

ARTICLE

ABANDONING ENDA

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This article provides the first comprehensive analysis of ENDA's shortcomings vis-à-vis Title VII of the Civil Rights Act of 1964. Whereas federal courts are increasingly likely to perceive LGBT-related employment discrimination as actionable sex discrimination under Title VII, the inclusion of gender identity protections in recent versions of ENDA has significantly diminished the bill's prospects for passage. This article contends that advocates should abandon their efforts to enact ENDA in favor of allowing Title VII's "sex" provision to continue on its LGBT-inclusive evolution.

Title VII stands to provide LGBT persons with three distinct advantages relative to ENDA. First, Title VII allows plaintiffs to contest discrimination on either a disparate treatment or disparate impact theory. ENDA, in contrast, would permit only disparate treatment claims such that facially neutral employment practices having a disproportionately adverse effect on LGBT persons would not be actionable. Second, Title VII permits voluntary affirmative action plans whereas ENDA would prohibit preferential treatment on the basis of sexual orientation or gender identity even if LGBT persons were significantly underrepresented in a given workforce. Third, Title VII allows religious organizations to discriminate on the basis of religion but not race, color, ethnicity, or sex. ENDA, conversely, would allow religious organizations to discriminate on the basis of sexual orientation or gender identity without having to justify the discrimination on religious precepts.

This article examines the feasibility of applying Title VII's protections to LGBT persons and concludes that, notwithstanding certain logistical difficulties in the short-run, LGBT individuals would benefit from the availability of disparate impact claims, voluntary affirmative action plans, and limited exemptions for religious organizations so that ENDA should be abandoned in favor of Title VII.

INTRODUCTION

The year 2013 was momentous for lesbian, gay, bisexual, and transgender ("LGBT") persons. On June 26, the United States Supreme Court struck down Section 3 of the Defense of Marriage Act ("DOMA"),¹ which for seventeen years had restricted the federal definition of marriage to the union of one man and one woman as husband and wife.² In seeking to prohibit lawfully married same-sex couples from receiving the myriad of federal benefits afforded to lawfully married opposite-sex couples, the Court held that the principal purpose of DOMA was to impose inequality on

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¹ United States v. Windsor, 133 S. Ct. 2675 (2013).

² Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. §7 and 28 U.S.C. §1738C).

LGBT persons in violation of the Due Process Clause of the Fifth Amendment.³

The very same day, the U.S. Supreme Court issued an order effectively legalizing same-sex marriage in the state of California.⁴ After a federal district court determined that California's voter-approved ban on same-sex marriage was unconstitutional⁵ and both the governor and attorney general of California declined to appeal, the initiative's proponents were allowed to intervene and defend the ban.⁶ The Supreme Court thereafter found that the proponents did not satisfy federal standing requirements,⁷ and the stay of the district court's ruling was lifted.⁸ Although opponents of same-sex marriage argued that the district court's order legalizing same-sex marriage should be limited to the two counties named in the complaint, the California Supreme Court⁹ and the U.S. Supreme Court¹⁰ ultimately allowed the ruling to take effect statewide.

In 2013, California was one of eight states to legalize same-sex marriage.¹¹ As of January 1, same-sex marriage was legal in only nine states;¹² by December 31, that number had grown to seventeen,¹³ with five of the eight new states legalizing same-sex marriage legislatively rather than judicially.¹⁴

The LGBT community's legislative victories were not limited to the issue of same-sex marriage, however. On November 7, 2013, the U.S. Senate passed the Employment Non-Discrimination Act ("ENDA"), a bill seeking to prohibit employment discrimination on the basis of an individual's actual or perceived sexual orientation or gender identity.¹⁵ Although a version of ENDA has been introduced in every session of Congress since 1994, the Senate had never before passed any of these bills.¹⁶ LGBT persons,

³ *Windsor*, 133 S. Ct. at 2694–95.

⁴ *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

⁵ *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010).

⁶ *Perry*, 133 S. Ct. at 2660.

⁷ *Id.* at 2668.

⁸ *Perry v. Brown*, 725 F.3d 968 (9th Cir. 2013).

⁹ Maura Dolan, *California High Court Again Refuses to Stop Gay Marriages*, L.A. TIMES, July 23, 2013, at A2.

¹⁰ *Justice Denies Request to Halt Gay Marriages*, N.Y. TIMES, June 30, 2013, at A1.

¹¹ *Same Sex Marriage Laws*, NAT'L CONF. OF STATE LEG. (Feb. 26, 2014), <http://www.ncsl.org/research/human-services/same-sex-marriage-laws.aspx>, archived at <http://perma.cc/SM3D-ZGAW>.

¹² Juliet Eilperin, *Democrats View Shift in Opinion on Gay Marriage as Boon*, BOSTON GLOBE, Jan. 27, 2014, at A3.

¹³ *Id.*

¹⁴ See NAT'L CONF. OF STATE LEG., *supra* note 11 (noting that Hawaii, Illinois, Delaware, Minnesota, and Rhode Island legalized same-sex marriage via legislation whereas California, New Jersey, and New Mexico did so through court rulings).

¹⁵ Jeremy W. Peters, *Senate Approves Ban on Antigay Bias in Workplace*, N.Y. TIMES, Nov. 7, 2013, at A1.

¹⁶ Amanda Terkel, *ENDA Vote: Senate Votes to Outlaw LGBT Workplace Discrimination*, HUFFINGTON POST (Nov. 8, 2013), http://www.huffingtonpost.com/2013/11/07/enda-vote_n_4228502.html, archived at <http://perma.cc/NL5X-HZQY>.

therefore, were elated that ENDA had won the support of sixty-four senators, including ten Republicans.¹⁷ Their enthusiasm was quickly tempered by House Speaker John Boehner's (R-Ohio) announcement that ENDA would not receive a floor vote in the U.S. House but would instead be left to die in committee.¹⁸ Given that eighty percent of House Republicans—including House Speaker John Boehner, Majority Leader Eric Cantor (R-Va.), and Majority Whip Kevin McCarthy (R-Cal.)—voted against a narrower, sexual orientation-only version of ENDA in 2007,¹⁹ there was little reason to believe House Republicans would support the broader, more inclusive version of ENDA being advanced in the 113th Congress.

