGBTQ Employment Discrimination Via Executive Order*, 29 NOTRE DAME J.L. ETHICS & PUB. POL'Y 133, 134 (2015).
8. *About Us*, TRANSGENDER LAW & POLICY INST., www.transgenderlaw.org/aboutTLPE.htm (last visited Apr. 107, 2018). We use "their," "they," and "them" to avoid the strict gender binary that comes with the use of "he/she," "him/her," and "his/hers."
9. *See* Lewis v. High Point Reg'l Health Sys., 79 F. Supp. 3d 588, 589 (E.D.N.C. 2015) (quoting the Merriam Webster Online Dictionary); Kaeo-Tomaselli v. Pi'ikoi Recovery House for Women, No. CIV. 11-00670 LEK, 2011 WL 5572603, at *3 n.4 (D. Haw. Nov. 16, 2011).

biological sex."[10] Even DSD or "intersex" individuals—those individuals who have atypical genitals, genitals of both sexes, or no genitals (where "genitals" can refer to internal reproductive organs, external genitalia, or sex-related chromosomes)—are constrained by ideas surrounding sex-stereotyping and the definition of gender.[11] Legal protection for a DSD person could be restricted simply because the person does not fit within the binary interpretation of "sex."[12]

Understanding that gender identity is an immutable characteristic[13] is important for advancing legal protections for transgender and DSD individuals. Because the Equality Act officially recognizes this fact, we believe it is a significant next step.

Policies at both the federal and state levels have discriminated against the LGBTQIA community. Some of this discriminatory legislation includes the military's "Don't Ask, Don't Tell" policy (prohibiting openly gay and lesbian people from entering service),[14] voting laws (prohibiting a transgender person the right to vote when their identity documents do not match their perceived sex),[15] the Trump administration's ban on allowing transgender military enlistees,[16] the exclusion of "transvestites" from the

10. *See* Am. Psychological Ass'n, *Guidelines for Psychological Practice With Lesbian, Gay, and Bisexual Clients*, 67 AM. PSYCHOLOGIST 10, 11 (2012), http://www.apa.org/pubs/journals/features/amp-a0024659.pdf.
11. *See Answers to Your Questions About Individuals with Intersex Conditions*, *supra* note 4.
12. Historically, utilization of anatomical external genitalia and patterns of chromosomes governed the categorization of a person's assigned sex. However, these tests did not account for chromosomal mutations, hormonal influences, and gender identities. *See* M. Dru Levasseur, *Gender Identity Defines Sex: Updating the Law to Reflect Modern Medical Science is Key to Transgender Rights*, 39 VT. L. REV. 943, 980–82 & n.214 (2015).
13. *Id.* at 980–82 & nn.214, 238 (detailing medical evidence that suggests brain function and hormonal influences, rather than genitalia, influence a person's gender identity).
14. Mary Kate Cannistra et al., *A History of "Don't Ask, Don't Tell"*, WASH. POST, Nov. 30, 2010, http://www.washingtonpost.com/wp-srv/special/politics/don't-ask-don't-tell-timeline/; Julie Hirschfeld Davis & Helene Cooper, *Trump Says Transgender People Will Not Be Allowed in the Military*, N.Y. TIMES, July 26, 2017, https://www.nytimes.com/2017/07/26/us/politics/trump-transgender-military.html.
15. Jody L. Herman, *Strict Voter ID Laws May Disenfranchise More than 34,000 Transgender Voters in the 2016 November Election*, WILLIAMS INST. (2016), http://williamsinstitute.law.ucla.edu/research/strict-voter-id-laws-may-disenfranchise-more-than-34000-transgender-voters-in-the-2016-november-election/.
16. Julie Hirschfeld Davis & Helene Cooper, *Transgender People Can Still Serve for Now, U.S. Military Says*, N.Y. TIMES, July 27, 2017, https://www.nytimes.com/2017/07/27/us/politics/transgender-military-trump-ban.html; Bryan Bender, *Congress Advised It Has Authority to Undo Any Transgender Military Ban*, POLITICO, July 28, 2017, http://www.politico.com/story/2017/07/28/trump-transgender-military-ban-congress-can-undo-241093.

protections of the Fair Housing Act,[17] and the exclusion of individuals with "transvestism, transsexualism and gender identity disorders not resulting from physical impairments" from the protections of the Americans with Disabilities Act.[18] Various states (including *inter alia* Arkansas, North Carolina, Mississippi, and Texas) have passed some form of legislation that discriminates against LGBTQIA individuals.[19] Notably, other states have passed antidiscrimination laws protecting individuals from sexual orientation and gender identity discrimination.[20]

It can be particularly easy for courts to overlook the way discrimination affects different groups within the LGBTQIA community.[21] The pervasiveness of discrimination against transgender and DSD persons in a variety of contexts has been studied and recognized through a number of judicial decisions and social science studies, including two national surveys, the 2011 National Transgender Discrimination Survey and the 2015 United States Transgender Survey.[22] It is estimated that there are 5.4 million

17. Kevin M. Barry et al., *A Bare Desire to Harm: Transgender People and the Equal Protection Clause*, 57 B.C. L. REV. 507, 527–29 (2016) (discussing whether transgender status is an immutable trait). *See also The Discrimination Administration: Trump's record of action against transgender people*, NAT'L CTR. FOR TRANSGENDER EQUAL., http://www.transequality.org/the-discrimination-administration (last visited Apr. 17, 2018) (addressing Trump's 100 days of action against transgender people and various other negative government actions, including the Department of Housing and Urban Development's regulations and guidance regarding transgender individuals).
18. 42 U.S.C.A. § 12211(b)(1) (Westlaw through Pub. L. No. 115–90). The quoted language utilizes outdated and offensive terminology regarding the LGBTQIA community.
19. *See generally* Douglas Nejaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L. J. 2516 (2015).
20. Kyle C. Velte, *All Fall Down: A Comprehensive Approach to Defeating the Religious Right's Challenges to Antidiscrimination Statutes*, 49 CONN. L. REV. 1, 21 (2016). *See also State Public Accommodation Laws supra* note 6.
21. Elise Holtzman, *"I Am Cait," But It's None of Your Business: The Problem of Invasive Transgender Policies and a Fourth Amendment Solution*, 68 FLA. L. REV. 1943, 1950–51 (2016) (citing Tyler Curry, *Why Gay Rights and Trans Rights Should Be Separated*, HUFFINGTON POST, Feb. 17, 2014, http://www.huffingtonpost.com/tyler-curry/gay-rights-and-transrights_b_4763380.html); Danielle Paquette, *8 critical facts about the state of transgender America*, WASH. POST, Jan. 22, 2015, http://www.washingtonpost.com/news/wonkblog/wp/2015/01/22/the-state-of-transgender-america-massive-discrimination-little-data/ (finding that 41% of transgender people surveyed had attempted suicide—a much larger portion than the 1.6% of the general population that had attempted suicide). *See also* Jaime M. Grant et al., *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey* (2011), http://www.thetaskforce.org/static_html/downloads/reports/reports/ntds_full.pdf.
22. *See* WALTER O. BOCKTING ET AL., *Stigma, Mental Health, and Resilience in an Online Sample of the US Transgender Population*, 103 AM. J. PUB. HEALTH, 943, 946 (2013); Grant et al., *supra* note 21; S.E. James et. al., *The Report of the 2015 U.S.*

LGBTQIA individuals in the United States workforce.[23] These individuals face significant discrimination in the workplace. According to the National Transgender Discrimination Survey, 8–17% of the respondents who identified as lesbian, gay, and bisexual reported being terminated or not hired because of their sexual orientation; by contrast, 47% of respondents who identified as transgender reported being fired or not hired because of their status.[24] Similarly, 7–14% of lesbian, gay, and bisexual workers reported being harassed by their co-workers; a shocking 78% of transgender workers reported that they had experienced some type of mistreatment or discrimination.[25]

The pay differentials that individuals in the LGBTQIA community face are likewise troubling. The Williams Institute determined that gay and bisexual men earn 10–32% less than similarly qualified heterosexual men.[26] And while lesbian and bisexual women seem to earn at comparable rates to heterosexual women (and sometimes more), all women are, on average, continuing to earn less than both heterosexual and gay men.[27] Even more troubling is the wage disparity for transgender women, who were found to earn up to 1/3 less money than they had before they transitioned from male to female.[28] Interestingly, the same study found those workers who transitioned from female to male saw slightly increased salaries after their transitions.[29] Thus, it is apparent that women, and transgender women in particular, continue to lack equality in workplace earnings.[30] Accordingly,

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Transgender Survey, NATIONAL CENTER FOR TRANSGENDER EQUALITY (2015), https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf. *See also* Board of Education v. U.S. Dep't of Educ., 208 F. Supp. 3d 850, 874 (S.D. Ohio 2016) (applying heightened scrutiny to transgender student's challenge to bathroom policies under the Equal Protection Clause); Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1050–51 (7th Cir. 2017) (holding that a school policy prohibiting a student from using bathroom of their choosing because they were transitioning may constitute a form of prohibited sex-stereotyping under Title IX and heightened scrutiny applied to the student's Equal Protection claim).

23. MOVEMENT ADVANCEMENT PROJECT ET AL., A BROKEN BARGAIN: DISCRIMINATION, FEWER BENEFITS AND MORE TAXES FOR LGBT WORKERS 5 (2013), http://www.lgbtmap.org/a-broken-bargain-full-report.
24. Grant et al., *supra* note 21, at 53.
25. *Id.* at 56. Notably, the survey does not address the DSD community in particular, so DSD status might be conflated into the definition of transgender or not included at all. *See id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. The National Center for Transgender Equality also found transgender individuals were four times more likely to live in extreme poverty—a household income of less

we turn next to the mechanisms through which the LGBTQIA community can seek relief from employment discrimination.

II. Statutory Protections for Employment Discrimination Involve the Definition of Sex

The extent to which the transgender community can seek employment redress remains uncertain, given the patchy (and sometimes inconsistent) protections afforded by federal and state laws. At the federal level, transgender and DSD plaintiffs can seek relief from employment discrimination under Title VII.[31] Claims of wage disparity can also be brought under the EPA, but it is unclear how the EPA applies to transgender and DSD individuals, as discussed in II.B.2. Additionally, several states provide potential causes of action through their own antidiscrimination and equal pay laws, which are often more comprehensive than those available at the federal level.[32] Even so, at the core of any employment discrimination claim, whether state or federal, will be the interpretation of "sex."[33]

In an attempt to define "sex" for employment discrimination purposes, courts have turned to the definition of the word as listed in the dictionary at the time the statute was enacted.[34] As a result, until very recently, courts have interpreted the term sex as purely binary—male and female.[35]

Over the past 40 years, several attempts have been made to expand employment protections for the LGBTQIA community, but each attempt has been unsuccessful.[36] In 2011, the most explicitly inclusive federal statute

than $10,000 per year—than the general population. *See* Grant et al., *supra* note 21, at 2.f

31. Reed*, supra* note 7, at 134.
32. *Compare id.* at 163 n.172 ("Executive Order 11246 would prohibit federal contractors from discriminating on the basis of race, color, religion, sex (including gender identity and sexual orientation), or national origin.") *with* Jerome Hunt, A State-by-State Examination of Nondiscrimination Laws and Policies (2012), https://www.americanprogress.org/issues/lgbt/reports/2012/06/11/11696/a-state-by-state-examination-of-nondiscrimination-laws-and-policies/ (summarizing state laws and indicating California and New York as having some of the broadest legislation).
33. *See* Hunt, *supra* note 32 (summarizing state laws and ranking their protections for employees; notably, state legislation speaks in terms of general statements of "sexual orientation" and "gender identity" without specific guidance into the more specific areas of discrimination experienced by the transgender and DSD community).
34. Carcieri v. Salazar, 555 U.S. 379, 388 (2009).
35. *Compare* Reed v. Reed, 404 U.S. 71, 76–77 (1971) (finding that dissimilar treatment between men and women is discrimination based on sex) *and* Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1222 (10th Cir. 2007) *with* Hively v. Ivy Tech Cmty Coll., 853 F.3d 339, 347 (7th Cir. 2017) (finding that Title VII protections should apply to discrimination based on sexual orientation, not simply sex discrimination).
36. *See* Reed, *supra* note 7, at 134.

for the LGBTQIA community, known as the Employment Non-Discrimination Act ("ENDA"), was proposed but not adopted.[37] ENDA would have resolved some of the issues presented by the term "sex" because it would have prohibited "discrimination against individuals in employment based on perceived or actual sexual orientation and gender identity, and retaliation against them."[38]

In 2017, the Equality Act—a sweeping antidiscrimination statute originally from the 1970s—was re-introduced in both the U.S. Senate and the House of Representatives.[39] The Equality Act seeks to protect against discrimination based on sexual orientation and gender identity in employment, housing, access to public places, federal funding, credit, education, and jury service.[40] If passed, the Equality Act would provide a broad base of protections—broader even than those proposed by ENDA—by amending existing statutes to expand protections on the basis of "sex" to include sexual orientation, gender identity, pregnancy, childbirth (or a related medical condition), and sex-based stereotypes.[41] Even so, the Equality Act lacks specific inclusion of the transgender and DSD community, so it likely does not go far enough.

Support for policies advanced by the Equality Act is growing, as evidenced by a poll of likely voters conducted by the Human Rights Campaign ("HRC"), an influential LGBTQ civil rights and political advocacy group.[42] The poll found that many likely voters desire to prevent discrimination against the LGBTQ community.[43] The poll also found that voters would be

37. Melissa Wasser, *Legal Discrimination: Bridging the Title VII Gap for Transgender Employees*, 77 OHIO ST. L.J. 1109, 1116 (2016) (discussing history of ENDA and the Equality Act). *See also* Lisa Bornstein & Megan Bench, *Married on Sunday, Fired on Monday: Approaches to Federal LGBT Civil Rights Protections*, 22 WM. & MARY J. WOMEN & L. 31, 34–35 (2015).

38. Wasser, *supra* note 37, at 1116.

39. Equality Act of 2017, S. 1006, 115th Cong. (2017) (referred to Senate Committee on the Judiciary on May 2, 2017); *see* Jerome Hunt, *A History of the Employment Non-Discrimination Act*, CTR. AM. PROGRESS (July 19, 2011), https://www.americanprogress.org/issues/lgbt/news/2011/07/19/10006/a-history-of-the-employment-non-discrimination-act/.

40. *See* Hunt, *supra* note 39.

41. S. 1006.

42. Human Rights Campaign uses the acronym "LGBTQ" to refer to the LGBTQIA community. Accordingly, we use this acronym when discussing HRC's work.

43. Press Release, Human Rights Campaign, New HRC Data: American Public Strongly Supports Federal Non-Discrimination Protections (June 16, 2014), https://www.hrc.org/press/new-hrc-data-american-public-strongly-supports-federal-non-discrimination-p.

less likely to support candidates who do not support the LGBTQ community.[44]

The Human Rights Campaign also annually rates corporations on their LGBTQ policies and work environments. Positive ratings by HRC generate positive press for the companies, and lead some employers to have more progressive policies than the law requires.[45] 92% percent of Fortune 500 companies have sexual orientation non-discrimination protections in place, and most have gender identity protections as well.[46] This is a hopeful trend. Perhaps if enough corporations move towards inclusivity then legislators and legislation will follow.

Importantly, there is some evidence to suggest that the general public erroneously believes that LGBTQIA discrimination is already illegal under existing laws.[47] Opponents of antidiscrimination legislation may harness this misunderstanding to argue that LGBTQIA individuals are already protected under current case law.[48] In fact, most state and federal laws fail to offer even basic workplace protections to the LGBTQIA community, as many states still permit employers to fire a person because they are gay or transgender.[49] Without clear congressional guidance and an explicit clarification of what counts as "sex discrimination," the community's right to equality remains precarious.

A. The EPA: Outdated Comparators of "the Opposite Sex" and Affirmative Defenses

The EPA—which was designed to eliminate or reduce pay disparities between the binary sexes—threatens to jeopardize transgender and DSD equality. Like Title VII, the EPA was designed to combat discrimination against *women*.[50] The federal government enacted the EPA in 1963 after a century of discussions about wage equality, thereby amending the Fair Labor Standards Act ("FLSA").[51]

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44. *Id.*
45. *Id.*; *see also* Shalyn L. Caulley, *The Next Frontier to LGBT Equality: Securing Workplace-Discrimination Protections*, 2017 U. ILL. L. REV. 909, 916 (2017).
46. *See* Allison Turner, *HRC Releases Annual Corporate Equality Index with Record 609 Companies Earning Perfect Scores*, HUMAN RIGHTS CAMPAIGN, Nov. 9, 2017, https://www.hrc.org/blog/hrc-releases-annual-corporate-equality-index-609-companies-earn-perfect-sco.
47. *See* Caulley, *supra* note 45, at 919.
48. *Id.*
49. German Lopez, *The Equality Act, the most comprehensive LGBTQ rights bill ever, explained*, VOX, Nov. 10, 2015, https://www.vox.com/2015/7/23/9023611/equality-act-lgbt-rights.
50. *See generally* County of Washington v. Gunther, 452 U.S. 161 (1981).
51. *See Gunther*, 452 U.S. at 174.

To state an EPA claim, a plaintiff must demonstrate that she or he received different compensation than a person of the "opposite sex" for "equal work" on jobs, "the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions."[52] If the prima facie case is proven, the employer must show the pay differential was made "pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex."[53] Moreover, under the EPA, and unlike a disparate treatment claim under Title VII, there is no requirement that the employer actually "intend" to discriminate.[54]

Ultimately, the EPA prohibits pay differentials between employees who perform "substantially similar work" unless the employer can claim one of the four affirmative defenses.[55] Even where the differences between the two positions are inconsequential, an employer can successfully argue that the pay differential was based on a "factor other than sex."[56] This is accomplished by comparing "the jobs held by the female and male employees, and by showing that those jobs are substantially equal, not by comparing the skills and qualifications of the individual employees holding those jobs."[57] The notion of "equal pay" for "equal work" might make a plaintiff's case

52. *See* Deborah Thompson Eisenberg, *Shattering the Equal Pay Act's Glass Ceiling*, 63 S.M.U. L. REV. 17, 29–31 (2010) (discussing the requirements for a claim under the Equal Pay Act). *See also* Elizabeth J. Wyman, *The Unenforced Promise of Equal Pay Acts: A National Problem and Possible Solution from Maine*, 55 ME. L. REV. 23, 50 (2002); 29 U.S.C.A. § 206(d)(1) (Westlaw through Pub. L. No. 115-90).

53. 29 U.S.C.A. § 206(d)(1).

54. Eisenberg, *supra* note 52, at 31.

55. 29 U.S.C. § 206(d)(1). *See also* Miranda v. B & B Cash Grocery Store, Inc., 975 F.2d 1518, 1532–34 (11th Cir. 1992) (denying motion for summary judgment on the issue of whether the plaintiff's job was substantially equal to that of a male buyer).

56. *E.g.*, *Miranda*, 975 F.2d at 1533

57. *Miranda*, 975 F.2d at 1533 (noting the male comparator employee must be at the same establishment as the female plaintiff). The establishment requirement is narrowly defined as a "physically separate place of business—not an enterprise which may comprise of multiple establishments." Wendi S. Lazar & Kerry C. Herman, *The State of Equal Pay in the 21st Century*, 89 N.Y. St. B.J. 56, 56–57 (2017). And yet, once the prima facie case has been made, courts allow for a comparison of the individuals in those jobs to support the pay differential. *See id.* Employers have little incentive to correct the pay disparities in light of a plaintiff's limited options for correcting back-pay differentials. There is also a negative trend in the Seventh and Eighth Circuits, where plaintiffs' success rates were 24% and 39% respectively. *Id.* In addition to private plaintiffs, the Equal Employment Opportunity Commission ("EEOC") may initiate EPA claims, but as Ms. Eisenberg noted, it failed to do so from 2000–2009. *Id.* Since then, courts have continued to dismiss EPA claims for procedural reasons or on comparator grounds. *Id.*

more difficult as positions can easily be distinguished from one another.[58] Although Equal Pay Act claims are very fact intensive, they are often decided at the summary judgment stage.[59]

One of the most controversial affirmative defenses an employer has in its arsenal is the ability to claim the wage disparity was based on a "factor other than sex." There is some Supreme Court guidance, albeit limited, regarding what an employer must demonstrate to defend against an EPA claim. In 1974, the Supreme Court interpreted the EPA in *Corning Glass Works v. Brennan* to require that employers must have a "legitimate reason" for a pay differential between men and women.[60] Four years later, the Supreme Court applied Title VII (as it incorporates the EPA's affirmative defenses) to address whether an employer's requirement that female employees pay higher pension premiums than male employees (because females tend to live longer) was really a proxy consideration for sex-based discrimination.[61] The employer argued that their action was based on a "factor other than sex," i.e. longevity, but the Court concluded the employer's analysis was in fact based on the difference between the sexes.[62] Accordingly, the Court found the "other than sex" defense of the EPA was inapplicable in the Title VII claim.[63]

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58. *Miranda*, 975 F.2d at 1532 (finding certain jobs may be worth less to an employer even though the jobs are mainly staffed by females). The EPA does not require equal pay for "comparable work" or equal pay for "comparable worth." To be "equal" the jobs "must be virtually identical, that is, they would be very much alike or closely related to each other." Waters v. Turner, Wood & Smith Ins. Agency, Inc., 874 F.2d 797, 799 (11th Cir. 1989). The positions need not be absolutely identical but, in practice, courts look for something extremely close to identical. *Id.* Where the differences are inconsequential, an employer may still overcome an EPA violation by showing that a factor other than sex played a role, e.g. the male comparators in the similar job had better experience, pay history, etc. Cochran v. Alabama Power Co., 2017 WL 2223038 at *6 (S.D. Ala. 2017). When employees rise to higher ranks, it becomes increasingly difficult to find appropriate comparators. *See e.g.* E.E.O.C. v. Port Auth., 768 F.3d 247, 258 (2d Cir. 2014) (attorneys did not perform equal work); Carey v. Foley & Lardner LLP, 577 F. App'x 573, 580 (6th Cir. 2014) (partners in law firm did not perform equal work).

59. *See* Eisenberg, *supra* note 52, at 41.

60. Corning Glass Works v. Brennan, 417 U.S. 188, 191 n.3 (1974). The men in *Brennan* demanded higher salaries to perform what they considered "women's work." *Id.* However, where working conditions are in fact different, pay differentials can be "legitimate." *Id.* at 201.

61. City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 707–08 (1978) (analyzing the case under Title VII, which incorporates the EPA's affirmative defenses).

62. *Manhart*, 435 U.S. at 711–12.

63. *Manhart*, 435 U.S. at 711–12.

More recently, the Supreme Court examined an age discrimination case under the Age Discrimination in Employment Act ("ADEA"), which has a somewhat similar affirmative defense to the EPA's "other than sex" defense.[64] The ADEA denies a plaintiff recovery if the employer can show that "reasonable factors other than age" led to the adverse action.[65] Because the EPA and the ADEA share a potentially similar affirmative defense, the plurality opinion in the ADEA case noted that the EPA allows a pay differential "on any other factor – reasonable *or unreasonable*," (emphasis added) as long as it is not based on sex.[66] In this regard, the Supreme Court's dicta suggests the Court would not require an employer to demonstrate that its reason for pay disparity furthered a reasonable business decision.[67] The reasonableness analysis could prove influential with respect to the identical affirmative defense under the EPA because it is a similar "catch-all" category. Without an obligation to demonstrate that the employer's justification for the pay disparity is reasonable, the defense allows an employer to fabricate a reason and withstand legal action by a member of the LGBTQIA community. For example, in *Rizo v. Yovino*, the Ninth Circuit Court of Appeals recently rejected a district court's opinion that pay disparities cannot be based solely on salary history.[68] The Ninth Circuit determined that the EPA's affirmative defense of a "factor other than sex" meant that an employer could set pay rates based on prior salaries, so long as doing so furthered a business policy and was reasonable.[69]

The controversy over this affirmative defense arises when employers examine the pay history of their employees and determine pay rates accordingly.[70] Facially, one might argue that resulting pay differentials are due to a

64. *See* Smith v. Jackson, 544 U.S. 228, 239 n.11 (2005) (plurality opinion); Deborah L. Brake, *Reviving Paycheck Fairness: Why and How the Factor-other-than-Sex Defense Matters* 52 Idaho L. Rev. 889, 895–96 ("The plurality [in *Smith*] contrasted the language in the EPA's FOTS defense with the language in the [ADEA's] RFOA, which permits an employment practice that is 'otherwise prohibited' under the ADEA if it was based on 'reasonable factors other than age' (RFOA).").

65. Brake, *supra* note 64, at 895.

66. *Smith*, 544 U.S. at 239 n.11.

67. Brake, *supra* note 64 at 896–98, nn.43–55 (noting the Seventh and Eighth Circuits' conclusion that the "factor other than sex" does not require anything other than the reason be gender-neutral, as opposed to the Sixth and Ninth Circuits, which require a sufficient business justification be part of the defense).

68. Rizo v. Yovino, 854 F.3d 1161, 1166 (9th Cir.), *reh'g en banc granted*, 869 F.3d 1004 (9th Cir. 2017) *and on reh'g en banc*, No. 16-15372, 2018 WL 1702982 (9th Cir. Apr. 9, 2018).

69. *Rizo*, 854 F.3d at 1166.

70. Deborah L. Brake, *The Shifting Sands of Employment Discrimination: From Unjustified Impact to Disparate Treatment in Pregnancy and Pay*, 105 Geo. L.J. 559, 604 (2017).

factor other than sex. But one has to acknowledge that women and transgender people have historically been paid less than heterosexual men as a result of discrimination.[71] Accordingly, if a woman's pay history is less than a man's pay history, then using it to set current pay rates will perpetuate the pay disparity cycle.[72] Likewise, as LGBTQIA community members traditionally have received lower wages than heterosexual workers, their pay histories will continue to subject them to pay disparity discrimination.[73] In this way, pay differentials that are created as a result of unequal pay histories are still based on sex.

Circuits are split on the issue of whether pay history alone can support a wage disparity claim. The Tenth and Eleventh Circuit Courts have held that salary history cannot be the sole basis for determining compensation under the EPA; the Seventh and Eighth Circuit Courts have permitted the practice.[74] The Ninth Circuit has agreed to review its recent ruling in *Rizo* that an employer must have a legitimate reason for its business decision to pay women less than men.[75]

Many legal scholars have discussed the weaknesses in the EPA and have recommended changes to resolve these issues.[76] Continuing to allow the EPA's outdated definition of sex and overly-broad interpretation of the business legitimacy requirement will continue to limit the LGBTQIA community's possible avenues of recourse.

Below we will examine the term "sex" in the context of state laws regarding driver's licenses and birth certificates and how this might affect a court's interpretation of "sex" in the employment context. We also examine

71. *Id.*
72. *Id.*
73. *Id.*
74. Brake, *supra* note 64, at 896–99.
75. Rizo v. Yovino, 854 F.3d 1161, 1166 (9th Cir.), *reh'g en banc granted*, 869 F.3d 1004 (9th Cir. 2017) *and on reh'g en banc*, No. 16-15372, 2018 WL 1702982 (9th Cir. Apr. 9, 2018). *See also* EEOC, Directives Transmittal No. 915.003, § 10.IV.F.2. (Dec. 5, 2000), https://www.eeoc.gov/policy/docs/accommodation_procedures.html ("An employer . . . must show that the factor is related to job requirements or otherwise is beneficial to the employer's business [and] the factor must be used reasonably in light of the employer's stated business purpose as well as its other practices.").
76. *See* Brake, *supra* note at 64, at 604–05. The Paycheck Fairness Act, which would help to resolve the EPA's inequities, has failed to pass both houses of Congress over the years. Brake, *supra* note 70, at 909 n.119-20 (collecting arguments). President Trump rescinded the prior administration's Executive Order prohibiting federal contractors from discriminating based on gender identity and sexual orientation. Robert G. Lian, Jr., Daniel L. Nash & Andrew R. Turnbull, *President Trump Rescinds the Blacklisting Executive Order,* Mar. 28, 2017, https://www.akingump.com/en/experience/practices/corporate/ag-deal-diary/president-trump-rescinds-the-blacklisting-executive-order-1.html.

the word's meaning within certain federal statutes and constitutional provisions affecting employment.

B. State and Federal Agency Definitions of "Sex"

The legal meaning of the word "sex" swings with the political pendulum. Under the Obama administration, the Office of Civil Rights (OCR), the Department of Justice (DOJ), and the Equal Employment Opportunity Commission (EEOC) began broadening the definition of "sex" in a variety of legal circumstances.[77] However, President Trump's 2017 pronouncement that transgender persons are to be excluded from the military, and the recent rescission of OCR's 2016 proclamation (which allowed transgender individuals the right to choose which bathroom they used) have narrowed the protections afforded on the basis of "sex."[78] A clear and final definition of "sex" is necessary.[79]

1. State-Level Discrepancies in Defining "Sex"

Clarifying "sex" is particularly important for employment law. To be legally employed a person must provide their employer with a valid Social Security card or passport.[80] If either of those documents is unavailable, they must present a birth certificate so that their employer can complete a federal I-9 Employment Eligibility Verification Form.[81] A birth certificate is also often required for a person to obtain other personal identification documents, such as a Social Security card, passport, or driver's license.[82]

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77. Alexandra A. Klimko, *Comment: Transgender Employment Discrimination Equality in Wisconsin: The Demise of a Former LGBTIQ+ Rights Trailblazer*, 18 Marq. Benefits & Soc. Welfare L. Rev. 163, 170 (2016); Alexandra A. Harriman, *Putting the Restroom Debate to Rest: Addressing Title IX and Equal Protection in G.G. Ex. Rel. Grimm v. Gloucester County School Board*, 69 Me. L. Rev. 273, 278-79, 282-83 (2017).

78. Davis & Cooper, *supra* note 14; Jeremy W. Peters et al., *Trump Rescinds Rules on Bathrooms for Transgender Students*, N.Y. TIMES, Feb. 22, 2017, https://www.nytimes.com/2017/02/22/us/politics/devos-sessions-transgender-students-rights.html.

79. *See* Gloucester Cty. Sch. Bd. v. G.G. *ex rel.* Grimm, 137 S. Ct. 1239 (2017) (vacating and remanding the appellate court's ruling, as federal guidance interpreting "sex" had been withdrawn); *see also* G.G. *ex rel.* Grimm v. Glouster Cty. Sch. Bd., 822 F.3d 709, 709–27 (4th Cir. 2016) (outlining the underlying claims and arguments).

80. *See* Lisa Mottet, *Modernizing State Vital Statistics Statutes and Policies to Ensure Accurate Gender Markers on Birth Certificates: A Good Government Approach to Recognizing the Lives of Transgender People*, 19 MICH J. OF GENDER & L. 373, 393-94 (2013).

81. *See id.* at 393 n.42 (2013) (explaining gender expression); Nate Silver, *Change Doesn't Usually Come This Fast*, FIVETHIRTYEIGHT, June 26, 2015, http://fivethirtyeight.com/datalab/change-doesnt-usually-come-this-fast/ (discussing the definitions of sex, legal sex, gender, and how one might identify as transgender).

82. Mottet, *supra* note 80, at 391.

How a person amends these identification documents varies depending on their state of residence, and whether the issuing agency is a state or federal agency.[83] Some states' requirements for alteration of identification documents are not particularly burdensome.[84] However, other states require proof of sex reassignment surgery before a person's listed gender can be altered from the one noted on official identification.[85] Obtaining the medical and legal prerequisites to alter one's identification documents can be expensive.[86] States that require proof of active gender transitioning deprive those who cannot afford the procedures or who otherwise choose to not undergo medical treatment of the legal protection they deserve.[87]

There is little clarity in the different state standards for identifying or changing one's official "sex." Complying with these various standards of "sex" is only one barrier for transgender and DSD individuals. These inconsistencies make proving—or even articulating—a prima facie case of wage discrimination especially complex.[88]

Overlaid on state definitions and requirements, the federal government has its own restrictions on when and how a person can alter their gender designation, as discussed below.[89] When applying for jobs, or other governmental services, how a person identifies their sex or gender may be at odds with the definitions propounded by various state and federal agencies.

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83. The federal government requires medical certification that the person is undergoing appropriate medical treatment whereas some states require a court order. *See* Doran Shemin, *My Body Is My Temple: Utilizing the Concept of Dignity In Supreme Court Jurisprudence To Fight Sex Reassignment Surgery Requirements For Recognition of Legal Sex*, 24 AM. U. J. GENDER SOC. POL'Y & L., 491, 496 (2016). Yet, other states require certification that a person has actually undergone the surgery, and others prohibit any amendments to birth certificates under any circumstances. *Id.* at 496–97.

84. *Id.* at 493 n.10 ("Residents of Michigan can now use a U. S. Passport to receive an updated Michigan ID.").

85. *See, e.g.*, Love v. Johnson, No. 15-11834, 2016 WL 4437667, at *1, 4 (E.D. Mich. Aug. 23, 2016) (asserting that state amended its prior restrictive policy on altering one's gender on their birth certificate, allowing the use of a U.S. passport instead, which has slightly less restrictive standards regarding when a person is considered to be in transition and qualifies for gender reassignment documentation).

86. Holtzman, *supra* note 21, at 1967.

87. *See* Mottet, *supra* note 80, at 405, 407–09 (noting that many individuals opt not to undergo treatment based on a lack of desire for medical treatment and cost).

88. Flaherty v. Massapequa Pub. Sch., 752 F. Supp. 2d 286, 289. *But see* Hinton v. Va. Union Univ., 185 F. Supp. 3d 807, 842 (E.D. Va. 2016), *motion to certify appeal denied*, No. 3:15CV569, 2016 WL 3922053 (E.D. Va. July 20, 2016) (finding openly gay male administrative assistant stated a prima facie Equal Pay Act claim because he was paid less than female colleagues for the same work).