Then-Representative Barney Frank (D-Mass.), the lead sponsor of ENDA in the 110th, 111th, and 112th Congresses, acknowledged that the inclusion of gender identity protections in more recent versions of the bill has diminished ENDA's prospects for passage, stating:

[P]art of the problem we face is that while there have been literally decades of education of the public about the unfairness of sexual orientation discrimination and the inaccuracy of the myths that perpetuated it, our educational efforts regarding gender identity are much less far along, and given the prejudices that exist, face a steeper climb.²⁰

Whereas the vast majority of Democrats support a transgender-inclusive ENDA, "Republicans [are] overwhelmingly likely to be opposed."²¹ Indeed, many of the Republicans who previously supported a sexual orientation-only ENDA have indicated that they would vote against a transgender-inclusive version of the bill.²²

¹⁷ Chris Johnson, *Historic: Senate Passes ENDA*, WASH. BLADE (Nov. 7, 2013), <http://www.washingtonblade.com/2013/11/07/senate-passes-trans-inclusive-enda/>, archived at <http://perma.cc/ZY6V-XXQ7>.

¹⁸ Chris Johnson, *Boehner Tells LGBT Caucus "No Way" ENDA Will Pass*, WASH. BLADE, (Jan. 29, 2014), <http://www.washingtonblade.com/2014/01/29/boehner-tells-lgbt-caucus-way-enda-will-pass/>, archived at <http://perma.cc/P6Y4-LTYT>; see also Sam Stein, *John Boehner Opposes ENDA, Dealing Blow to Bill's Chances*, HUFFINGTON POST (Nov. 4, 2013), http://www.huffingtonpost.com/2013/11/04/john-boehner-enda_n_4212250.html, archived at <http://perma.cc/3T8M-ANA6> (noting Speaker Boehner believes ENDA will increase frivolous litigation and impose unnecessary financial burdens on businesses).

¹⁹ *Bill Summary & Status: Employment Non-Discrimination Act of 2007*, LIBRARY OF CONG., <http://thomas.loc.gov/cgi-bin/bdquery/z?d110:HR03685:@@X> (last visited June 2, 2013), archived at <http://perma.cc/53C3-PALB>.

²⁰ John Aravosis, *Barney on ENDA Transgender Controversy. And He's Right*, AM. BLOG (Sept. 28, 2007, 5:58 PM), <http://americablog.com/2007/09/barney-on-enda-transgender-controversy-and-hes-right.html>, archived at <http://perma.cc/CZ88-55HQ>.

²¹ *Id.*

²² Jackie Kucinich, *GOP Support for Gay Rights Measure Slips: Transgender Provisions Scare Off Republicans*, ROLL CALL (Apr. 26, 2010, 12:00 AM), http://www.rollcall.com/issues/55_121/-45524-1.html, archived at <http://perma.cc/F3C5-WAD4>; see also Sunnive Brydum, *Paul Ryan Helped Kill Trans-Inclusive ENDA*, THE ADVOCATE (Sept. 6, 2012), <http://www.advocate.com/politics/2012/09/06/paul-ryan-helped-kill-trans-inclusive-enda> ("Republican vice-presidential nominee Paul Ryan voted in favor of protecting gay, lesbian, and bisexual

Representative Frank, therefore, believes that the only viable means of enacting a transgender-inclusive ENDA requires that the Democrats simultaneously attain a simple majority in the U.S. House, a near filibuster-proof majority in the Senate, and control of the White House.²³ Representative Frank, moreover, has acknowledged that “people don’t realize how rarely we have had that. We’ve had a Democratic president, House and Senate for four years out of the 32 I’ve been in Congress.”²⁴ Thus, assuming Representative Frank is correct, ENDA is unlikely to become law anytime in the foreseeable future as Republicans are expected to retain their majority in the House and possibly gain control of the Senate following the 2014 midterm elections.²⁵

Ironically, lawmakers’ reluctance to extend employment protections to transgender persons and, by extension, lesbian, gay, and bisexual (“LGB”) individuals may have the unintended consequence of allowing LGBT persons to contest employment discrimination under the more robust provisions of Title VII of the Civil Rights Act of 1964.²⁶ Beginning in the mid-1970s and continuing through the year 2000, courts and the Equal Employment Opportunity Commission (“EEOC”) routinely dismissed LGBT persons’ employment discrimination claims on the grounds that Congress “had only the traditional notions of ‘sex’ in mind” when it passed Title VII.²⁷ Today, however, courts and the EEOC are increasingly likely to perceive LGBT-related employment discrimination as discrimination “because of . . . sex” so as to be actionable under Title VII.²⁸ The last decade, in particular, has seen a small but marked shift in favor of allowing LGBT individuals to state cognizable sex discrimination claims.²⁹ Because of this trend, advocates should abandon their seemingly quixotic quest to enact ENDA in favor of allowing Title VII’s “sex” provision to continue on its LGBT-inclusive evolution.

Title VII stands to provide LGBT persons with three distinct advantages relative to ENDA. First, Title VII allows plaintiffs to contest intentional discrimination on a disparate treatment theory and inadvertent

ual employees from discrimination in 2007, but refused to support a version of the legislation that added gender identity to the protected characteristics.”), *archived at* <http://perma.cc/XM3E-8ZKF>.