89. *See e.g.*, *Gender Designation Change*, U.S. DEP'T OF STATE – BUREAU OF CONSULAR AFFAIRS, https://travel.state.gov/content/travel/en/passports/apply-renew-passport/gender.html (last visited Apr. 17, 2018).

These inconsistencies make the process of completing standard employment documentation especially difficult for DSD individuals.

2. Federal-Level Discrepancies in Defining "Sex"

At the core of a federal sex discrimination claim is the protection afforded on the basis of "sex." As previously discussed, the two primary avenues of federal relief for sex discrimination in the employment context are through Title VII and the EPA. Where case law is lacking in one, courts may look to the other statute for guidance.

Sex discrimination in compensation is prohibited by both Title VII and the EPA.[90] In 2014, the EEOC estimated approximately 30% of the complaints it received were related to sex discrimination.[91] The EEOC has interpreted Title VII to include transgender individuals, and it views issues surrounding gender identity and sexual orientation as sex-based discrimination.[92] Although the EEOC is charged with enforcing Title VII and the EPA, courts view its interpretations as persuasive, rather than binding.[93] (If the EEOC's opinions were binding, appellate courts would be required to adopt the agency's interpretation absent proof that the ruling was "arbitrary and capricious."[94]) Accordingly, the EEOC's pre-Trump administrative policy has limited persuasiveness and does not provide legal precedent. Likewise, this Article contends, the Supreme Court has provided no clarity on what the term "sex" entails with respect to the LGBTQIA community.

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90. Brake, *supra* note 70, at 601–602 (2017); *see* Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 2, 123 Stat. 5 (2009). The Fair Pay Act ("FPA") amended Title VII as follows: "[A]n unlawful employment practice occurs, with respect to discrimination in compensation in violation of this title, when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice." *Id.* at 5–6.

91. U.S. Equal Emp't Opportunity Commission, *Women in the American Workforce*, www.eeoc.gov/eeoc/statistics/reports/american_experiences/women.cfm (last visited Apr. 17, 2018).

92. Roberts v. Clark Cty. Sch. Dist., 312 F.R.D. 594, 605 (D. Nev. 2016).

93. Tessa M. Register, Note, *The Case for Deferring to the EEOC's Interpretation in Macy and Foxx to Classify LGBT Discrimination as Sex Discrimination Under Title VII*, 102 IOWA L. REV. 1397, 1400-08 (2017) (discussing varying degrees of deference afforded to agency interpretations and arguing the EEOC's interpretation regarding sex should carry great weight). *See also* Darrell Parker & Debra Burke, *From Hot to Lukewarm: Union Strength and Worker Rights*, 44 W. ST. U. L. REV. 29, 37–38 (2016).

94. Register, *supra* note 93, at 37–38.

To determine what Congress meant by certain key words, such as "sex," courts often begin by examining dictionaries.[95] Dictionaries, in turn, add or modify words by "scour[ing] the texts in search of new words, new usages of existing words, variant spellings . . . anything that might help . . . [to understand] what [the word] means."[96] When citing the dictionary's definition, courts have focused on language that that reinforces the binary idea of sex.[97] Most have determined that the word "sex" is separate and distinct from the word "gender," and as such, gender identity is not protected within Title VII's prohibition on "sex discrimination."[98]

a. The Definition of "Sex" Under the EPA

The case law under the EPA is inconsistent, but it is largely not favorable to DSD plaintiffs.

One outlier court has recognized that a transgender person who has undergone surgery has standing to sue for wage disparity under the EPA. In *Cummings v. Greater Cleveland Regional Transit Authority,* a district court in Ohio determined that a plaintiff who was born a male (but had undergone sex reassignment surgery) was anatomically a female and therefore had standing to sue under the EPA.[99] The plaintiff had previously amended her birth certificate to reflect that she was a female.[100] The defendant employer argued that because gender is assigned at birth, a person cannot later change the designation.[101] The court concluded that the plaintiff's birth certificate was to be given the full faith and credit of the Constitution, and as such, the plaintiff was a female and had standing to sue under state equal pay laws, gender discrimination laws, and Equal Protection laws.[102]

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95. Adam Liptak, *Justices Turning More Frequently to Dictionary, and Not Just for Big Words*, N.Y. TIMES, June 13, 2011, https://www.nytimes.com/2011/06/14/us/14bar.html.

96. *How Does a Word get into a Merriam-Webster Dictionary?*, MERRIAM-WEBSTER, https://www.merriam-webster.com/help/faq-words-into-dictionary (last visited Apr. 17, 2018).

97. Fabian v. Hosp. of Cent. Conn., 172 F. Supp. 3d 509, 524–26 (D. Conn. 2016).

98. *Fabian*, 172 F. Supp. 3d at 518.

99. Cummings v. Greater Cleveland Reg'l Transit Auth., 88 F. Supp. 3d 812, 816 (N.D. Ohio 2015).

100. *Cummings*, 88 F. Supp. 3d at 815.

101. *Cummings*, 88 F. Supp. 3d at 816.

102. *Cummings*, 88 F. Supp. 3d at 816. The parties reached a settlement which plaintiff has challenged based on mutual mistake of the parties regarding whether the settlement would count toward her earnable salary equating to the 30 years of service she would need for retirement purposes with the defendant. Cummings v. Greater Cleveland Reg'l Transit Auth., No. 1:14-CV-01729, 2016 WL 6593857, at *2 (N.D. Ohio Nov. 8, 2016).

The Ohio district court's decision is a step forward, but it still only protects those individuals who have actually undergone transitions; it would not protect other members of the transgender or DSD community who have opted not to undergo significant medical procedures.

Consider our initial hypothetical and the protections afforded by the EPA: Sam was issued an intersex birth certificate by the state of New York. It must be given the full faith and credit of the United States Constitution. Viewed in the most progressive light, Sam should be able to allege that every non-DSD person is a proper comparator for the opposite sex under the EPA (because the DSD person is not categorized in a binary sense). To the extent that another employee holds the same position as Sam and is not a DSD person, that employee would be a proper comparator, regardless of if that person is male, female, or transgender. Unless there is a nondiscriminatory reason for the pay disparity, Sam should have standing to raise a prima facie EPA claim. Unfortunately, under current judicial interpretations, it is more likely that Sam, as a DSD person, will be unable to demonstrate that any non-DSD employee is a compactor of the "opposite sex." And because Sam has not had a sex reassignment surgery like the one at issue in *Cummings*, they are not likely to benefit from the Ohio court's reasoning. A court would be more likely to dismiss Sam's claim for lack of standing.

b. The Definition of "Sex" under Title VII

Because of Sam's likely inability to demonstrate an opposite sex comparator under the EPA, we turn to Title VII and the viability of Sam's sex discrimination claim. Title VII protects against adverse employment actions, including unfair compensation terms, but unlike the EPA, it does not mandate an opposite sex comparator.[103] The DSD plaintiff might assume that Title VII is a good avenue of relief; however, as discussed below, it is unclear whether a person's status as DSD is protected by Title VII.

Regarding Title VII sex discrimination claims, courts struggle with the breadth of adverse actions; courts disagree about whether protection from sex discrimination also includes protection based on a person's gender identification, gender stereotyping (i.e. males not behaving in a masculine manner), transgender status, and sexual orientation. Moreover, even where a court might find an action to be sex discrimination, Title VII's incorporation of the EPA's affirmative defenses, including the "factor other than sex" defense, is a significant hurdle in any Title VII case.[104] Title VII prohibits an employer from failing or refusing:

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103. 42 U.S.C.A. § 2000e-2(a)(1) (Westlaw through Pub. L. No. 115-90); 29 U.S.C. § 206 (1963).

104. See *supra* Section II.A for more on the EPA's affirmative defenses.

> (1). . . to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, *sex*, or national origin; or (2) to *limit, segregate, or classify* his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, *sex*, or national origin.[105]

Plaintiffs can demonstrate unlawful discrimination under Title VII in two ways: through "direct" evidence under a "mixed motives" theory of liability (e.g. employer explicitly states it is firing a woman because she is a woman) or through circumstantial evidence under the *McDonnell Douglas* "burden shifting" framework.[106] To establish "direct" evidence of discrimination, a plaintiff who is a member of a protected class must provide direct or indirect evidence of intentional discrimination (e.g., through statements or actions) resulting in an adverse employment action.[107] Because this is a high bar, the more common method of proof is under the *McDonnell Douglas* burden shifting framework, in which the plaintiff demonstrates a prima facie case of discrimination by showing that "(1) she was within the protected class; (2) she was qualified for the position; (3) she was subject to an adverse employment action; and (4) the adverse action occurred under circumstances giving rise to an inference of discrimination."[108] If the plaintiff meets her burden, the defendant must "articulate some legitimate, nondiscriminatory reason for the employee's rejection." The plaintiff then will be required "to show that petitioner's [employer's] stated reason for respondent's rejection was in fact pretext."[109]

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105. 42 U.S.C.A. § 2000e-2(a), as amended by Civil Rights Act of 1991, Pub. L. 102-166, 105 Stat. 1071 (1991). Under Title VII, a plaintiff must demonstrate that sex was a motivating factor in the adverse action. Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2522–23 (2013).

106. Hawthorne v. Mercer Cty. Children & Youth Services, P. 147381 CCH, 2007 WL 9436343 (W.D. Pa. Aug. 6, 2007).

107. *E.g.,* Hill v. Lockheed Martin Logistics Mgmt., 354 F.3d 277, 284 (4th Cir. 2004), *abrogated on other grounds by Nassar*, 133 S. Ct. at 2532; *see also* Foster v. Univ. of Md. E. Shore, 787 F.3d 243, 249 (4th Cir. 2015) (recognizing abrogation).

108. Leibowitz v. Cornell Univ., 584 F.3d 487, 498 (2d Cir. 2009) (stating the framework as adopted in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–03 (1973)).

109. *McDonnell Douglas Corp.*, 411 U.S. at 804.

Even though Title VII's protection against sex discrimination has been around since 1964, the definition of "sex" remains controversial.[110] The intent of Title VII was to ensure women were treated the same as men in employment.[111] It seems obvious today that any discrimination against a woman based on her pregnancy qualifies as sex discrimination; however, this has not always been the case. For example, in *General Electric Co. v. Gilbert*, the Supreme Court determined that discrimination based on pregnancy was not sex discrimination under Title VII because the disparity in paying for certain types of disability-related benefits and not others, including pregnancy, was a pure business decision and had nothing to do with sex.[112] Congress later rectified the issue through the Pregnancy Discrimination Act and amendments to Title VII, which clarified that adverse actions taken based on an employee's pregnancy-related status qualified as sex discrimination.[113] Likewise, whether sex discrimination protections reach status-based sex discrimination requires clarity and legislative action.

Title VII requires the individual be part of a protected class in order to obtain relief. In *Connecticut v. Teal*, the Supreme Court explained that Title VII protects the *individual* member of the class—even in cases where the employer generally treats members of the individual's *protected class* fairly.[114] In *Teal,* employees were required to pass a particular test in order to maintain supervisory status.[115] Although 54% of black employees passed the test,

110. For a thorough discussion of Title VII and gender identity discrimination in the workplace, see Leora F. Eisenstadt, *Fluid Identity Discrimination*, 52 AM. BUS. L.J. 789 (2015).

111. *See, e.g.*, Holloway v. Arthur Andersen & Co., 566 F.2d 659, 662 (9th Cir. 1977) ("[The 1972 Amendments to Title VII were] to remedy the economic deprivation of women as a class."); Knott v. Mo. Pac. R.R. Co., 527 F.2d 1249, 1251–52 (8th Cir. 1975) (referring to the legislative history and employment discrimination against women); Willingham v. Macon Tel. Publ'g Co., 507 F.2d 1084, 1090 (5th Cir. 1973) ("We find the legislative history inconclusive at best and draw but one conclusion, and that by way of negative inference. Without more extensive consideration, Congress in all probability did not intend for its proscription of sexual discrimination to have significant and sweeping implications. We should not therefore extend the coverage of the Act to situations of questionable application without some stronger Congressional mandate.").

112. Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 138–40 (1976) (holding that even though pregnancy-related disabilities only occur in females, non-pregnancy-related disability coverage applied to all non-pregnant employees, whether male or female), *superseded by statute*, 42 U.S.C.A. § 2000e(k) (Westlaw through Pub. L. No. 115-90).

113. 42 U.S.C.A. § 2000e(k).

114. Connecticut v. Teal, 457 U.S. 440, 455 (1982) ("It is clear that Congress never intended to give an employer license to discriminate against some employees on the basis of race or sex merely because he favorably treats other members of the employees' group.").

115. *Teal*, 457 U.S. at 443.

the plaintiff employees, also black, did not pass, and were excluded from promotional consideration.[116] They contended that although a bottom-line analysis showed more black employees received a promotion than white employees, they were excluded based on their race from an opportunity to compete equally with white employees.[117] The Supreme Court explained that in a Title VII case, the issue is whether the employer mistreats the *individual* because of the protected classification, not whether the protected class as a whole is well-treated.[118] This analysis is helpful, but for an individual within the LGBTQIA community to benefit from this analysis they must be considered part of a "protected class," which is not yet the case. Accordingly, a DSD individual's ability to bring a claim is severely constrained, if feasible at all.

i. Sex Discrimination based on Transgender or DSD Status

In the context of Title VII, several courts agree that transgender discrimination is discrimination based on sex, and therefore qualifies as a protected class.[119] However, not all courts have reached the same conclusion.[120] Many courts continue to limit Title VII's protection to simply prohibit sex-stereotyping, i.e. a man is not masculine enough or a woman is not feminine enough.[121] Under this approach a DSD or transgender person cannot

116. *Teal*, 457 U.S. at 443–44.

117. *Teal*, 457 U.S. at 444.

118. *Teal*, 457 U.S. at 453–54.

119. *See, e.g.*, Chavez v. Credit Nation Auto Sales, L.L.C., 641 F. App'x 883, 885 (11th Cir. 2016) (finding pretext that transgender discrimination—based on the person's status as a transgendered person—would be sex discrimination under Title VII); Barnes v. City of Cincinnati, 401 F.3d 729, 736 (6th Cir. 2005), *cert. denied*, 546 U.S. 1003 (2005) (finding a transgender person's claim of Title VII discrimination was sufficient to survive summary judgment because of sex-stereotyping); Schwenk v. Hartford, 204 F.3d 1187, 1201–03 (9th Cir. 2000) ("Title VII encompasses both sex—that is, the biological differences between men and women—and gender.").

120. *See* Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1224–25 (10th Cir. 2007) (finding the vast majority of federal courts have concluded that transgender discrimination based on the person's status is not sex discrimination under Title VII, and holding that termination for using the "wrong" restroom is a legitimate nondiscriminatory reason for termination); Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1086–1087 (7th Cir. 1984) (holding that the term "sex" as it is used in Title VII only refers to a biological male and biological female and does not protect sexual identity).

121. *See* Lewis v. Heartland Inns of Am., L.L.C., 591 F.3d 1033, 1041 (8th Cir. 2010) (holding that a hotel desk employee who was terminated for lacking a pretty, "Midwestern girl" appearance established pretext for sex discrimination); Chadwick v. WellPoint, Inc., 561 F.3d 38, 45 (1st Cir. 2009) (holding that sex discrimination occurs when an employer believes that a woman, because she is a woman, will neglect her job in favor of her childcare responsibilities).

allege discrimination based on their status as DSD or transgender, but must instead allege sex-based stereotyping.

Lower court interpretations on both sides of this topic are based on the watershed case of *Price Waterhouse v. Hopkins*. *Price Waterhouse v. Hopkins* was the first Supreme Court case to address sex-based characteristics outside the context of gender roles.[122] In *Price Waterhouse*, the Court held that Title VII protects people from discrimination "because of . . . sex" and that failing to promote a female accountant to a managerial role simply because she did not conform to the partnership's idea of how women should look, act, and dress was a prohibited form of sex discrimination and sex-stereotyping.[123]

Since then, courts have reached varied conclusions about whether the "because of . . . sex" prohibition applies to transgender individuals, or to issues surrounding gender identity, gender expression, and sexual orientation.[124] Generally, those cases finding in a plaintiff's favor rely on the Court's expansive language in *Price Waterhouse*, which prohibited employers from taking an action because the employee did not behave like a man or woman "should" behave.[125] Some of these cases have stated that a person's transgender status is necessarily part of their sex or gender identity, rather than a separate or unique issue.[126] Because gender status is a part of a person's identity, when an employer treats a DSD employee differently from non-DSD employees, the treatment is because of the employee's failure to conform to their birth sex.[127] In this way discrimination against a DSD employee because of their status—rather than because of their failure to behave in a manner the employer expects—is inherently a form of gender-stereotyping.