²³ Chris Geidner, *Barney Talks About ENDA’s Future, Saying Dems are the “Only Way”*, METRO WEEKLY (Nov. 29, 2011), *available at* <http://metroweekly.com/poliglot/2011/11/barney-talks-about-endas-future.html>, *archived at* <http://perma.cc/8E3W-RD3T>.

²⁴ *Id.*

²⁵ John Sides, *Republicans Have a 44% Chance of Taking the Senate. But It May be Much Higher*, MONKEY CAGE (Jan. 27, 2014, 8:00 AM), <http://www.washingtonpost.com/blogs/monkey-cage/wp/2014/01/27/republicans-have-a-44-chance-of-taking-the-senate-but-it-may-be-much-higher/>, *archived at* <http://perma.cc/6XTZ-CKKE>.

²⁶ Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 701–16, 78 Stat. 241 (codified as amended in scattered sections of 2 U.S.C., 28 U.S.C., and 42 U.S.C.).

²⁷ *DeSantis v. Pac. Tel. & Tel. Co.*, 608 F.2d 327, 329 (9th Cir. 1979), *abrogated by* *Nichols v. Azteca Rest. Enter.*, 256 F.3d 864, 875 (9th Cir. 2001).

²⁸ Civil Rights Act of 1964 § 703, 78 Stat. at 255.

²⁹ *See* discussion *infra* Part II.

discrimination on a disparate impact theory.³⁰ ENDA, in contrast, would permit only disparate treatment claims such that facially neutral employment practices having a disproportionately adverse effect on LGBT persons would not be actionable.³¹ Second, Title VII allows employers to adopt voluntary affirmative action plans for the purpose of eliminating manifest imbalances in traditionally segregated job categories, provided the plans are temporary and do not unnecessarily trammel the rights of non-minorities.³² ENDA, on the other hand, would prohibit employers from adopting quotas or granting preferential treatment on the basis of sexual orientation or gender identity even if LGBT persons were significantly underrepresented in a particular workforce.³³ Third, Title VII permits religious organizations to discriminate on the basis of religion but not race, color, national origin, or sex.³⁴ ENDA, conversely, would allow religious organizations to discriminate on the basis of sexual orientation or gender identity without having to justify the discrimination on religious precepts.³⁵

This article examines the feasibility of applying Title VII's protections to lesbian, gay, bisexual, and transgender persons and concludes that, notwithstanding certain logistical difficulties in the short-run, the advantages of litigating LGBT-related discrimination claims under Title VII are sufficiently great to warrant ENDA's abandonment. Part I provides a brief history of Congress's attempts to enact legislation prohibiting discrimination on the basis of sexual orientation and, more recently, gender identity. Part II confirms that federal courts and the EEOC are increasingly likely to perceive LGBT-related employment discrimination as actionable sex discrimination under Title VII. Part III demonstrates that lesbian, gay, bisexual, and transgender persons would benefit from the availability of disparate impact claims, voluntary affirmative action plans, and limited exemptions for religious organizations, all of which are available under Title VII but stand to be precluded by ENDA.

I. FORTY YEARS OF FAILURE: PRIOR LEGISLATIVE ATTEMPTS TO PROHIBIT LGBT-RELATED EMPLOYMENT DISCRIMINATION

The earliest LGB nondiscrimination bills were also the most ambitious.³⁶ Rather than seeking to enact a stand-alone statute prohibiting only sexual orientation-based employment discrimination, these bills would have

³⁰ *Ricci v. DeStefano*, 557 U.S. 557, 577–78 (2009).

³¹ S. 815, 113th Cong. § 4(g) (2013); H.R. 1755, 113th Cong. § 4(g) (2013).

³² *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 208–09 (1979).

³³ S. 815, 113th Cong. § 4(f) (2013); H.R. 1755, 113th Cong. § 4(f) (2013).

³⁴ 42 U.S.C. § 2000e-1(a) (2006).

³⁵ S. 815, 113th Cong. § 6 (2013); H.R. 1755, 113th Cong. § 6 (2013).

³⁶ See Alex Reed, *A Pro-Trans Argument for a Transexclusive Employment Non-Discrimination Act*, 50 AM. BUS. L.J. 835, 837–49 (2013) (providing a detailed history of Congress's attempts to pass legislation prohibiting discrimination on the basis of sexual orientation and, more recently, gender identity).

amended the Civil Rights Act of 1964 to include sexual orientation as a protected class along with race, color, religion, sex, and national origin.³⁷ Had these bills become law, LGB persons would have secured protections against discrimination in employment as well as in public accommodations, public facilities, and federally-assisted programs.³⁸ Although each of these bills died in committee,³⁹ support for amending the Civil Rights Act rose steadily over the years, with the number of cosponsors in the House increasing from 0 in 1974 to 110 in 1991 and in the Senate from 3 in 1979 to 16 in 1991.⁴⁰

In 1994, however, LGB advocates ceased their efforts to amend the Civil Rights Act in favor of enacting a freestanding ENDA.⁴¹ Scholars have offered various theories for this abrupt shift in strategy. Some commentators have suggested that “the loss in the fight against Don’t Ask, Don’t Tell—the U.S. military’s [1993] ban on openly gay, lesbian, or bisexual people from military service—had seriously weakened the perceived political power” of the LGB community such that amending the Civil Rights Act was no longer a viable option.⁴² It has also been asserted that the “decade-long battle against the AIDS epidemic had exhausted the gay and lesbian community’s resources” so that advocates lacked the means to continue the fight for more expansive protections.⁴³ The passage of the Americans with Disabilities Act,⁴⁴ moreover, had “demonstrated that a stand-alone civil rights statute was more palatable to Congress than an amendment to existing civil rights legislation.” Thus, to its proponents, ENDA represented the proverbial path of least resistance.⁴⁵

Representative Barney Frank, meanwhile, attributed ENDA’s rise to a shift in public attitudes toward affirmative action. According to Congressman Frank, opponents had been so successful in “demonizing affirmative action as the source of ‘reverse discrimination’ against white males” that by the 1980s, any legislation proposing an expansion of affirmative action was

³⁷ J. Banning Jasiunas, *Is ENDA the Answer? Can a “Separate but Equal” Federal Statute Adequately Protect Gays and Lesbians from Employment Discrimination?*, 61 OHIO ST. L.J. 1529, 1545 (2000).