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122. *See* Bonnie L. Roach, *Gender Stereotyping: The Evolution of Legal Protections for Gender Nonconformance*, 12 ATLANTIC L.J. 125, 131 (2010).

123. Price Waterhouse v. Hopkins, 490 U.S. 228, 240 (1989).

124. *See* E.E.O.C. v. R.G. & G.R. Harris Funeral Homes, Inc., 201 F. Supp. 3d at 840 (discussing conflicting opinions on this topic). *See generally* Jessica A. Clarke, *Frontiers of Sex Discrimination Law*, 115 MICH. L. REV. 809 (2017) (compiling cases).

125. *See* Clarke, *supra* note 124; EEOC v. Scott Med. Health Ctr., 217 F. Supp. 3d 834, 840 (W.D. Pa. 2016); Winstead v. Lafayette Cty. Bd. of Cty. Comm'r, 197 F. Supp. 3d 1334, 1345 (N.D. Fla. 2016).

126. *See, e.g.*, Barnes v. City of Cincinnati, 401 F.3d 729, 738 (6th Cir. 2016), *cert. denied*, 546 U.S. 1003 (2005) (affirming Title VII judgment for a transgender woman who was denied a promotion because of the perception that she was a man with an "ambiguous sexuality" whose behavior was "not sufficiently masculine," including "dressing as a woman outside of work"); Schroer v. Billington, 577 F. Supp. 2d 293, 306–08 (D. D.C. 2008) (sex discrimination includes adverse treatment because of a person's gender transition).

127. *See* Am. Psychological Ass'n, *Guidelines for Psychological Practice with Transgender and Gender Nonconforming People*, 70 AM. PSYCHOLOGIST 832, 862–23 (2015).

In *Fabian v. Hospital of Central Connecticut,* the Sixth Circuit considered whether failing to hire a transgender woman was grounds for a Title VII and state law claim of sex discrimination.[128] The court determined that discrimination based on transgender identity was a form of gender-stereotyping protected by *Price Waterhouse*.[129] The court then noted that when courts limit the meaning of "sex" to mean male or female, they do so without real regard for the Supreme Court's language in *Price Waterhouse*: actions taken "because of sex" are sex discrimination.[130] The *Fabian* court stated:

> Discrimination 'because of sex,' therefore, is not only discrimination because of maleness and discrimination because of femaleness, but also discrimination because of the *distinction* between male and female or discrimination because of the *properties or characteristics* by which individuals may be classified as male or female.[131]

The *Fabian* court examined contemporaneous and historically significant dictionary terms that defined the term "sex" as "the sum of the morphological, physiological, and behavioral peculiarities of living beings that subserves biparental reproduction . . . and that is typically manifested as maleness and femaleness. . . ."[132] Based on these definitions, the court found the term "sex" is more "than discrimination against women because they are women and discrimination against men because they are men—it would surely include discrimination on the basis of gender stereotypes, and just as surely discrimination on the basis of gender identity. . . ."[133] Narrow interpretations of the word "sex" are unwarranted and prove problematic for an effective workforce.

Nonetheless, the issue of whether a transgender individual's status is considered a protected class is unclear. Definitive protection for the LGBTQIA community needs to be established. Specifically, a DSD person may have a more difficult case to prove than a transgender person, as courts have historically held that DSD individuals have no discrimination protection under Title VII.[134]

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128. Fabian v. Hosp. of Cent. Connecticut, 172 F. Supp. 3d 509, 518 (D. Conn. 2016).
129. *Fabian*, 172 F. Supp. 3d at 527.
130. *Fabian*, 172 F. Supp. 3d at 526.
131. *Fabian*, 172 F. Supp. 3d at 526.
132. *Fabian*, 172 F. Supp. 3d at 526.
133. *Fabian*, 172 F. Supp. 3d at 527 (citing Ulane v. E. Airlines, Inc., 581 F. Supp. 821, 822 (N.D. Ill. 1983), *rev'd*, 742 F.2d (7th Cir. 1984)).
134. *E.g.*, Wood v. C.G. Studios, 660 F. Supp. 176, 177–78 (E.D. Pa. 1987) (finding a person born with a "hermaphroditic condition" unable to bring a sex discrimination

The current, conflicting standards around sex discrimination continue to marginalize the DSD population.[135] Most judicial interpretations unnecessarily categorize individuals as "men," or "women," or "transgender." Instead of this narrow interpretation of gender and the behaviors associated therewith, courts should focus on an employer's reaction to the person and their gender-based characteristics.[136] The difficulties with the current rationales are well-articulated by a Louisiana district court:

> This is not a matter of an employee of one sex exhibiting characteristics associated with the opposite sex. This is a matter of a person of one sex assuming the role of a person of the opposite sex.[137]

One recent case, *EEOC v. R.G. & G.R. Harris Funeral Homes*, demonstrates one court's struggle with the nuances of sexual orientation and gender identity discrimination issues.[138] There, the Michigan district court determined that the defendant funeral home had engaged in gender-based stereotyping by terminating the funeral director for failing to behave and dress like a stereotypical male.[139] The director was transitioning from male to female, and she desired to wear feminine clothing to work, but the funeral home had a gender-specific clothing policy which required men to wear pant suits and women to wear skirts.[140] When the funeral director began to conform to the feminine clothing requirements, she was terminated.[141] Despite the court's finding of gender-based stereotyping in violation of *Price Waterhouse*, the court dismissed the EEOC's enforcement action for wrongful termination under Title VII because it concluded that

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claim under a state human rights law). *But see* Maffei v. Kolaeton Indus., Inc., 164 N.Y.S.2d 547, 556 (1995) (holding that a "transsexual" person was included in a subgroup of men, and could bring a same-sex harassment claim because of the harassment they endured for undergoing surgery and hormone treatments).

135. Courts generally follow one of three analytical frameworks: (1) gender nonconformity approach, (2) per se, and (3) constructionalist approach. *See* Jason Lee, *Lost in Translation: The Challenges of Remedying Transgender Employment Discrimination Under Title VII*, 35 HARV. J.L. & GENDER 423, 423 (2012) (evaluating the three general judicial constructs surrounding gender identity claims).

136. *Id.* at 423 (discussing how a narrow focus unnecessarily excludes many members of the LGBTQIA community when interpretations are based on comparison of binary sexes).

137. Oiler v. Winn-Dixie La., Inc., No. 2:00-cv-03114, 2002 WL 31098541, at *30 (E.D. La. Sept. 16, 2002).

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

139. *R.G. & G.R. Harris Funeral Homes, Inc.*, 201 F. Supp. 3d at 840.

140. *R.G. & G.R. Harris Funeral Homes, Inc.*, 201 F. Supp. 3d at 840.

141. *R.G. & G.R. Harris Funeral Homes, Inc.*, 201 F. Supp. 3d at 840.

the funeral home established an exemption for compliance with Title VII under RFRA.[142] As discussed in Section IV.B below, RFRA legislation prohibits the "[g]overnment [from] substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability" unless the government "demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."[143] RFRA was amended to ensure coverage for "*any exercise of religion*, whether or not compelled by, or central to, a system of religious belief."[144] Thus, RFRA provides more protections to entities from government regulation than the Establishment Clause, thereby accommodating religion.[145]

In *R.G. & G.R. Harris Funeral Homes* the funeral home argued that Title VII and the EEOC's enforcement action substantially burdened its religious beliefs.[146] The EEOC filed an appeal from the district court's ruling, and the terminated funeral director then joined the suit.[147] In response to the appeal, the funeral home contended that courts were attempting to expand sex discrimination to include a broader gender discrimination classification under Title VII.[148] Specifically, the funeral home argued:

> [t]he term "sex" as used in § 2000e-2(a) is not synonymous with the term "gender" . . . The term "sex" in Title VII refers to an individual's distinguishing biological or anatomical characteristics, whereas the term "gender" refers to an individual's sexual identity. . . . Simply stated, Congress did not intend Title VII to protect transsexuals from discrimination on the basis of their transsexualism.[149]

142. *R.G. & G.R. Harris Funeral Homes, Inc.*, 201 F. Supp. 3d at 841.

143. 42 U.S.C. §§ 2000b-1(a)-(b) (Westlaw through Pub. L. No. 103-141).

144. 42 U.S.C. § 2000cc-5(7)(A) (2012) (RLUIPA addresses governmental land use regulations and substantial burdens on persons residing in or confined to an institution).

145. *See* Employment Div.v. Smith, 494 U.S. 872 (1990), *superseded by statute*, Religious Freedom Restoration Act of 1993, 42 U.S.C.A. § 2000bb (1993); *see also* Frederick Mark Gedicks & Rebecca G. Van Tassel, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 HARV. C.R.-C.L. L. REV. 343, 348 (2014).

146. Response Brief of Appellee R.G. & G.R. Harris Funeral Homes, Inc., 2017 WL 2222848, at *37-38 (6th Cir. May 17, 2017).

147. EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., No. 16-2424 (6th Cir. 2016).

148. *R.G. & G.R. Harris Funeral Homes, Inc.*, No. 16-2424.

149. Reply Brief for EEOC as Appellant at 3, R.G. & G.R. Harris Funeral Homes, Inc., 201 F. Supp. 3d (6th Cir. 2016) (No. 16-2424).

Conversely, the EEOC argued that the trial court interpreted "sex-stereotyping" too narrowly and failed to recognize that transgender individuals fail to conform to expected sex characteristics not only in the way they dress, but in their use of pronouns, name, and appearance.[150] The EEOC contended that defining sex by using "chromosome based" evidence "excludes not only transgender people, but many more intersex Americans, from the protections of Title VII of the Civil Rights Act of 1964."[151]

Of particular interest to this Article, the EEOC's reply brief in *R.G. & G.R. Harris Funeral Homes* indicated that the narrow interpretation of sex "neglected the existence of many intersex people, who in the past were commonly referred to as hermaphrodites and 'whose sex cannot be neatly categorized into male or female.'"[152] Citing statistics from the Intersex Society of North America, the EEOC noted "millions of Americans are not biologically male or female because they have neither XX nor XY chromosomes or have some other intersex condition."[153]

Prior to the Trump administration, presidential executive policy favored the broader interpretation of "sex" to include protections from sexual orientation and gender identity discrimination under both Title VII and Title IX, two important sex-based discrimination statutes.[154] Under the Obama administration, the DOJ noted that Title VII "includes

150. *See EEOC Says Basing Sex On 'Chromosomes' Excludes Millions from Bias Protections* EEOC v. R.G. & G.R. Harris Funeral Homes, 31 WESTLAW J. EMP. 3 (2017). There is significant concern that the EEOC will not pursue an appeal, and that the EEOC's administrative position on the definition of "sex" was a split 3-2 vote. *See* Donna L. Roberts & Stephen H. Price, *Testing Your LGBTQ I.Q. in the Workplace*, 35 ACC DOCKET 42 (2017). The EEOC is now under a Republican majority. *Id.*

151. *EEOC Says Basing Sex on 'Chromosomes' Excludes Millions from Bias Protections* EEOC v. R.G. & G.R. Harris Funeral Homes, *supra* note 150, at 1.

152. *Id.*

153. *Id.* However, in support of a narrower interpretation, Douglas Wardlow at the Alliance Defending Freedom said in an email dated June 12, 2017 that transgender and intersex people are not comparable because intersex conditions are "objectively verifiable" by looking at an individual's DNA, and are in fact protected by Title VII. *Id.* at 2. By contrast, a person's "sexuality" cannot always be easily defined by DNA. *See* Ilana Gelfman, *Because of Intersex: Intersexuality, Title VII, and the Reality of Discrimination "Because of . . .[Perceived] Sex*, 34 N.Y.U. REV. L. & SOC. CHANGE 55, 62 (2010) (Medical and scientific evidence reflects that there are physical, hormonal, and chromosomal anomalies that render a person's maleness or femaleness completely ambiguous.).

154. *See* Rebecca Hersher & Carrie Johnson, *Trump Administration Rescinds Obama Rule on Transgender Students' Bathroom Use*, NPR, Feb. 22, 2017, https://www.npr.org/sections/thetwo-way/2017/02/22/516664633/trump-administration-rescinds-obama-rule-on-transgender-students-bathroom-use. Title IX cases often apply the principles developed under Title VII. *E.g.* Videckis v. Pepperdine Univ., 150 F.Supp. 3d 1151, 1158 (C.D. Cal. 2015).

discrimination because an employee's gender identification is as a member of a particular sex, or because the employee is transitioning, or has transitioned, to another sex."[155] Under President Obama, the DOJ decided to "no longer assert that Title VII's prohibition against discrimination based on sex [did] not encompass gender identity *per se* (including transgender discrimination)."[156]

Under President Trump, the DOJ's position has begun to change. For example, in the *Zarda v. Altitude Express* case, the DOJ withdrew its prior interpretation and indicated that Title VII does not protect against sexual orientation discrimination.[157] The DOJ also currently argues that the EEOC's interpretation of Title VII is not entitled to deference or controlling weight.[158] Because the LGBTQIA community is subject to conflicting outcomes depending on political whims, it is clear that congressional intervention is needed.[159] The constant policy shifts threaten to destabilize an entire community.

ii. Sexual Orientation Discrimination as a Form of Sex Discrimination

Beyond questions of gender identity, it is also unclear whether discrimination on the basis of sexual orientation is protected under Title VII.[160] Until the Seventh Circuit decided *Hively v. Ivy Tech Community Col-*

155. MEMORANDUM FROM U.S. ATTORNEY GEN. TO U.S. ATTORNEYS, 2 (Dec. 15, 2014), http://www.justice.gov/file/188671/download.

156. *Id.*

157. Daniel Wiessner, *U.S. Justice Department Says Anti-bias Law Does Not Protect Gay Workers*, REUTERS, July 27, 2017 9:53 AM, https://www.reuters.com/article/us-usa-court-LGBTQIA-idUSKBN1AC2DZ.

158. *Id.*

159. In light of potential conflicting outcomes depending on judicial interpretations of the breadth of the word "sex" and its protections, congressional intervention is needed. *See* Smith v. City of Salem, 378 F.3d 566, 575 (6th Cir. 2004); *cf.* Glenn v. Brumby, 663 F.3d at 1312, 1320 (11th Cir. 2011) (noting "governmental acts based upon gender stereotypes—which presume that men and women's appearance and behavior will be determined by their sex—must be subjected to heightened scrutiny [under the Fourteenth Amendment] because they embody 'the very stereotype the law condemns'" (quoting J.E.B. v. Alabama, 511 U.S. 127, 138 (1994)).

160. *See* Hively v. Ivy Tech Comm. Coll. of Ind., 853 F.3d 339, 347 (7th Cir. 2017); *cf.* Evans v. Georgia Reg'l Hosp., 850 F.3d 1248, 1256 (11th Cir. 2017). For example, in *Lewis v. High Point Reg'l Health Sys.*, 79 F. Supp. 3d 588, 589–90 (E.D.N.C. 2015), the court noted that sexual orientation and gender identity are two distinct concepts. This more nuanced understanding of gender identity seems likely to result in more courts in the future allowing claims for Title VII discrimination based on the transgender nature of the plaintiff. *See also* Rumble v. Fairview Health Serv., 2015 WL 1197415, at *7, *10 (D.Minn. 2015) (unreported opinion finding the ACA extends protections on basis of gender identity).

lege in 2017, no federal circuit had found that sexual orientation, separate and distinct from sex-stereotyping, was protected under Title VII.[161] *Hively* was a positive step, but it is unclear whether it marks a new trend in broadening the definition of "sex," so it does not diminish the need for statutory clarity on the issues of sexual orientation and gender identity discrimination.

Although this Article focuses on transgender and DSD discrimination, sexual orientation cases and their rationale prove instructive regarding the need for clarity around "sex" and sexual orientation. In *Hively*, the Seventh Circuit held that Title VII protects against sexual orientation discrimination even absent a claim of sex-stereotyping.[162] In so doing, the court declined to follow the Eleventh Circuit's decision in *Evans v. Georgia Regional Hospital*, which held that a lesbian security guard could not bring a claim of sexual orientation and gender nonconformity discrimination against her former employer.[163] The security guard, Evans, alleged that she had been denied equal pay for her work and had been harassed and battered for not "carry[ing] herself in a 'traditionally woman[ly] manner.'"[164] Although Evans did not publicize her sexuality, she wore male clothing and had a more masculine haircut.[165] The *Evans* court concluded that sexual orientation discrimination was not actionable under Title VII, but gender nonconformity was a valid sex-based discrimination claim.[166] The court remanded the case to allow the plaintiff to allege sufficient facts that her gender nonconformity was the reason for the discriminatory treatment.[167] The court dismissed her claims of discrimination on the basis of her sexual orientation as unprotected by Title VII.[168]

The Seventh Circuit reached a different conclusion on a similar theory. In *Hively*, the plaintiff was an openly lesbian female adjunct professor

161. *Hively*, 853 F.3d at 363–65.

162. *Hively*, 853 F.3d at 369–70.

163. *Hively*, 853 F.3d at 342 (citing *Evans*, 850 F.3d).