³⁸ See Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 243–66.

³⁹ Mary Kristen Kelly, *(Trans)forming Traditional Interpretations of Title VII: “Because of Sex” and the Transgender Dilemma*, 17 DUKE J. GENDER L. & POL’Y 219, 234 (2010).

⁴⁰ William C. Sung, *Taking the Fight Back to Title VII: A Case for Redefining “Because of Sex” to Include Gender Stereotypes, Sexual Orientation, and Gender Identity*, 84 S. CAL. L. REV. 487, 497–98 (2011).

⁴¹ Chai R. Feldblum, *The Federal Gay Rights Bill: From Bella to ENDA*, in *CREATING CHANGE: SEXUALITY, PUBLIC POLICY, AND CIVIL RIGHTS* 149, 178–79 (John D’Emilio, William B. Turner & Urvashi Vaid eds., 2000).

⁴² Sung, *supra* note 40, at 497 (quoting Chai R. Feldblum, *The Federal Gay Rights Bill: From Bella to ENDA*, in *CREATING CHANGE: SEXUALITY, PUBLIC POLICY, AND CIVIL RIGHTS* 149, 178 (John D’Emilio, William B. Turner & Urvashi Vaid eds., 2000)).

⁴³ *Id.* at 497.

⁴⁴ Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified as amended in scattered sections of 29 U.S.C., 42 U.S.C., and 47 U.S.C.).

⁴⁵ Sung, *supra* note 40, at 497.

destined to fail.⁴⁶ LGB advocates responded by drafting the Civil Rights Act amendments of 1989⁴⁷ to restrict affirmative action on the basis of sexual orientation.⁴⁸ These modifications failed to mollify opponents and alarmed those who supported affirmative action for racial minorities and women on the belief that such concessions, once made, could not be contained to sexual orientation.⁴⁹ Representative Frank and his allies, therefore, chose to forego further attempts to amend the Civil Rights Act in favor of pursuing a narrower, stand-alone statute, which would expressly disallow sexual orientation-based affirmative action.

Twenty years' worth of prior lobbying allowed ENDA to make a strong debut on Capitol Hill in the summer of 1994.⁵⁰ By 1996, ENDA appeared to be on the brink of passing at least one house of Congress.⁵¹ Proponents in the Senate calculated that they had 50 votes in support of the bill, with Vice President Al Gore set to cast the tie-breaking vote in favor of passage.⁵² Opponents, however, threatened to filibuster ENDA unless proponents agreed to permit a vote on the Defense of Marriage Act ("DOMA").⁵³ DOMA sought to establish a federal definition of marriage as the union of one man and one woman while ensuring that no state would be compelled to recognize same-sex marriages legally performed in another state.⁵⁴ Ostensibly believing that meaningful employment protections were of greater concern to most LGB persons than the federal government's position on the then-purely hypothetical issue of same-sex marriage, proponents agreed to allow a vote on DOMA in exchange for their colleagues' promise to permit a vote on ENDA.⁵⁵ On the day of the vote, however, one of ENDA's supporters was unexpectedly called away on a personal matter and ENDA was defeated fifty to forty-nine.⁵⁶

⁴⁶ Barney Frank, *Civil Rights, Legislative Wrongs*, THE ADVOCATE, Feb. 15, 2000, at 9.

⁴⁷ See H.R. 655, 101st Cong. (1989) ("Nothing in this Act shall be construed to permit or require . . . the use of any quota as a remedy for discrimination on the basis of sexual orientation.").

⁴⁸ Frank, *supra* note 46, at 9.

⁴⁹ *Id.*

⁵⁰ The Employment Non-Discrimination Act of 1994 had 109 cosponsors in the House and 30 in the Senate. See S. 2238, 103d Cong. (1994); H.R. 4636, 103d Cong. (1994).

⁵¹ See S. 932, 104th Cong. (1995); H.R. 1863, 104th Cong. (1995).

⁵² Sung, *supra* note 40, at 502.

⁵³ Jill D. Weinberg, *Gender Nonconformity: An Analysis of Perceived Sexual Orientation and Gender Identity Protection under the Employment Non-Discrimination Act*, 44 U.S.F. L. REV. 1, 10 (2009).

⁵⁴ H.R. 3396, 104th Cong. §§ 2(a), 3(a) (1996) (enacted).

⁵⁵ See Weinberg, *supra* note 53, at 10.

⁵⁶ Sung, *supra* note 40, at 502. DOMA, meanwhile, passed eighty-five to fourteen and was ultimately enacted into law. Sung, *supra* note 40, at 502. The Supreme Court subsequently held section 3 of DOMA unconstitutional. *United States v. Windsor*, 133 S. Ct. 2675, 2696 (2013).