164. *Evans*, 850 F.3d at 1251.

165. *Evans*, 850 F.3d at 1251.

166. *Evans*, 850 F.3d at 1254–55. A majority of cases have held no Title VII protection for sexual orientation. *See, e.g.*, Vickers v. Fairfield Med. Ctr., 453 F.3d 757, 762 (6th Cir. 2006); Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 260–61 (3d Cir. 2001); Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc., 224 F.3d 701, 707 (7th Cir. 2000); Simonton v. Runyon, 232 F.3d 33, 36 (2d Cir. 2000); Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 259 (1st Cir. 1999); Wrightson v. Pizza Hut of Am., Inc., 99 F.3d 138, 143 (4th Cir. 1996), *abrogated by* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998); Williamson v. A.G. Edwards & Sons, Inc., 876 F.2d 69, 70 (8th Cir. 1989).

167. *Evans*, 850 F.3d at 1255.

168. *Evans*, 850 F.3d at 1255.

who applied for six full-time positions and was denied each time.[169] Her part-time contract as an adjunct professor was ultimately not renewed.[170] The Seventh Circuit Court of Appeals determined, by examining Supreme Court case law, that discrimination on the basis of sexual orientation *is* discrimination based on sex, as it relates to the question of with whom the person intimately associates.[171] The court held that precedent such as *Price Waterhouse*[172] (gender-based stereotyping is actionable), and *Oncale*[173] (same-sex harassment is actionable)—when interpreted in light of *Obergefell*[174] (same sex individuals have a fundamental right to marry)—required it to reexamine how sexual orientation claims are analyzed.[175] The Seventh Circuit recognized that it was bound by statutory interpretations, including the extent to which Congress had considered and rejected amendments to Title VII, to include sexual orientation as a protected class.[176] But the Seventh Circuit also noted that it must examine statutory language as it evolves over time in a manner consistent with Supreme Court analysis.[177]

It remains unclear how claims of discrimination on the basis of gender identity and sexual orientation will fare under Title VII.[178] Several courts have found that gender identity claims are a form of sex discrimination under a sex stereotyping claim, rather than a sexual preference argument.[179]

169. *Hively*, 853 F.3d at 341.

170. *Hively*, 853 F.3d at 341.

171. *See Hively*, 853 F.3d at 350 (recognizing that a majority of courts have determined that sexual orientation in and of itself is not protected).

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

173. Oncale v. Sundowner Offshore Servs. Inc., 523 U.S. 75, 118 (1998).

174. Obergefell v. Hodges, 135 S. Ct. 2584, 2607 (2015).

175. *Hively*, 853 F.3d at 342–43.

176. *Hively*, 853 F.3d at 343–44.

177. *Hively*, 853 F.3d at 350–51.

178. *Compare* Evans v. Georgia Regional Hospital, 850 F.3d 1248, 1255 (11th Cir. 2017) (holding Title VII does not protect persons based on their sexual orientation), *with* Boutillier v. Hartford Pub. Sch. 221 F. Supp. 3d 255, 267 (D.Conn. 2016) ("Straightforward statutory interpretation and logic dictate that sexual orientation cannot be extricated from sex."). *See also* Rosa v. Park W. Bank & Trust Co., 214 F.3d 213, 215 (1st Cir. 2000) (discussing gender identity protection under Title VII). *But cf.* Underwood v. Archer Mgmt. Servs., Inc., 857 F. Supp. 96, 98 (D.D.C. 1994) (indicating that transsexuality is not included within the definition of "sex" under the District of Columbia Human Rights Act); Sommers v. Iowa Civil Rights Comm'n, 337 N.W.2d 470, 474 (Iowa 1983) (discussing that transsexuals are not covered by sex discrimination laws).

179. *See, e.g.*, *Evans*, 850 F.3d at 1255 (holding Title VII does not protect persons based on their sexual orientation); *Boutillier*, 221 F. Supp. 3d at 267 ("Straightforward statutory interpretation and logic dictate that sexual orientation cannot be extricated from sex."); *Rosa*, 214 F.3d at 215 (discussing gender identity protection under Title VII).

Other state courts have determined that there is no protection for gender identity as a sex-stereotyping claim.[180]

This judicial inconsistency necessitates reform. When employers assume an employee should act, dress, or be intimate in a certain manner (that correlates to their sex designation), they are necessarily perceiving a person's sexual characteristics. When an employer takes a negative or discriminatory action against the person because of their sexual characteristics, the employer is discriminating on the basis of sex. To combat this, several states have enacted broad antidiscrimination laws. But as is established below, these efforts don't go far enough.

III. State Antidiscrimination Laws and Preemption

A. Preemption Issues

Many states seek to combat disparity and sex discrimination.[181] Twenty-three states have either enacted or introduced equal pay acts, including some whose scope is broad enough to extend protection to individuals on the basis of gender identity and sexual orientation.[182]

California and New York are two examples of the former sort of state—those attempting to correct pay disparity based on gender identity and sexual orientation.[183] Such state "fair pay" laws go farther than the federal Equal Pay Act. Fair pay laws require employers to pay employees the same for work of *comparable* skill, effort, and responsibility,[184] while the federal Equal Pay Act only requires the same pay for *equal* skill, effort, and responsibility.[185] However, there is some reason to think that employers who raise wages based on their state's law could face Title VII claims by the comparators themselves.[186] If an employer, abiding by state law, raised the pay of an employee in a "comparable" but not "equal" job, but did not give commensurate raises to all employees, they could face a reverse discrimination claim by the nonminority employees.[187]

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180. *See Underwood*, 857 F. Supp. at 98 (indicating that transsexuality is not included within the definition of "sex" under the District of Columbia Human Rights Act); *see also Sommers*, 337 N.W.2d at 474 (discussing that transsexuals are not covered by sex discrimination laws).

181. *See* Velte, *supra* note 20, at 22.

182. *See id.*

183. Allan G. King, *Does Title VII Preempt State Fair Pay Laws?*, 32 A.B.A. J. Lab. & Emp. L. 65, 70–71 (2016).

184. *Id.* at 65.

185. *Id.*

186. *See id.* at 66, 70.

187. *See id.* at 91.

The key question for those employers is whether Title VII and the EPA preempt state wage laws. Federal law preempts state law in one of three scenarios: (1) when Congress explicitly says that the federal statute preempts state law, (2) when preemption is inferred because Congress enacts a comprehensive regulatory scheme that leaves no room for state action regarding the same subject matter, and (3) when a state statute imposes requirements inconsistent with federal law or stands as an obstacle to accomplishing Congress's purposes.[188] Title VII states:

> Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter.[189]

This clause prevents employers from using state law as a defense when their action violates Title VII.[190] For example, although Title VII prohibits discrimination based on religion, Congress was cognizant that religious organizations need to be able to manage their internal religious affairs and their employment relationships with their ministers.[191] Thus, Congress carved out an exception to compliance with Title VII based in part on religious reasons, as we discuss more fully below.

Because of the breadth of these laws, the LGBTQIA community might have viable claims under state law protections that they would not have under federal law.[192] But those state laws that require employers to pay all employees the same for *comparable* (rather than *equal*) work may also open employers to reverse discrimination claims under Title VII.[193]

Courts have reached differing conclusions regarding whether a plaintiff must *actually* be a member of a protected class, rather than simply *perceived* to be a member of a protected class, in order to be protected under

188. *Id.* at 69.

189. *Id.* at 70.

190. *Id.*

191. *See generally* Roger W. Dyer, Jr., *Qualifying for the Title VII Religious Organization Exemption: Federal Circuits Split Over Proper Test*, 76 MO. L. REV. 545, 546 (2011) (discussing Title VII and the religious exemptions in the employment context); *see also* 42 U.S.C.A. § 2000e-1(a) (Westlaw through P.L. 115-90).

192. *See* King, *supra* note 183, at 65.

193. *See* King, *supra* note 183, at 79–80 (discussing Ricci v. DeStefano, 129 S. Ct. 2658 (2009), which held that promotional qualification test that seemingly had a disparate impact on minorities could not be discarded without creating reverse discrimination claims for those who passed the exam).

the federal laws.[194] In instances where a plaintiff must show actual membership, expansive state laws would provide certain plaintiffs with more rights than those afforded under federal law.[195] This situation triggers the preemption issue.

The Supreme Court's decision in *Ricci* has only further muddied the waters on questions of reverse discrimination under federal law. In *Ricci,* an employer recognized that its minority employees overwhelmingly failed a promotional exam, reflecting what the employer believed to be a disparate impact.[196] The employer determined that it must discard the exam in light of the near probability that it would lose a disparate impact claim.[197] However, in discarding the exam, the employer effectively denied white employees the promotion.[198] The white employees sued for reverse discrimination and won.[199] After *Ricci*, for an employer to successfully defend a reverse discrimination claim, she must have clear evidence that she would lose a race-based action if she retained the policy that had had the unintentional disparate impact on minorities.[200] Accordingly, an employer cannot default to more favorable treatment of minorities out of fear of future litigation if she has an affirmative defense to a disparate impact claim, such as a bona fide occupational requirement.[201]

After *Ricci*, valiant attempts by state legislators to rectify workplace discrimination on the basis of sexual orientation and status may be overturned on preemption grounds.[202] Currently, employers who raise wages for one employee, without clear proof that failure to do so would violate Title VII, face potential reverse discrimination claims under Title VII.[203] To resolve this disparity, gender identity and sexual orientation must be considered a constitutionally protected class. By interpreting the word "sex" more broadly in all its contexts, we would eliminate any preemption or reverse discrimination problems.

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194. Jessica A. Clarke, *Protected Class Gatekeeping*, 92 N.Y.U. L. Rev. 101, 115–16 (2017) (citing cases and conflicting analysis regarding whether a person who is perceived to be a member of a protected class is actually a member of a protected class under Title VII).

195. *See* King, *supra* note 183, at 65.

196. *Ricci*, 129 S. Ct. at 2661.

197. *Ricci*, 129 S. Ct. at 2661.

198. *Ricci*, 129 S. Ct. at 2661.

199. *Ricci*, 129 S. Ct. at 2663.

200. *Ricci*, 129 S. Ct. at 2661.

201. *Ricci*, 129 S. Ct. at 2661.

202. *See* King, *supra* note 183, at 65–67, 91–92 (2016).

203. *Id.* at 91–92.

B. Constitutional Protections Concerning Sex and LGBTQIA Status as a Protected Class

To determine the Supreme Court's potential analysis of the word "sex" in the employment context, we examine whether an individual's status as LGBTQIA would be considered a protected classification under constitutional law. "The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike."[204] Laws that provide classifications are generally examined according to whether they are "rationally related to a legitimate state interest," but this "general rule gives way . . . when a statute classifies" groups that have historically been subject to discrimination or "impinge[s] on personal rights protected by the Constitution."[205]

204. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985) (quoting Plyler v. Doe, 457 U.S. 202, 216 (1982)).

205. *City of Cleburne*, 473 U.S. at 439. If presented with this question, the Supreme Court would examine whether transgender persons (or the LGBTQIA community) are a suspect class by analyzing the following factors: (1) whether the discrimination is based on "stereotyped characteristics not truly indicative" of the group's abilities, and (2) whether the group has experienced a history of discrimination. *See* Massachusetts Bd. Of Ret. v. Murgia, 427 U.S. 307, 313 (1976) (per curiam); *City of Cleburne*, 473 U.S. at 441 (discussing how gender distinctions are likely based on stereotypes, rather than the actual "relative capabilities of men and women"). The Supreme Court also has considered whether the group has "obvious, immutable, or distinguishing characteristics that define them as a discrete group" and whether the group cannot adequately protect itself within the political process in determining if they should be classified as a suspect class. *See* Bowen v. Gilliard, 483 U.S. 587, 602 (1987) (close relatives are not a suspect class and have no right to heightened scrutiny); Lying v. Castillo, 477 U.S. 635, 638 (1986) (finding parents, children, and siblings are not a suspect class); Craig v. Boren, 429 U.S. 190, 198–99 (1976) (discussing stereotype discrimination); Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (finding that sex is an immutable characteristic); Hibbs v. Dep't of Human Res., 273 F.3d 844, 856 (9th Cir. 2001), *aff'd*, 538 U.S. 721 (2003) (noting that differences in gender are rarely "relevant to the achievement of any legitimate state interest") (quoting Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 83 (2000)); Bd. of Educ. of Highland Local Sch. Dist. v. Dep't of Educ., 208 F. Supp. 3d 850, 873 (2016) (S.D. Ohio 2016) (transgender persons have immutable characteristics warranting heightened scrutiny). Although these additional factors would assist in the court's assessment, they are not required, as evidenced by cases involving alienage and immutability. Even though one can alter residency, making alienage not immutable, a person's alienage is still entitled to strict scrutiny analysis. *See* Nyquist v. Maculet, 432 U.S. 1, 9 n.1 (1977). Aside from the Equal Protection and Due Process challenges, transgender and DSD persons may have a strong argument that their gender identity is an immutable characteristic and entitled to constitutional privacy protections. Holtzman, *supra* note 21, at 1961 (arguing individual autonomy is a liberty interest protected by the Fourth Amendment).

Laws that discriminate based on a "suspect" classification (race) or a "quasi-suspect" classification (gender) are subject to heightened judicial scrutiny.[206]

The Supreme Court has held that "sex-based classifications [are] quasi-suspect," so they warrant intermediate scrutiny, which requires any regulation to be substantially related to an important governmental interest.[207] However, with respect to transgender persons, it is unclear what level of scrutiny the Supreme Court would apply.[208] In *General Electric Co. v. Gilbert*, the Supreme Court grappled with whether a General Electric policy excluding pregnancy-related disability benefits violated Title VII.[209] There the Court held:

> While there is no necessary inference that Congress, in choosing this language, intended to incorporate into Title VII concepts of discrimination which have evolved from court decisions construing the Equal Protection Clause of the Fourteenth Amendment, the similarities between the congressional language and some of those decisions surely indicate that the latter are a useful starting point in interpreting the former. Particularly in the case of defining the term 'discrimination,' which Congress has nowhere in Title VII defined, those cases afford an existing body of law analyzing and discussing that term in a legal context not wholly dissimilar to the concerns which Congress manifested in enacting Title VII.[210]

The Supreme Court's decision in *General Electric* led Congress to enact the Pregnancy Discrimination Act in an effort to ensure that pregnancy-related discrimination was prohibited under federal law.[211] In light of this instruction, an examination of recent Supreme Court analysis with respect to the LGBTQIA community demonstrates that protections against discrimination based on "sex" should reach transgender and DSD persons. For

206. *See City of Cleburne*, 473 U.S. at 439; Bostic v. Schaefer, 760 F.3d 352, 374 (4th Cir. 2015) (recognizing that the Supreme Court "identified sex-based classifications as quasi-suspect," and "has meaningfully altered the way it views both sex and sexual orientation through the Equal Protection lens").

207. *Ricci*, 129 S. Ct. at 2661.

208. *See* Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982); Adkins v. City of New York, 143 F. Supp. 3d 134, 139 (S.D.N.Y. 2015) (suggesting the Supreme Court should apply heightened judicial scrutiny in light of history of discrimination against the transgender community).

209. General Elec. Co. v. Gilbert, 429 U.S. 125 (1976).

210. *General Elec.*, 429 U.S. at 133.

211. *See* Deborah Dinner, *Beyond "Best Practices": Employment-Discrimination Law in the Neoliberal Era*, 92 IND. L. J. 1059, 1092–93 (2017).

example, in 2015, the Supreme Court held in *Obergefell v. Hodges* that state prohibitions on same-sex marriage violate the Equal Protection and Due Process Clauses.[212] The Court noted that under the Due Process Clause individuals have certain fundamental liberties "including intimate choices that define personal identity and beliefs."[213] Further, because marriage has historically been a constitutionally protected right that could not be abridged, it is fundamental in nature.[214] Notably, the Court said:

> The limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency with the central meaning of the fundamental right to marry is now manifest. With that knowledge must come the recognition that laws excluding same-sex couples from the marriage right impose stigma and injury of the kind prohibited by our basic charter.[215]

The Court further noted: "in interpreting the Equal Protection Clause, the Court has recognized that new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged."[216] However, because the Court found in favor of the plaintiffs on the issue of a fundamental right to marry, rather than finding the LGBTQIA community is a suspect class, it remains unclear what level of scrutiny the Court would apply in a discrimination challenge based solely on Equal Protection, rather than the exercise of a fundamental right.[217]

Arguably, the Supreme Court precedent provides a basis for courts to examine new insight and societal understandings that reflect a broader interpretation of "sex." But that presents new questions. May a court hold unconstitutional only those laws that implicate a person's fundamental rights, such as marriage, or *are* status-based infringements unconstitutional even when they don't violate a fundamental right?[218] The Supreme Court's *Obergefell* rationale seems to provide adequate support in favor of finding that the LGBTQIA community is a suspect class and entitled to protection from discriminatory treatment.