Although ENDA was reintroduced in 1997,⁵⁷ 1999,⁵⁸ 2001,⁵⁹ and 2003,⁶⁰ each of these bills ultimately died in committee. Whereas a sexual orientation-only ENDA had always enjoyed bipartisan support, the bill was not a priority for the new Republican-controlled Congress.⁶¹ Separately, enthusiasm among ENDA's proponents was dealt a serious blow in 1999 when several prominent advocacy organizations announced they were withdrawing their support because the bill failed to include protections for transgender persons.⁶² ENDA's prospects were further diminished following the 2000 presidential election as President George W. Bush indicated that he would veto any bill seeking to extend employment protections on the basis of sexual orientation.⁶³

After languishing for more than a decade, ENDA was suddenly resurgent in the spring of 2007.⁶⁴ Democrats had made substantial gains in the 2006 midterm elections and once again controlled both chambers of Congress.⁶⁵ Under the leadership of House Speaker Nancy Pelosi (D-Cal.), Democrats made ENDA a top legislative priority for the 110th Congress.⁶⁶ Unlike its predecessors, the Employment Non-Discrimination Act of 2007 ("ENDA 2007") stood to protect not only LGB individuals but also transgender persons by prohibiting employment discrimination on the basis of an "individ-

⁵⁷ See S. 869, 105th Cong. (1997); H.R. 1858, 105th Cong. (1997).

⁵⁸ See S. 1276, 106th Cong. (1999); H.R. 2355, 106th Cong. (1999).

⁵⁹ See S. 1284, 107th Cong. (2001); H.R. 2692, 107th Cong. (2001).

⁶⁰ See S. 1705, 108th Cong. (2003); H.R. 3285, 108th Cong. (2003).

⁶¹ See Adam Clymer, *The 1994 Elections: Congress the Overview*; *G.O.P. Celebrates its Sweep to Power; Clinton Vows to Find Common Ground*, N.Y. TIMES, Nov. 10, 1994, at A1 ("[Representative] Gingrich said the Republicans in the House would move swiftly after the new Congress convenes . . . to adopt the legislation specified in their 'Contract with America.'"); Kenneth J. Cooper, *GOP Offers a 'Contract' to Revive Reagan Years*, WASH. POST, Sept. 28, 1994, at A1 ("Besides tax cuts, balanced budgets and term limits, the GOP contract calls for House action on welfare reform, a stripped-down crime bill, legal reform and defense spending."); Robin Toner, *73 Mr. Smiths, of the G.O.P., Go to Washington*, N.Y. TIMES, Jan. 8, 1995, at A1 ("[M]any of the Republican freshmen [view the Contract with America as] a political bible.").

⁶² Shannon H. Tan, *When Steve is Fired for Becoming Susan: Why Courts and Legislators Need to Protect Transgender Employees from Discrimination*, 37 STETSON L. REV. 579, 605 (2008).

⁶³ Although the 2001 and 2003 versions of ENDA were introduced during the first term of the George W. Bush presidency, neither was given serious consideration by Congress. As a result, the President was not compelled to take a position on either bill publicly. When the Democrats gained control of Congress in 2006 and the passage of ENDA 2007 appeared increasingly likely, however, the White House issued a statement indicating that President Bush would be inclined to veto the bill for fear it would substantially burden the free exercise of religion. Kate B. Rhodes, *Defending ENDA: The Ramifications of Omitting the BFOQ Defense in the Employment Non-Discrimination Act*, 19 LAW & SEXUALITY 1, 3-4 (2010).

⁶⁴ As originally introduced, ENDA 2007 had seventy cosponsors in the House. See H.R. 2015, 110th Cong. (2007).

⁶⁵ *Dems in Control*, CHI. TRIB., Nov. 10, 2006, at A3.

⁶⁶ See Press Release, House Speaker Nancy Pelosi, Pelosi: ENDA is an Historic Advancement for Gays and Lesbians (Sept. 28, 2007) ("For my twenty years in Congress, ending discrimination against gays and lesbians has been a top priority of mine.").

ual's actual or perceived sexual orientation or gender identity."⁶⁷ As summer gave way to fall, however, opposition to a gender-identity-inclusive ENDA began to mount. An internal poll by the House leadership revealed that although a majority of Democrats remained committed to passing an inclusive ENDA, a handful were likely to break ranks and join with a majority of Republicans to defeat the bill.⁶⁸ Over the strenuous objections of the LGBT community, the Democratic leadership chose to proceed with a sexual orientation-only version of the bill that ultimately passed the U.S. House by a vote of 235 to 184.⁶⁹ Because the Senate never took the bill up,⁷⁰ however, ENDA 2007 died with the adjournment of the 110th Congress.

Seeking to avoid the political infighting of 2007, in each subsequent version of the bill ENDA's sponsors have included language prohibiting gender identity discrimination.⁷¹ The 2009 and 2011 versions of ENDA did not fare as well as their 2007 counterpart, however, having both died in committee.⁷² While this reversal of fortune was primarily attributable to a change in the leadership of the U.S. House, Congress's reluctance to move forward on a bill that once enjoyed broad bipartisan support appeared to validate the concerns that precipitated gender identity protections' removal from ENDA 2007. Indeed, although the Senate passed a gender-identity-inclusive ENDA in 2013 ("ENDA 2013"), the bill's protections for transgender persons continued to elicit strong opposition.⁷³ Thus, a significant number of lawmakers in both parties ostensibly continue to be uncomfortable with the notion of a

⁶⁷ H.R. 2015, 110th Cong. § 4(a)(1) (2007).

⁶⁸ Aravosis, *supra* note 20.

⁶⁹ Elias Vitulli, *A Defining Moment in Civil Rights History? The Employment Non-Discrimination Act, Trans-Inclusion, and Homonormativity*, 7 *SEXUALITY RES. & SOC. POL'Y* 155, 165 (2010).

⁷⁰ Sung, *supra* note 40, at 501.

⁷¹ See S. 815, 113th Cong. § 4 (2013); H.R. 1755, 113th Cong. § 4 (2013); S. 811, 112th Cong. § 4 (2011); H.R. 1397, 112th Cong. § 4 (2011); S. 1584, 111th Cong. § 4 (2009); H.R. 3017, 111th Cong. § 4 (2009).