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212. Obergefell v. Hodges, 135 S. Ct. 2584, 2584 (2015).
213. *Obergefell*, 135 S. Ct. at 2597.
214. *Obergefell*, 135 S. Ct. at 2598.
215. *Obergefell*, 135 S. Ct. at 2602.
216. *Obergefell*, 135 S. Ct. at 2603.
217. *See* Charles Cohen, *Losing Your Children: The Failure To Extend Civil Rights Protections To Transgender Parents*, 85 GEO. WASH. L. REV. 536, 554 (2017).
218. United States v. Windsor, 133 S. Ct. 2675 (2013) (striking down Internal Revenue Service rule that prohibited same-sex spouse from claiming federal estate tax exemption).

Gender, in the binary sense, has received quasi-suspect classification and the Supreme Court seems to recognize that distinctions based on fundamental characteristics are unwarranted.[219] Nearly 15 years ago, the Supreme Court struck down a Texas state statute that criminalized sodomy between consenting adults.[220] The Court found that individuals have a liberty interest in "respect for their private lives" and the state statute furthered no legitimate interest by interfering with the private sexual lives of consenting adults.[221] Likewise, in 1996, the Supreme Court found a Colorado constitutional amendment violated the Equal Protection Clause because it precluded legislation that would protect the status of individuals based on their "homosexual, lesbian or bisexual orientation, conduct, practices or relationships."[222] The Court determined that the amendment was an improper status-based classification that "classifies homosexuals not to further a proper legislative end, but to make them unequal to everyone else."[223]

These cases support the conclusion that the determination of one's sex, like one's sexual orientation, is within one's own purview and private life, and it is thus a fundamental right. How a person lives, dresses, and acts are all inherent physical or psychological traits and as such are part and parcel of a person's fundamental characteristics. Gender identity and sexual orientation are fundamental in nature, so they deserve quasi-suspect classification under Due Process and legal protection in a variety of contexts, including employment.[224]

According to Supreme Court rationale, sex and gender arguably are "quasi suspect" classes entitled to intermediate scrutiny that requires any restrictive government regulation based on sex to be substantially related to an important governmental interest.[225] Federal district courts have recently

219. *See* Autumn L. Bernhardt, *The Profound and Intimate Power of the* Obergefell *Decision: Equal Dignity*, 25 TUL. J. L. & SEXUALITY 1, 16–17 (2016).

220. Lawrence v. Texas, 539 U.S. 558 (2003).

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

222. Romer v. Evans, 517 U.S. 620, 624 (1996).

223. *Romer*, 517 U.S. at 635 (holding the legislation was based on "animosity toward the class" and had no rational relation to a legitimate governmental purpose).

224. *See* Levasseur, *supra* note 12 at 980–82, nn.214, 238 (detailing medical evidence that suggests brain function and hormonal influences rather than genitalia play a role in a person's gender identity).

225. Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982). *See also* Adkins v. City of New York, 143 F. Supp. 3d 134, 139 (S.D. N.Y. 2015). Some cases note that the commingling of the terms "gender" and "sex" is inappropriate and that laws protect the former and not the latter. For example, in *Lewis v. High Point Regional Health System*, 79 F. Supp. 3d 588, 589 (E.D. N.C. 2015), the court noted that sexual orientation and gender identity are two distinct concepts. This more nuanced understanding of gender identity seems likely to result in more courts in the future allowing claims for Title VII discrimination based on the transsexual or transgender

recognized that heightened judicial scrutiny is appropriate in Equal Protection claims for transgender persons.[226] Recently, Judge Jed S. Rakoff in the Southern District of New York evaluated whether laws that discriminate against transgender persons are entitled to a heightened level of scrutiny.[227] In *Adkins v. City of New York*, Judge Rakoff determined that a transgender arrestee could proceed with an Equal Protection claim based on his discriminatory treatment, relative to other arrestees who were not transgender and were arrested for the same reasons.[228] In evaluating whether transgender individuals were a suspect class, Judge Rakoff reviewed the four elements espoused by the Supreme Court and concluded that transgender persons were subject to a history of discrimination and persecution; their status bore no relation to their abilities to contribute to society; their status as transgender was a "sufficiently discernable characteristic to define a discrete minority class"; and they were a politically powerless minority.[229] Accordingly, he allowed the plaintiff's Equal Protection claim against the city to proceed.[230]

In 2017, the Supreme Court had an opportunity to address some aspects of the constitutional protections for the transgender community in *Gloucester County School Board v. G.G.*[231] The Fourth Circuit Court of Appeals found in favor of a transgender student's right to use the bathroom of their choosing (rather than the bathroom that matches their genitalia) by relying on the Department of Justice's and Department of Education's interpretation of Title IX (under the Obama administration).[232] The Obama administration's interpretation of Title IX—and by extension, Title VII as well—allowed students to use the bathroom of their choosing.[233] On appeal, the United States Supreme Court accepted certiorari, but prior to its decision on February 22, 2017, the Trump administration rescinded the two departments' prior interpretations of "sex."[234] The Supreme Court remanded the matter to the Fourth Circuit Court of Appeals to examine the

nature of the plaintiff. *See also* Rumble v. Fairview Health Servs. 2015 WL 1197415, at *10 (D. Minn. 2015) (unreported opinion finding the ACA extends protections on basis of gender identity).

226. *See* Evancho, et al. v. Pine-Richland Sch. Dist., 237 F. Supp. 3d 267, 288 (W.D. Pa. 2017); Bd. of Educ. of Highland Local Sch. Dist. v. Dep't of Educ., 208 F. Supp. 3d 850, 873 (S.D. Ohio 2016); *Adkins*, 143 F. Supp. 3d at 140.
227. *Adkins*, 143 F. Supp. 3d at 138–39.
228. *Adkins,* 143 F. Supp. 3d at 138, 142.
229. *Adkins*, 143 F. Supp. 3d at 139–40.
230. *Adkins*, 143 F. Supp. 3d at 142.
231. Gloucester Cty. Sch. Bd. v. G.G. *ex rel.* Grimm, 137 S. Ct. 1239 (2017).
232. G.G. *ex rel.* Grimm v. Glouster Cty. Sch. Bd., 822 F.3d 709 (4th Cir. 2016), vacated and remanded by 137 S. Ct. 1239 (2017).
233. *G.G.*, 822 F.3d at 720–21. Title IX prohibits discrimination "on the basis of sex" by schools that accept federal funding.
234. Peters et al., *supra* note 78.

issue without regard to the two departments' prior interpretations.[235] The Fourth Circuit remanded the case to the district court to determine whether the issue was moot, as the student had since graduated.[236] As a result, there is no clarity for the LGBTQIA community on the issue.

IV. Constitutional and Statutory Rights to Discriminate

Despite the Supreme Court's seemingly broad interpretation of sex and the potentially strong argument that transgender and DSD persons are a quasi-suspect class that warrants heightened judicial scrutiny, Supreme Court precedent can also be an obstacle for the LGBTQIA community. In particular, the conflict between constitutional protections of a suspect class on the one hand, and an employer's First Amendment and statutory religious freedom rights on the other, warrant congressional clarification. Congress could clarify the application of the word "sex" by amending the Dictionary Act[237] to include a broader definition of "sex." Such an amendment would apply to all federal statutes unless the statute itself specifically modified the term.[238]

As we discussed above, when faced with sex discrimination claims under either the EPA or Title VII, an employer has a number of affirmative defenses, including *inter alia* seniority systems, merit-based protections, and justification because of factors "other than sex." Beyond these, employers also have constitutional and statutorily-provided rights that act as defenses to discrimination claims. Building upon the inherent conflicts between the interpretation of "sex" and an employer's constitutional rights, we begin by discussing the employer's First Amendment right to be free from substantial burdens on their religious beliefs, the right to free speech, and to freely associate. Next, we address an employer's statutory protections under state and federal RFRA laws, and whether these laws provide employers with affirmative defenses in private actions.

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235. *See* Shannon Price Minter, *Déjà Vu All Over Again: Recourse to Biology by Opponents Transgender Equality*, 95 N.C. L. Rev. 1161, 1169 (2017) (discussing Gloucester Cty. School Bd. v. G.G. *ex. rel.* Grimm, 137 S. Ct. 1239).

236. *See generally*, 1 U.S.C. § 1 (explaining that Congress provides definitions for terms to be used in interpreting any Act of Congress unless otherwise indicated by the legislation).

237. *See generally* 1 U.S.C. § 1. *See also* Rowland v. California Men's Colony 506 U.S. 194, 200 (1993) (discussing the use of the Dictionary Act).

238. 1 U.S.C. § 1.

A. An Employer's First Amendment Right to Discriminate

Employers may raise three constitutional defenses to discrimination challenges by the LGBTQIA community: the employer's right to the free exercise of religion, the right to free speech, and the right to freely associate by choosing its own employees.[239]

1. Right to Free Exercise of Religion

With limited exceptions, state and federal governments are prohibited from imposing laws that infringe upon a person's or entity's First Amendment rights.[240] An employer's argument under the First Amendment is that the statutory protection in question—be it the EPA, Title VII, or a state antidiscrimination law—violates his sincerely held religious tenets, and is thus unconstitutional.[241]

There is considerable confusion over the extent to which an employer can cite a sincerely held religious belief to justify discrimination against its employees.[242] The protections guaranteed by antidiscrimination laws such as Title VII and the EPA are met with the force of the Free Exercise Clause of the First Amendment. The Free Exercise Clause states that "Congress shall make no law . . . prohibiting the free exercise" of religion.[243] And Title VII itself exempts religious organizations and their discriminatory actions when such actions are based on religion:

> [T]he Courts of Appeals have uniformly recognized . . . a 'ministerial exception,'" arising from "the First Amendment, that precludes application of [Title VII] to claims concerning the employment relationship between a religious institution and its ministers.[244]

In order to benefit from this immunization, generally an employer must be a "religious institution" that is discriminating on religious grounds against its "ministers."[245] The scope of these two terms remains at issue. In

239. *See* Velte, *supra* note 20 at 6, 41.
240. *See* Velte, *supra* note 20, at 34–36.
241. *See* Sarah M. Stephens, *Employer's Conscience After* Hobby Lobby *& the Continuing Conflict Between Women's Rights & Religious Freedom*, 24 BUFF. J. GENDER L. & SOC. POL'Y 1, 24 (2015–16).
242. In *Burwell v. Hobby Lobby Stores, Inc.,* the Court found that secular, for-profit corporations could exercise religion by "pursuing religious goals." *Id.* at 24–26.
243. U.S. CONST. amend. I.
244. *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 173 (2012).
245. *See* Stephens, *supra* note 241, at 20.

2012, the Supreme Court unanimously found in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* that the First Amendment provided an affirmative defense for religious schools using the ministerial exemption to the ADA after the school terminated a teacher who threatened to file a disability discrimination claim.[246] In *Hosanna-Tabor*, the Court found that the terminated teacher was considered a "minister" even though the majority of her day was spent teaching secular subjects.[247] The Court focused on her title, "Minster of Religion, Commissioned," to conclude that the teacher had a "significant degree of religious training," had been hired "by a formal process of commissioning," and that she was responsible for relaying "the Church's message and . . . its mission."[248] The Supreme Court made it clear that the "interest of religious groups in choosing who will preach their beliefs, teach their faiths, and carry out their mission," is protected by the Free Exercise Clause and protects churches and other religious organizations.[249]

Prior to *Hosanna-Tabor*, Supreme Court precedent prevented the use of the Free Exercise Clause to definitively defend against laws that were considered neutral and generally applicable.[250] Still, some employers had successfully argued that the exemption permitted religious-based organizations to discriminate against women.[251] "[E]ven before *Hosanna-Tabor*, the courts of appeals had applied the ministerial exception to hospitals, universities, and nursing homes with religious missions."[252] Thus, the term "religious institutions" is not limited solely to churches, and it potentially encompasses a variety of for-profit businesses.[253]

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246. Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 190 (2012).

247. *Hosanna-Tabor*, 565 U.S. at 190–92.

248. *Hosanna-Tabor*, 565 U.S. at 191.

249. *Hosanna-Tabor*, 565 U.S. at 196.

250. *See* Stephens, *supra* note 241 at 20–21. *See also Hosanna-Tabor,* 565 U.S. at 193.

251. Stephens *supra* note 241. EEOC v. Cath. U. of Am., 83 F.3d 455, 455, 470 (D.C. Cir. 1996) (denying nun's Title VII claim based on sex discrimination under religious exemption as she was a professor for a Catholic university); McClure v. Salvation Army, 460 F.3d 553, 560–61 (1972) (denying woman's Title VII wrongful termination claim after she complained about unequal pay for women as Salvation Army is religiously affiliated and exempt from its application); *see also* Rayburn v. Gen. Conf. of the Seventh-Day Adventists, 772 F.2d 1164, 1168 (7th Cir. 1985) (finding for church under religious exemption despite evidence of sex and racial discrimination); *but see* Bryce v. Episcopal Church in the Diocese of Colorado, 289 F.3d 648, 657, 659 (10th Cir. 2002) (limiting ministerial exemption to those positions that truly are "rooted in religious belief").

252. Elliott Williams, *Resurrecting Free Exercise* Hosanna-Tabor Lutheran Church & School v. EEOC, 132 S. Ct. 694 (2012), 36 HARV. J. L. PUB. POL'Y 391, 400 (2013).

253. *Id.* at 395, 400.

More recently, the Supreme Court ruled in favor of a for-profit entity's religious rights in *Hobby Lobby v. Burwell*.[254] The watershed decision focused on whether a for-profit corporation was a "person" under RFRA and whether the company could refuse to pay for employee health insurance plans based on its religious beliefs.[255] Female employees, through government intervention, challenged the company-employer's refusal to pay for health coverage as required by the Affordable Care Act ("ACA") on gender discrimination grounds.[256]

One of the more controversial aspects of the *Hobby Lobby* decision was the Supreme Court's interpretation of the word "person," as RFRA did not define it.[257] Because RFRA did not indicate otherwise, the Court concluded the word "person" included entities.[258] Although the Court's holding seems to be limited to closely-held corporations, its discussion of the word "persons" is expansive enough to include both nonprofit and for-profit corporations.[259] The Court then examined whether the entities could "exercise religion."[260] Because corporations may operate for "any lawful purpose" under state corporate law, the Supreme Court held corporations can support charitable and religious endeavors.[261]

Because of the breadth of the *Hobby Lobby* and *Hosanna-Tabor*, the LGBTQIA community is rightfully concerned that a closely-held corporation could argue that its sincerely held religious beliefs allow it to discriminate against the LGBTQIA community.[262] Reading these two Supreme Court precedents together could allow an employer with a decidedly religious owner and articulated religious mission statement to refuse to hire

254. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).
255. *Hobby Lobby*, 134 S. Ct. at 2751.
256. *Hobby Lobby*, 134 S. Ct. at 2781 (although the employer provided coverage for some types of birth control, it refused to provide coverage for a certain drug which it deemed tantamount to an abortion, which violated the company's religious objections).
257. *Hobby Lobby,* 134 S. Ct. at 2768.
258. *Hobby Lobby*, 134 S. Ct. at 2768.
259. *Hobby Lobby*, 134 S. Ct. at 2769.
260. *Hobby Lobby*, 134 S. Ct. at 2769.
261. *Hobby Lobby*, 134 S. Ct. at 2771.
262. *Compare* Hamilton v. Southland Christian Sch., Inc., 680 F.3d 1316, 1319 (11th Cir. 2012) (declining to address *Hosanna-Tabor* on procedural grounds and holding school's argument that it terminated a female teacher who became pregnant outside of marriage on religious grounds rather than gender-based grounds was likely pretext for gender discrimination), *with* Boyd v. Harding Acad., 88 F.3d 410 (6th Cir. 1996) (holding termination based on religious beliefs against extra-marital sex was not gender-based discrimination under Title VII), *and* Curay-Cramer v. Ursuline Acad. of Wilmington, Inc., 450 F.3d 130, 139–140 (3d Cir. 2006) (declining to review gender discrimination claim because school argued religious justifications and court determined doing so would violate school's First Amendment rights).

LGBTQIA employees for managerial positions, as these positions could be viewed as furthering the employer's religious mission.

Our hypothetical provides an example for how this might play out. Recall that our hypothetical photography studio is owned by a religious couple in a small Texas town where they market their services to local church groups by advertising in the paper and on local radio stations. Many of their clients are churches and members of church congregations, all of whom believe that marriage is between one man and one woman, that same-sex intimacy is a sin, and that a person is the sex to which they were assigned at birth. Moreover, they consider any attempt to alter a person's birth designation to be a sin. Although the studio is open to the public, it is selective in its hiring practices, generally only hiring those individuals who the owners personally know. In our hypothetical, the studio hired Sam based on Sam's talented portfolio. The studio never thought to inquire about Sam's sex and believed Sam to be male. After Sam had worked at the studio for a year, entitling Sam to a pay raise, and other benefits, Sam disclosed that their birth certificate from New York reflects that Sam is "intersex." Sam applies for the vacant managerial position at the studio and seeks a raise commensurate with the other people in managerial positions at the studio.

If the studio were to terminate Sam upon disclosure of Sam's intersex birth certificate, they could argue that their actions are consistent with the First Amendment and the ministerial exemption to Title VII (as well as the protections afforded by RFRA, discussed below). Sam might contend that Title VII was designed to be applicable only to truly religious organizations and that the ministerial exemption of *Hosanna-Tabor* only applies to individuals who carry out the mission of the religious entity. However, in light of judicial conflicts as to the breadth of Supreme Court precedent, Sam's position is weak. Reading *Hobby Lobby* and *Hosanna-Tabor* together demonstrates that closely-held entities with religious owners engaged in a for-profit business with an underlying faith-based mission can contend that employees—and employees in supervisory positions in particular—must conform to the employer's religious and moral beliefs. When they fail to do so, for example, because they are members of the LGBTQIA community, employees can be terminated.

Some scholars argue that most courts, when presented with the ministerial exemption question, will construe it narrowly and will apply it only to those entities that are truly religious in nature and those positions that

further the entity's religious mission.[263] This has not been borne out. Rather, the Supreme Court appears to hold that entities can have religious convictions, and that those convictions can permeate their employment environment—even to the detriment of their employees.[264] If not properly constrained, it is not implausible to imagine a situation where business owners express a religious mission in conjunction with their for-profit business and explicitly identify what actions they believe are sinful. A religious owner could then contend that because their employees represent their business, and because the very existence of the LGBTQIA community is against their religious beliefs, the employer is therefore entitled to not hire, not promote, and even fire an LGBTQIA employee. This type of rationale imbues entities with both the benefits of limited liability and tax protections (afforded only to corporations that are not living persons), and with the freedom of thought (historically afforded only to living persons). In this way, corporate entities will benefit from legal shields that permit discrimination by simply demonstrating that their company is owned by like-minded religious people.[265]

Corporate benefits like limited liability and tax protections should come with a concomitant obligation to waive the right to religious thought. Those wishing to operate a business and simultaneously further their individual religious mission should do so without state-based protections, and without permission to discriminate.

2. Compelling Employers to Speak

Beyond free exercise defenses, corporations contend that the First Amendment permits them to not comply with antidiscrimination laws in instances where the law compels speech in opposition to their beliefs or violates their right to freely associate.[266] The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech. . . ."[267] The Supreme Court has interpreted this clause as one that protects both the right to speak *and* the right to refrain from speaking; thus, no law may compel speech with which an actor disagrees.[268] Commercial actors in the

263. Marc O. DeGirolami, *Free Exercise by Moonlight*, 53 SAN DIEGO L. REV. 105, 115–16, 127–29 (2016) (detailing scholarly debate on the breadth of *Hosanna-Tabor*).

264. *Hobby Lobby,* 134 S. Ct. at 2768.

265. *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2774 (2014).

266. Velte, *supra* note 20, at 35. *See* discussion *infra* Section IV A.

267. U.S. CONST. amend. I.

268. Wooley v. Maynard, 430 U.S. 705, 714 (1977); *see also* Bob Jones U. v. United States, 461 U.S. 574, 604 (1983) (denying tax exemption to university based on university's racially discriminatory admissions policy did not violate First Amend-

antidiscrimination context contend that they are entitled to an exemption from antidiscrimination laws because complying with such laws would compel a pro-LGBTQIA message, with which they have a religious disagreement.[269]

The Supreme Court granted certiorari on this very issue in *Craig v. Masterpiece Cakeshop, Inc.*[270] In *Masterpiece*, a for-profit bakery refused to bake a cake for a same-sex couple's wedding because of the owners' convictions, even though it bakes cakes for opposite-sex couples.[271] Plaintiffs filed an administrative complaint alleging discrimination in violation of the Colorado Anti-Discrimination Act.[272] The state and administrative courts ruled in the plaintiffs' favor and the bakery sought relief based on First Amendment grounds, alleging that being forced to bake the cake was a form of compelled speech.[273] Colorado argued that the case is analogous to *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, which held that law schools must provide equal access to military and non-military recruiters alike despite the military's "Don't Ask Don't Tell" policy against gays in the military.[274] The Supreme Court determined that requiring law schools to allow recruiters on campus regulated conduct, not speech.[275]

At the time of writing, it is unclear which way the Supreme Court will decide the *Masterpiece* case.[276] If the Supreme Court sides with the bakery, *Masterpiece Cakeshop*, *Hobby Lobby*, and *Hosanna-Tabor* will work together to provide a for-profit entity with the legal defenses it needs to refuse to hire or equally pay a member of the LGBTQIA community. But even if the Supreme Court holds that such action constitutes discrimination, a third

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ment rights); Roberts v. Jaycees, 468 U.S. 609 (1984) (requiring admission of women to group did not violate freedom of association rights of group).

269. *See, e.g.*, Elane Photography, LLC v. Willcock, 309 P.3d 53, 64–65 (N.M. 2013).

270. Craig v. Masterpiece Cakeshop, 370 P.3d 272 (Colo. App. 2015), *cert. granted*, 2017 WL 2722428 (June 26, 2017).

271. *See Masterpiece Cakeshop*, 370 P.3d at 277.

272. *Masterpiece Cakeshop*, 370 P.3d at 277.

273. *Masterpiece Cakeshop*, 370 P.3d at 283.

274. Rumsfeld v. Forum for Acad. & Inst. Rights, Inc., 547 U.S. 47 (2006).

275. *Rumsfeld*, 547 U.S. at 70.

276. *See* Velte, *supra* note 20, at 52–53; *see also* Alex Riley, Note, *Religious Liberty vs. Discrimination: Striking A Balance When Business Owners Refuse Service to Same-Sex Couples Due to Religious Beliefs*, 40 S. ILL. U. L.J. 301, 305–314 (2016) (discussing case law which prohibits businesses in the wedding industry from refusing services to same sex couples and those states that have proposed or enacted legislation to protect businesses and their religious freedoms). *But see* Haley Holik, Note, *You have Right to Speak by Remaining Silent: Why State Sanction to Create Wedding Cake is Compelled Speech*, 28 REGENT U. L. REV. 299, 301–02 (2015) (arguing that requiring businesses to bake a cake for a same sex couple is in fact compelled speech because of the historical and ceremonial significance of wedding cakes).

element of the First Amendment—the right to freely associate—offers employers yet another avenue of defense.

3. Compelling Association

Instructive in the First Amendment analysis of our hypothetical are two Supreme Court cases involving antidiscrimination laws under the First Amendment's freedom of association analysis: *Boy Scouts of America v. Dale* and *Hurley v. Irish-American Gay, Lesbian, & Bisexual Group of Boston*. Both cases found antidiscrimination statutes to be unconstitutional as applied.[277] In *Boy Scouts of America*, the Boy Scouts organization removed one of its leaders, despite a state antidiscrimination law that protected against sexual orientation discrimination, after he came out as gay.[278] The Supreme Court determined that a state statute cannot compel an organization to "accept members where such acceptance would derogate from the organization's expressive message."[279] The Court noted that leaders were employed to reflect the association's core beliefs, and thus, the association's removal of the leader as a director was based on protected First Amendment grounds.[280]

Likewise, in *Hurley*, a group of LGBTQIA Irish-Americans applied for a permit to march in Boston's annual Saint Patrick's Day parade.[281] The private non-profit group in charge of awarding permits for the parade denied the application and alleged that the state public accommodation law violated the private non-profit group's First Amendment right to expressive association.[282] The Court determined that parades are specifically designed as expressive associations and the organizers should be permitted to determine whose message conforms to the group's associational expression.[283] Ultimately, the Court held that the public accommodation statute was not unconstitutional on its face, but did violate the parade organizers' First Amendment rights.[284]

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277. Boy Scouts of America v. Dale, 530 U.S. 640, 640 (2000). Hurley v. Irish-American Gay, Lesbian, & Bisexual Grp. of Boston, 515 U.S. 557, 557 (1995). *See* James M. Gottry, *Just Shoot Me: Public Accommodation Anti-Discrimination Laws Take Aim First Amendment Freedom of Speech*, 64 VAND. L. REV. 961, 975–981 (2011) (addressing the conflict between public accommodation laws and the freedom to expressive association and highlighting that public accommodation laws should only apply to "essential" services not all services available to the public).

278. *Dale*, 530 U.S. at 643–44.

279. *Dale*, 530 U.S. at 661.

280. *See Dale*, 530 U.S. at 656.

281. *Hurley*, 515 U.S. at 561.

282. *Hurley*, 515 U.S. at 557.

283. *Hurley*, 515 U.S. at 774–75.

284. *Hurley*, 515 U.S. 572–73.

For-profit businesses, like the one in our hypothetical, are not discrete associations, as they are open to the public for the sale of goods or services, and thus, they must comply with antidiscrimination laws.[285] However, an employer may argue that the hiring, paying, and promotion of employees is not relevant to the service to the public at large. If our hypothetical entity does not refuse to provide photography services to the LGBTQIA community, Ward Photography may argue they have not violated any antidiscrimination law. Rather, they can contend that their employees are representatives of the business, and that employers are permitted to discipline and terminate employees who do not serve the employer's mission. Further, the studio in our hypothetical might argue that by retaining Sam, they are forced to associate with a DSD or transgender person—an idea that directly conflicts with their stated religious beliefs. If *Dale* and *Hurley* were applied to the employment context, Supreme Court precedent would protect an employer's explicit discrimination on freedom of association and compulsory speech grounds.

B. An Employer's Statutory Right to Discriminate

In addition to potential constitutional protections, employers also benefit from statutorily-created defenses to employment discrimination, which are particularly concerning to the LGBTQIA community. These defenses purport to protect religious freedoms, and are present under both state and federal RFRA laws. Generally speaking, these laws broaden a person's religious freedom rights beyond the protections afforded under the First Amendment. We have addressed the federal RFRA throughout this Article in the context of both Supreme Court jurisprudence and recent federal court decisions. We now turn to a slightly more focused examination of the parameters of a RFRA-type defense.

1. Right to Discriminate under RFRA

As discussed in Section II.B.2 above, federal RFRA laws prohibit the government from substantially burdening a person's exercise of religion. Several states have adopted similar, and in some cases more expansive,

285. Whether and to what extent all services provided to the public are considered public accommodations, as opposed to only those services that are considered essential, could be the significant factor in determining whether a business must comply with all antidiscrimination laws, even where doing so would violate the religious beliefs of the owners with respect to sexual orientation and transgender rights. *See* Gottry *supra* note 277, at 1003.

versions of RFRA.[286] For example, some state RFRA laws impose a lower standard than a "substantial burden" on religion in order to trigger strict scrutiny.[287] As a result, any time a law burdens a religious belief in any sense, the law must withstand exacting judicial scrutiny to be upheld.[288] Arguably, those state RFRA laws that provide more religious protections—and thereby allow more discrimination against suspect classes—are unconstitutional in light of *Romer v. Evans*.[289] In *Romer*, the Supreme Court invalidated a Colorado state constitutional amendment denying homosexuals certain protections from discrimination.[290] Legal scholars have debated whether state religious accommodation laws could be used by closely-held, religiously-minded employers to discriminate against both their own employees, as well as members of the general public who oppose their gender identity and sexual orientation.[291] Depending on the state law at issue, employers may have a strong argument that such discrimination is legal.

The mechanism through which employers may take adverse actions against their LGBTQIA employees is most explicit in *Burwell v. Hobby Lobby Stores, Inc.,* as discussed in Section IV.A.1.[292] In *Hobby Lobby,* female employees challenged the company's refusal to pay for health coverage as required by the Affordable Care Act ("ACA") on gender discrimination

286. Twenty-one states have enacted such legislation: Alabama, Arizona, Arkansas, Connecticut, Florida, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, New Mexico, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, and Virginia. *See State Religious Freedom Restoration Acts*, NAT'L CONFERENCE OF STATE LEGISLATURES, Oct. 15, 2015, http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx.

287. *See* Jason Goldman, Note, *Religious Freedom: Why States Are Unconstitutionally Burdening Their Own Citizens as They "Lower" Burden*, 2015 CARDOZO L. REV. DE NOVO 57, 68–70 (2015) (identifying states, including Pennsylvania and Texas, which appear to use lower standards in their own statutory or constitutional free exercise protections). *See also* Michael T. Zugelder, *Toward Equal Rights for LGBT Employees: Legal & Managerial Implications for Employers*, 43 OHIO N. U. L. REV., 193, 207–08 (2017) (discussing discriminatory effects of states' "little" RFRA laws).

288. *Id.*

289. Romer v. Evans, 517 U.S. 620, 635 (1996).

290. *Romer*, 517 U.S. at 635. *See also* Mark Joseph Stern, *North Carolina's New Anti-LGBTQ Law is Vicious, Shameful, & Unconstitutional*, SLATE: OUTWARD, Mar. 24, 2016, http://www.slate.com/blogs/outward/2016/03/24/north_carolina_s_anti_lgbtq_law_is_unconstitutional.html (analyzing unconstitutionality of North Carolina bill in light of court's decision in *Romer*, 517 U.S. at 635).

291. *See, e.g.*, Nelson Tebbe, *Religion & Marriage Equality Statutes*, 9 HARV. L. & POL'Y REV. 25, 26 (2015) (discussing religious accommodations for those who oppose same sex marriages on religious grounds in a variety of contexts including employment).

292. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

grounds.[293] The *Hobby Lobby* Court noted that courts must "take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries," such as the burdens imposed by the employer's religious convictions.[294] The Court noted that harms to third parties—here, the female employees who are affected by the religious belief—"will often inform the analysis of the Government's compelling interest and the availability of a less restrictive means of advancing that interest."[295] However, the Court noted that no third-party harms existed in the *Hobby Lobby* case[296] and "appear[ed] to cast doubt on the third party harm doctrine."[297] Legal scholars have urged courts to treat this language as pure dicta and ensure that third-party harms are considered.[298]

The next step in the *Hobby Lobby* Court's analysis of whether a law that impacted an entity's religious beliefs was warranted—and thus constitutional—was whether the government's law served a compelling interest.[299] The Court assumed, without evaluating the proposition, that providing contraceptives is a compelling governmental interest.[300] But the Court went on to note that the government must show that the burden on Hobby Lobby's exercise of religion is the least restrictive way to accomplish the compelling interest.[301]

In her dissent, Justice Ginsberg questioned whether the Court would reach the same outcome if a corporation were to have a sincerely held relig-

293. *Hobby Lobby*, 134 S. Ct at 2759 (although the company-employer provided coverage for birth control, it refused to provide coverage for a certain drug which it deemed was tantamount to an abortion and an issue with which the company had religious objections).

294. *Hobby Lobby*, 134 S. Ct. at 2781 n.37 (noting that courts analyze the religious exemption claims to "take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries" (quoting Cutter v. Wilkinson, 544 U.S. 709, 720 (2005))). *See also* Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 709–11 (1985) (holding state law that allowed employees the unfettered right to dictate when they could work based on religious grounds violated the Establishment Clause as it did not consider the effects on employer and other employees).

295. *Hobby Lobby*, 134 S. Ct. at 2781 n.37.

296. *Hobby Lobby*, 134 S. Ct. at 2760.

297. Tebbe, *supra* note 291, at 53 n.129.

298. *See* Tebbe, *supra* note 291, at 53. *See also* Jennifer A. Marshall, *Burwell v. Hobby Lobby: Protecting Religious Freedom Diverse Society*, 10 N.Y.U. J. L. & LIBERTY 327, 332 (2016) ("The *Hobby Lobby* opinion itself articulated the case-specific nature of its analysis").

299. *Hobby Lobby*, 134 S. Ct. at 2779.

300. *Hobby Lobby*, 134 S. Ct. at 2780.

301. *Hobby Lobby*, 134 S. Ct. at 2780.

ious belief that women should not receive equal pay to men.[302] The majority countered her argument, stating:

> [O]ur holding is very specific. We do not hold . . . that for-profit corporations and other commercial enterprises can 'opt out of any law (saving only tax laws) they judge incompatible with their sincerely held religious beliefs.' . . . Nor do we hold . . . that such corporations have free rein to take steps that impose 'disadvantages . . . on others'. . . .[303]

The majority further noted:

> The principal dissent raises the possibility that discrimination in hiring, for example on the basis of race, might be cloaked as religious practice to escape legal sanction. . . . Our decision today provides no such shield. The Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal.[304]

Despite these assurances, the question remains whether the LGBTQIA community as a class would be protected in the same way as women or racial minorities. After *Hobby Lobby*, organizations continue to challenge the ACA's contraceptive mandate on RFRA grounds.[305] They allege that, even though they are now allowed to opt-out of providing coverage by notifying the government of their religious objections, they still feel complicit in the promotion of abortion-inducing drugs, because the employee's health coverage costs have merely shifted to a third-party—an outside insurance provider.[306] Courts have generally concluded that sending a notification to

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302. *Hobby Lobby*, 134 S. Ct. at 2802 (Ginsburg, J., dissenting) (citing Dole v. Shenandoah Baptist Church, 899 F.2d 1389, 1392 (4th Cir. 1990) (holding head of household supplemental pay for teachers violated the Fair Labor Standards Act minimum wage despite the church's argument that its application violated their free exercise beliefs)). The Court found limited burden on the church's beliefs because the Bible does not mandate a pay differential based on sex. *Id.* at 1397. Increased payroll expenses are not a burden that is determinative in a free exercise claim. *Id.* at 1398.