⁷² See *Bill Summary & Status: Employment Non-Discrimination Act of 2009*, LIBRARY OF CONG., <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:h.r.03017>: (last visited March 4, 2014), archived at <http://perma.cc/NR67-BGFG>; *Bill Summary & Status: Employment Non-Discrimination Act*, LIBRARY OF CONG., <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:h.r.01397>: (last visited March 4, 2014), archived at <http://perma.cc/7ND8-F5CB>.

⁷³ See S. REP. NO. 113-105, at 25–26 (2013) (listing the concerns of the Senators who opposed ENDA 2013 in committee, including a desire to protect schoolchildren from their transgender classmates and a desire to protect employers from the “devastating” repercussions that would result if transgender persons were allowed to use facilities consistent with their gender identities over the objections of employees and customers); see also Ryan T. Anderson, *ENDA Threatens Fundamental Civil Liberties*, HERITAGE FOUND. (Nov. 1, 2013), <http://www.heritage.org/research/reports/2013/11/enda-threatens-fundamental-civil-liberties> (asserting that “prohibiting employers from making decisions about transgendered employees, especially when in positions of role-modeling, could be detrimental to children” and suggesting that “ENDA would prevent employers from protecting children from these adult debates about sex and gender identity by barring employers from making certain decisions about transgendered employees”), archived at <http://perma.cc/GYV6-ZWGY>. The Heritage Foundation is the pre-eminent conservative think tank in the United States and has promised to penalize legislators supporting ENDA on its “scorecard” for conservatism. See “No” on the *Employment Non-Discrimination Act (ENDA)*, HERITAGE ACTION FOR AM. (Nov. 1, 2013), <http://heritageaction>

transgender-inclusive ENDA even if they otherwise support extending employment protections to LGB persons.⁷⁴

II. INTERPRETING “BECAUSE OF SEX” TO INCLUDE LGBT INDIVIDUALS

Ironically, by the time lawmakers are prepared to enact a fully inclusive ENDA, the need for LGBT-specific employment legislation will likely have ceased to exist. ENDA is predicated on the notion that Title VII does not proscribe LGBT-related employment discrimination such that separate legislation is necessary to protect lesbian, gay, bisexual, and transgender persons. Until relatively recently, this view was supported by decades of adverse judicial and administrative decisions dismissing employment discrimination claims by LGBT individuals. Courts and the EEOC, however, are increasingly likely to perceive discrimination on the basis of sexual orientation or gender identity as actionable sex discrimination under Title VII. Whereas only a handful of jurisdictions currently permit LGBT persons to state cognizable sex discrimination claims, the recent marked shift in favor of affording LGBT persons protection under Title VII suggests that ENDA will become moot before it becomes law.

A. *Transgender Persons*

Courts initially relied on a narrow, biologically-based definition of “sex” to dismiss discrimination claims brought by transgender persons. These courts’ justification for eschewing a more inclusive interpretation of “sex” was threefold. First, “the plain meaning of ‘sex’ [purportedly] referred only to birth-assigned sex [such that it] encompassed neither gender identity nor transsexuality.”⁷⁵ Second, “the sparse legislative history of Title VII [ostensibly] militated against a broader reading of ‘sex’” as “Congress [presumably] would have engaged in a more lengthy debate had it intended to include . . . something as controversial as gender identity.”⁷⁶ Third, the

.com/key-votes/employment-non-discrimination-act-enda/, archived at <http://perma.cc/DVF-3ZXF>.

⁷⁴ See Aravosis, *supra* note 20 (noting it has taken “decades of education . . . about the unfairness of sexual orientation discrimination” to have even a chance of extending employment protections on the basis of sexual orientation whereas “educational efforts regarding gender identity are much less far along, and . . . face a steeper climb”).

⁷⁵ Jason Lee, *Lost in Transition: The Challenges of Remediating Transgender Employment Discrimination under Title VII*, 35 HARV. J. L. & GENDER 423, 430 (2012); see also *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984) (finding that the “plain meaning” of Title VII “implies that it is unlawful to discriminate against women because they are women and against men because they are men”); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982) (concluding that the term “sex” should be “given its traditional definition” in the absence of any clearly expressed legislative intent to the contrary); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 663 (9th Cir. 1977) (noting that the term “sex” should be interpreted to reflect its “traditional meaning”).

⁷⁶ Lee, *supra* note 75, at 430–31; see also *Ulane*, 742 F.2d at 1085 (“The total lack of legislative history supporting the sex amendment coupled with the circumstances of the

repeated rejection of bills seeking to amend Title VII to prohibit sexual orientation discrimination supposedly confirmed that the term “sex” “should be given a narrow, traditional interpretation, which would also exclude transsexuals.”⁷⁷

The rationale underlying these holdings was subsequently called into question by the Supreme Court’s decision in *Price Waterhouse v. Hopkins*,⁷⁸ wherein the Court appeared to reject a narrow, biologically-based definition of “sex” in favor of a more expansive, culturally-influenced understanding of the term as encompassing aspects of gender.⁷⁹ In finding that an employer had discriminated against a female employee for being too “macho,” the Court declared, “we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group.”⁸⁰ Known as the sex-stereotyping theory of sex discrimination, “this principle permits an individual to bring a claim under Title VII if an employer has based an employment decision on the individual’s failure to conform to stereotypical expectations of how men and women should look and behave.”⁸¹

Twenty-five years later, a small but growing number of courts permit transgender persons to contest employment discrimination on a sex-stereotyping theory notwithstanding employers’ assertions that such claims are an attempt to bootstrap gender identity protection into Title VII. These courts hold that an individual’s transgender status “should not [be permitted to] spoil what would otherwise be an actionable sex-stereotyping claim.”⁸² Instead, a plaintiff’s transgenderism is treated as a neutral element that neither helps nor hinders her ability to prevail on a sex-stereotyping theory.⁸³ This view represents the first of two distinct approaches by which transgender

amendment’s adoption clearly indicates that Congress never considered nor intended that this 1964 legislation would apply to anything other than the traditional concept of sex.”); *Sommers*, 667 F.2d at 750 (“The legislative history does not show any intention to include transsexualism in Title VII.”); *Holloway*, 566 F.2d at 663 (“Congress has not shown any intent other than to restrict the term ‘sex’ to its traditional meaning, [and] this court will not expand Title VII’s application in the absence of Congressional mandate.”).

⁷⁷ *Ulane*, 742 F.2d at 1086; see also *Sommers*, 667 F.2d at 750 (“The fact that these proposals were defeated indicates that the word ‘sex’ in Title VII is to be given its traditional definition, rather than an expansive interpretation.”); *Holloway*, 566 F.2d at 662 (citing Congress’s failure to enact legislation prohibiting discrimination on the basis of “sexual preference” as proof that “Congress had only the traditional notions of ‘sex’ in mind” when it passed Title VII).

⁷⁸ 490 U.S. 228 (1989).

⁷⁹ Professor Mary Anne Case has advocated that the term “sex” be used to “refer[] to the anatomical and physiological distinctions between men and women” whereas “the cultural overlay on those anatomical and physiological distinctions” be regarded as matters of gender. Mary Anne Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 *YALE L.J.* 1, 10 (1995).

⁸⁰ *Price Waterhouse*, 490 U.S. at 251.

⁸¹ Lee, *supra* note 75, at 432.

⁸² Lee, *supra* note 75, at 435.

⁸³ See Lee, *supra* note 75, at 435.

persons are able to challenge employment discrimination under Title VII and is known as the Gender Nonconformity Approach.⁸⁴

The Gender Nonconformity Approach received the endorsement of the Sixth Circuit Court of Appeals in the seminal case of *Smith v. City of Salem*.⁸⁵ In dismissing a transgender plaintiff's sex-stereotyping claim, the Sixth Circuit held that the district court failed to give sufficient "consideration to [the transgender plaintiff's] well-pleaded claims concerning his contra-gender behavior" and instead "accounted for that behavior only insofar as it confirmed . . . [plaintiff's] status as a transsexual, which the district court held precluded [plaintiff] from Title VII protection."⁸⁶ The Sixth Circuit found that this analysis could not "be reconciled with *Price Waterhouse*, which does not make Title VII protection against sex stereotyping conditional or provide any reason to exclude Title VII coverage for non-stereotypical behavior simply because the person is transsexual."⁸⁷ The Sixth Circuit is not alone in allowing transgender persons to state viable sex-stereotyping claims. The Ninth Circuit Court of Appeals⁸⁸ and seven U.S. district courts⁸⁹ also utilize the Gender Nonconformity Approach.

Alternatively, some courts permit transgender persons to contest employment discrimination directly using the Per Se Approach.⁹⁰ These courts hold "that discrimination on the basis of a person's transgender status is per se actionable under Title VII, relying either on the statutory language of Title VII or the nature of transgenderism itself."⁹¹ Because transgender persons may state cognizable sex discrimination claims irrespective of their ostensible gender nonconformity, the sex-stereotyping theory is largely superfluous in jurisdictions embracing the Per Se Approach. Nonetheless, some courts rely on the sex-stereotyping theory to justify their recognition of status-based protections for transgender persons. The Eleventh Circuit Court of Appeals, for example, premised its adoption of the Per Se Approach on the

⁸⁴ See Lee, *supra* note 75, at 435.

⁸⁵ 378 F.3d 566 (6th Cir. 2004).

⁸⁶ *Id.* at 574.

⁸⁷ *Id.* at 574–75.

⁸⁸ See *Kastl v. Maricopa Cnty. Cmty. Coll. Dist.*, 325 Fed. Appx. 492 (9th Cir. 2009).

⁸⁹ See *Hart v. Lew*, No. ELH-12-03482, 2013 WL 5330581 (D. Md. Sept. 23, 2013); *Glenn v. Brumby*, 724 F. Supp. 2d 1284 (N.D. Ga. 2010); *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008); *Lopez v. River Oaks Imaging & Diagnostic Grp.*, 542 F. Supp. 2d 653 (S.D. Tex. 2008); *Creed v. Family Express Corp.*, No. 3:06-CV-465RM, 2007 WL 2265630 (N.D. Ind. Aug. 3, 2007); *Mitchell v. Axcan Scandipharm, Inc.*, No. Civ.A. 05-243, 2006 WL 456173 (W.D. Pa. Feb. 17, 2006); *Tronetti v. TLC Healthnet Lakeshore Hosp.*, No. 03-CV-0375E(SC), 2003 WL 22757935 (W.D.N.Y. Sept. 26, 2003).

⁹⁰ See Lee, *supra* note 75, at 436; see also *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011) (noting there is "a congruence between discriminating against transgender and transsexual individuals and discrimination on the basis of gender-based behavioral norms"); *Hart*, 2013 WL 5330581, at *17 (denying employer's motion to dismiss where a reasonable inference could be drawn that plaintiff "was discharged because of her sex, her status as a transsexual, and/or her failure to conform with gender norms"); *Schroer*, 577 F. Supp. 2d at 308 (holding that discrimination on the basis of an individual's transgender status is "literally discrimination because of sex").

⁹¹ Lee, *supra* note 75, at 436.

fact that “a person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes,” leading the court to conclude that “there is a congruence between discriminating against transgender and transsexual individuals and discrimination on the basis of gender-based behavioral norms.”⁹² The controversial nature of this approach is evidenced by the fact that only three courts—the Eleventh Circuit and two U.S. district courts⁹³—perceive discrimination predicated on a person’s transgender status and their behavior transgressing sex stereotypes as actionable sex discrimination under Title VII.