303. *Hobby Lobby*, 134 S. Ct. at 2760.

304. *Hobby Lobby*, 135 S. Ct. at 2783.

305. *E.g.*, Zubik v. Burwell, 136 S. Ct. 1557, 1560 (2016) (per curiam).

306. *See Zubik*, 136 S. Ct. at 1560. *See, e.g.*, Cath. Health Care Sys. v. Burwell, 796 F.3d 207, 217 (2d Cir. 2015) (noting plaintiffs' argument that "by submitting the opt-out notification . . . they are indirectly facilitating the provision to their employees of products and services that have contraceptive and 'abortion-inducing' effects"), *vacated*, 136 S. Ct. 2450 (2016). *See also* Frederick Mark Gedicks, *"Substantial" Bur-*

the government that one is eligible for an exemption to the ACA is not a substantial burden despite any sincerely held religious beliefs.[307] However, in *Zubik v. Burwell*, the Supreme Court disagreed with the lower courts' analysis and vacated and remanded these cases.[308] The Supreme Court held the circuit courts should find an accommodation to the non-profit religious entities' religious exercise "while at the same time ensuring that women covered by petitioner's health plans 'receive full and equal health coverage, including contraceptive coverage.'"[309] The Court implicitly found that by requiring religious entities to draft insurance plan documents that covered these contraceptives (so the entity itself did not provide them) is still a substantial burden on their religious beliefs.[310]

Despite the breadth of *Hobby Lobby* and *Zubik*, RFRA does not protect private businesses from engaging in discriminatory behavior where there is a compelling interest in eradicating a particular form of discrimination, such as racial discrimination.[311] For example, schools are prohibited from engaging in racial segregation—even if the school claims a religious opposition to interracial relationships: "the Government has a fundamental, overriding interest in eradicating racial discrimination in education . . . [that] outweighs whatever burden denial of tax benefits places on [the schools'] exercise of their religious beliefs . . . and no less restrictive means . . . are available to achieve the governmental interest."[312]

Likewise, religious employers cannot argue that RFRA permits them to discriminate against women because eliminating sex discrimination is a compelling interest.[313] The question remains, however, whether the

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dens: How Courts May (And Why They Must) Judge Burdens on Religion Under RFRA, 85 GEO. WASH. L. REV. 94, 128–29 (2017) (discussing Zubik's remand order and the theory that the Supreme Court remanded in anticipation of the parties reaching a settlement).

307. *See* Velte, *supra* note 20.

308. *Zubik*, 136 S. Ct. at 1560.

309. *Zubik*, 136 S. Ct. at 1560.

310. *See* Mark L. Rienzi, *Fool Me Twice:* Zubik v. Burwell *& Perils Judicial Faith Government Claims*, 2016 CATO SUP. CT. REV. 123, 130–31 (2016) (noting the government conceded its interests are furthered so long as women have some form of contraceptive coverage, not necessarily all forms of contraceptive coverage, and that this could be accomplished without the entities' drafting documents violating their faith). *See also* Gedicks, *supra* note 306 at 133–35 (discussing courts' need to review whether the law truly places a "substantial" burden on religious beliefs).

311. *Hobby Lobby*, 134 S. Ct. at 2774. This same rationale is used when businesses contend laws violate religious beliefs under the Free Exercise Clause. *Id.*

312. *Bob Jones U. v. United States*, 461 U.S. 574, 604 (1983) (citations and quotations omitted).

313. *See, e.g.*, Redhead v. Conf. of Seventh-Day Adventists, 440 F. Supp. 2d 211, 221–22 (E.D.N.Y. 2006) (finding RFRA inapplicable where religious school violated Title VII by firing female teacher for becoming pregnant outside of marriage); *see also*

LGBTQIA community (and transgender or DSD persons in particular) is protected from sex discrimination.[314] Whether these employers can discriminate for reasons "other than sex," is an ongoing question, as evidenced by *Equal Employment Opportunity Commission v. R.G. & G.R. Harris Funeral Homes,* which we initially discussed in Section II.B.2 above.

In *R.G. & G.R. Harris Funeral Homes,* the court determined that the funeral home had stated a valid RFRA defense as it had a sincerely held religious belief: "The Bible teaches that a person's sex (whether male or female) is an immutable God-given gift and that it is wrong for a person to deny his or her God-given sex."[315] The court determined that Title VII and the body of sex-stereotyping case law place a substantial burden on the funeral home's ability to carry out its business in accordance with its religious beliefs.[316] Additionally, the court determined that the EEOC failed to demonstrate its two-part burden: that (1) it had a compelling interest in prohibiting the funeral home's dress policy, and (2) the law was the least restrictive means of furthering that interest with respect to the funeral home.[317] The court assumed, without deciding, that eradicating gender-based stereotyping in the workplace was a compelling interest, but disagreed with the EEOC's argument that this interest was furthered solely by allowing employees to wear clothing commensurate with the gender with which they identify.[318] Accordingly, the court determined the funeral home's RFRA defense to the Title VII gender-based stereotyping claim was valid.[319] However, the case is now on appeal and the terminated funeral director has joined the suit, which places into question whether RFRA can be used as a viable defense.[320]

In those instances where an employer with sincerely-held religious beliefs demonstrates that its mission is hindered by employing an LGBTQIA

United States v. Burke, 504 U.S. 229, 238 (1992) (noting "[i]t is beyond question that discrimination in employment on the basis of sex, race, or any of the other classifications protected by Title VII is. . . . an invidious practice that causes grave harm to its victims").

314. *See Hobby Lobby*, 134 S. Ct. at 2774 (finding no cause to determine the scope of RFRA outside the facts of the case).

315. EEOC v. R.G. & G.R. Harris Funeral Homes, 201 F. Supp. 3d 837, 855 (E.D. Mich. 2016).

316. *Harris Funeral Homes*, 201 F. Supp. 3d. at 855.

317. *Harris Funeral Homes*, 201 F. Supp. 3d. at 859–60.

318. *Harris Funeral Homes*, 201 F. Supp. 3d. at 861–62 (noting the EEOC's position is that the funeral director should be permitted to dress in a stereotypical female manner that does not eliminate gender-based stereotyping as opposed to a gender-neutral clothing policy).

319. *Harris Funeral Homes*, 201 F. Supp. 3d. at 862–63.

320. Response Brief of Appellee R.G. & G.R. Harris Funeral Homes, Inc., 2017 WL 2222848, *37–38 (6th Cir. May 17, 2017).

person, RFRA could be an affirmative defense to the enforcement of federal legislation like the EPA or Title VII. However, as addressed in Section 2, the Supreme Court has not expressly concluded that the federal RFRA law is an available defense in private litigation. To the extent that it is not, employers would need to argue a defense under a broader state RFRA law or the First Amendment.

2. Federal RFRA as a Defense in Purely Private Litigation

A current controversy exists regarding whether federal RFRA can be used as a defense in private litigation. In particular, there is a question about whether RFRA is a defense to employment discrimination where an individual, rather than the EEOC, is the plaintiff.[321] RFRA section 2000bb-1(c) states: "[a] person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government."[322] The language "and obtain appropriate relief" implies that the defense is only applicable if the case involves the government.[323] However, the phrase "claim or defend in a judicial proceeding" could be interpreted as extending the right of a plaintiff to use it as a defense (or a claim) to *any* proceeding, not just those that involve the government.[324] A literal reading of the language reflects that the statute was designed to apply when the government is a party to a suit (e.g. that the government bears a burden of proof to demonstrate its compelling interest, etc.).[325] However, this does not necessarily negate the clear statutory language that allows a litigant to raise RFRA as a defense in other proceedings.[326]

The majority of courts addressing the issue of whether defendants in lawsuits brought by nongovernmental entities may use RFRA as a defense have found that they may not.[327] Justice Sotomayor, while on the Second

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321. Response Brief of Appellee R.G. & G.R. Harris Funeral Homes, Inc., *supra* note 146, at *34–35.

322. 42 U.S.C.A. § 2000bb-1(c) (Westlaw through P.L. 115-90). *See also* Sara Lunsford Kohen, *Religious Freedom Private Lawsuits: Untangling When RFRA Applies to Suits Involving Only Private Parties*, 10 CARDOZO PUB. L. POL'Y & ETHICS J. 43, 45 (2011) (collecting conflicting decisions and advocating for use of RFRA defense in all litigation).

323. 42 U.S.C. § 2000bb-1(c).

324. *Id.*

325. *Id.*

326. *Id.*

327. *See* EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 201 F. Supp. 3d 837, 864 (E.D. Mich. 2016). *See also* Gen. Conf. Corp. of Seventh-Day Adventists v. McGill, 617 F.3d 402, 410–12 (6th Cir. 2010) (holding that RFRA does not apply in suits between private parties); Mathis v. Christian Heating & Air Conditioning, Inc., 158

Circuit Court of Appeals, dissented in a RFRA case, *Hankins v. Lyght*, explaining that RFRA defenses are only available when the government is bringing the suit, not when the suit is between private parties.[328] Justice Sotomayor reasoned that where the government is not a party to the suit, it cannot "go[ ] forward" with evidence to prosecute or defend its case.[329] Nonetheless, she "recognize[d] that according to RFRA's "applicability" section, the statute applies "to all Federal law."[330] This suggests that RFRA defenses ought to be available whenever a federal law is at issue—even when the government is not actually a party.[331] This issue was discussed in *General Conference Corporation of Seventh-Day Adventists v. McGill*, where the 6th Circuit noted:

> [C]ongress repeatedly referred to government action in the findings and purposes sections of RFRA. Congress found that "*governments* should not substantially burden religious exercise without compelling justification," that the pre-*Smith* regime had required that "the *government* justify burdens on religious exercise," and that strict scrutiny was necessary for "striking sensible balances between religious liberty and competing prior *governmental* interests." 42 U.S.C. § 2000bb(a) (emphasis added). Congress described RFRA's purpose as "to provide a claim or defense to persons whose religious exercise is substantially burdened *by government.*" § 2000bb(b) (emphasis added).[332]

Ultimately, in *Hankins v. Lyght*, the Court determined that RFRA applied to any action wherein a federal *statute* "substantially burden[ed] . . . exercise of religion."[333] In *Hankins*, the plaintiff sought relief under the Age Discrimination in Employment Act ("ADEA"), as he had been forced to retire.[334] Because both the plaintiff and the EEOC could have brought suit,

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F. Supp. 3d 317, 326 (E.D. Pa. 2016) (agreeing with the majority interpretation that RFRA only applies to suits in which the government is a party); Sutton v. Providence St. Joseph Med. Ctr., 192 F.3d 826, 834 (9th Cir. 1999) (holding that the plaintiff cannot state a valid claim under RFRA against the defendant, a private employer, in the circumstances presented). *But see* Korte v. Sebelius, 735 F.3d 654, 692 n.2 (7th Cir. 2013) (noting apparent conflict among courts).

328. *See* Hankins v. Lyght, 441 F.3d 96, 114–15 (2d Cir. 2006) (Sotomayor, J., dissenting).
329. *Hankins,* 441 F.3d at 114.
330. *Hankins,* 441 F.3d at 115.
331. *Hankins,* 441 F.3d at 115.
332. Gen. Conf. Corp. of Seventh-Day Adventists v. McGill, 617 F.3d 402, 411 (6th Cir. 2010).
333. Hankins v. Lyght, 441 F.3d 96, 103–04 (2d Cir. 2006).
334. *Hankins,* 441 F.3d at 99.

the court noted it would be discordant to allow the employer to assert a RFRA defense when sued by the government, but not when sued by a private plaintiff.[335] Accordingly, whether employers can use RFRA as a defense in private litigation is not settled.[336] But even if an employer is precluded from using RFRA as a defense in a private action, both the EPA and Title VII provide ample affirmative defenses to employers that would permit continued discrimination against the LGBTQIA community.

CONCLUSION

Despite federal and state antidiscrimination laws, many individuals remain unprotected because of a narrow and outdated interpretation of the word "sex." We have explored how these laws unnecessarily restrict a person's right to equal employment and enable employers to use anachronistic reasoning to disadvantage an entire population. And we have demonstrated the need for both judicial and congressional action to broaden the definition of "sex" and "sex discrimination" to include the LGBTQIA community.

Turning back to our hypothetical, let's imagine that Sam sues Ward Photography for both wage discrimination under the EPA and gender-based stereotyping under Title VII. Clearly, Sam will face several substantial obstacles, not the least of which is who would be considered Sam's "opposite sex" comparator for an EPA claim.[337] Even if Sam is able to identify a comparator, Ward Photography may argue that it paid Sam differently based on a "factor other than sex." Because of the uncertainty surrounding whether the "other factor" can literally be *any* other factor, Ward Photography may

335. *Hankins,* 441 F.3d at 103. However, another panel within the Second Circuit has since questioned whether the *Hankins*' ruling regarding RFRA and private parties was accurate. *See* Rweyemamu v. Cote*,* 520 F.3d 198, 203–04 (2d Cir. 2008). The court noted: "we think the text of RFRA is plain," and RFRA is inapplicable to purely private disputes "regardless of whether the government is capable of enforcing the statute at issue." *Id.* at 203 n.2. *Accord*, Tomic v. Cath. Diocese of Peoria, 442 F.3d 1036, 1042 (7th Cir. 2006) (discounting *Hankins* and finding "RFRA is applicable only to suits to which the government is a party"), *abrogated on other grounds by* Hosanna–Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171 (2012); Sutton v. Providence St. Joseph Med. Ctr.*,* 192 F.3d 826, 834, 837–43 (9th Cir. 1999) (noting RFRA does not state that it specifically applies to nongovernmental actors).

336. *See* Stephens, *supra* note 241, at 41.

337. If the hypothetical were altered slightly and Sam is employed in a state with antidiscrimination in pay laws, and the employer were accepting of the LGBTQIA community—the employer that raises Sam's salary could likewise subject itself to a reverse discrimination claim. In this regard, the employer should establish evidence (taken from the plethora of evidence) that the LGBTQIA community has historically been, and continues to be, the subject of discrimination.

be successful in contending a variety of defenses, e.g. moral, legal, religious objections to recognizing a person as intersex, etc.[338] If the studio were to terminate Sam upon disclosure of their intersex birth certificate, the studio could argue that their action complies with exemptions found within RFRA, as well as the First Amendment and the ministerial exemption of Title VII.

The tandem reading of *Hobby Lobby* and *Hosanna-Tabor* cases demonstrates that closely-held entities with religious owners engaged in a for-profit business (with an underlying faith-based mission), may contend that employees must conform to the employer's religious and moral beliefs. When the employees fail to do so, they can be terminated.

To combat this blatant discrimination, the proposed federal Equality Act would amend Title VII to specifically include sex, sexual orientation, and gender identity as a protected class, and would expand the definition of places that are considered "public accommodations."[339] This is a good step, but the Equality Act may not go far enough, as it does not eliminate or limit the ministerial exemption and does not define the term "sex" as it applies in other statutes, like the EPA.[340] To fully ensure equality, Congress must narrow the entities who can claim a religious exemption and the situations in which such exemptions may be invoked. Congress must also update the Dictionary Act to include a more progressive and inclusive definition of sex. Without judicial and legislative clarity, an entire community will remain unprotected. This has deep moral implications and would lead to an inefficient, unequal workforce. ♣

338. Should a defendant succeed in carrying this burden, a plaintiff may then "counter the employer's affirmative defense by producing evidence that the reasons the defendant seeks to advance are actually a pretext for sex discrimination." Belfi v. Prendergast, 191 F.3d 129, 136 (E.D. N.Y. 2016) (finding valid EPA claim, as plaintiff was paid less than men and the stated reasons may have been pretext). *But see* Allen Smith, *EEO-1 Pay Reporting, Overtime Rule May Be Repealed Following Trump Order*, SOC'Y FOR HUMAN RES. MGMT., Mar. 20, 2017, https://www.shrm.org/resources andtools/legal-and-compliance/employment-law/pages/eeo-1-overtime-repeal.

339. *See Why the Equality Act?* HUMAN RIGHTS CAMP., https://www.hrc.org/resources/why-the-equality-act (last visited Feb. 4, 2018). *See also* EQUALITY ACT OF 2017, S. 1006, 115th Cong. (1st Sess. 2017) (specifically identifying that sex discrimination includes sex, sexual orientation, gender identity, or pregnancy, childbirth, or a related medical condition or an individual, as well as because of sex-based stereotypes).

340. Equality Act of 2017, S. 1006, 115th Cong. (2017) (referred to Senate Committee on the Judiciary on May 2, 2017).