After receiving the EEOC’s unqualified endorsement in *Macy v. Holder*,⁹⁴ however, the Per Se Approach appears poised to overtake the Gender Nonconformity Approach as the primary means by which transgender persons may successfully invoke the protections of Title VII. In *Macy*, the EEOC determined that a transgender plaintiff’s “gender identity stereotyping” claim was eligible for adjudication under Title VII as a form of sex discrimination:

When an employer discriminates against someone because the person is transgender, the employer has engaged in disparate treatment “related to the sex of the victim.” This is true regardless of whether an employer discriminates against an employee because the individual has expressed his or her gender in a non-stereotypical fashion, because the employer is uncomfortable with the fact that the person has transitioned or is in the process of transitioning from one gender to another, or because the employer simply does not like that the person is identifying as a transgender person. In each of these circumstances, the employer is making a gender-based evaluation, thus violating the Supreme Court’s admonition [in *Price Waterhouse v. Hopkins*] that “an employer may not take gender into account in making an employment decision.”⁹⁵

Although *Macy* is not binding on federal courts, the Supreme Court has held that EEOC rulings “constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.”⁹⁶ Courts adjudicating discrimination claims brought by transgender persons, thus, will have difficulty discounting *Macy*’s sweeping declaration that “intentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination based on sex.”⁹⁷

⁹² *Glenn*, 663 F.3d at 1316.

⁹³ See *Hart*, 2013 WL 5330581, at *17; *Schroer*, 577 F. Supp. 2d at 308.

⁹⁴ No. 0120120821, 2012 WL 1435995 (E.E.O.C. Apr. 20, 2012).

⁹⁵ *Id.* at *7–8 (alteration in original) (citations omitted).

⁹⁶ *Meritor Sav. Bank FSB v. Vinson*, 477 U.S. 57, 65 (1986) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

⁹⁷ *Macy*, 2012 WL 1435995, at *11. Some commentators have argued that *Macy* is vulnerable to being overturned such that a transgender-inclusive ENDA is still needed. See *Why We Still Need a Fully Inclusive ENDA*, THE ADVOCATE (Apr. 27, 2012), <http://www.advocate.com/>

B. Lesbian, Gay, and Bisexual Persons

Courts initially commandeered decisions holding that Title VII does not prohibit discrimination on the basis of “transsexualism” to dismiss discrimination claims brought by lesbian, gay, and bisexual persons. In *DeSantis v. Pacific Telephone and Telegraph Company*, for example, the Ninth Circuit Court of Appeals cited its dismissal of a transgender person’s employment discrimination claim as evidence that “Title VII’s prohibition of ‘sex’ discrimination . . . should not be judicially extended to include sexual preference such as homosexuality.”⁹⁸ Similarly, in *Spearman v. Ford Motor Company*, the Seventh Circuit Court of Appeals invoked its dismissal of a transgender person’s Title VII claim to conclude that “Congress intended the term ‘sex’ to mean ‘biological male or biological female,’ and not one’s sexuality or sexual orientation.”⁹⁹ Courts then began citing *DeSantis* and *Spearman* for the proposition that Title VII does not prohibit discrimination on the basis of sexual orientation.¹⁰⁰ A number of courts have relied on these earlier decisions to dismiss LGB persons’ discrimination claims, often without “examin[ing] the reasoning underlying the precedent or even determin[ing] whether the precedent [was] a true holding or merely dicta.”¹⁰¹

Congress’s failure to enact legislation prohibiting discrimination on the basis of sexual orientation ostensibly provided a second basis for dismissing LGB persons’ discrimination claims. According to the *DeSantis* court, “later legislative activity” confirmed that “Congress had only the traditional notions of ‘sex’ in mind” when it passed Title VII given that “several bills [had] been introduced to [a]mend the Civil Rights Act to prohibit discrimination against ‘sexual preference’” but “none [had] been enacted into law.”¹⁰² The Second Circuit Court of Appeals employed similar logic in *Simonton v. Runyon*, finding that “Congress’s refusal to expand the reach of Title VII [to include sexual orientation] is strong evidence of congressional intent.”¹⁰³

Dismissing LGB persons’ discrimination claims based on congressional inaction, however, would seem to contradict the Supreme Court’s admonition that “failed legislative proposals are a particularly dangerous ground on

politics/commentary/2012/04/27/oped-why-we-still-need-fully-inclusive-enda, archived at <http://perma.cc/ZS65-ES5J>.

⁹⁸ 608 F.2d 327, 329–30 (9th Cir. 1979), abrogated by *Nichols v. Azteca Rest. Enter.*, 256 F.3d 864, 875 (9th Cir. 2001).

⁹⁹ 231 F.3d 1080, 1084 (7th Cir. 2000).

¹⁰⁰ See, e.g., *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 766 (6th Cir. 2006) (citing *Spearman*); *Williamson v. A.G. Edwards and Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989) (citing *DeSantis*).

¹⁰¹ Victoria Schwartz, *Title VII: A Shift from Sex to Relationships*, 35 HARV. J. L. & GEN. DER 209, 236 (2012).

¹⁰² 608 F.2d at 329.

¹⁰³ 232 F.3d 33, 35 (2d Cir. 2000).

which to rest an interpretation of a prior statute.”¹⁰⁴ The Court has explained that “congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn, including the inference that the existing legislation already incorporated the offered change.”¹⁰⁵ Speaker Boehner, for example, has repeatedly argued that ENDA is “unnecessary” on the grounds that “people are already protected in the workplace.”¹⁰⁶ Similarly, those senators opposing ENDA 2013 in committee asserted that “the legislation is not necessary” given “that employment protections for LGBT individuals have been granted under Title VII of the Civil Rights Act of 1964.”¹⁰⁷ A similar assertion was made by House members who opposed ENDA 2007: “We . . . believe the protections found in Title VII of the Civil Rights Act to be, on balance, sufficient for guarding against” intentional discrimination against LGBT persons such that “we . . . find [ENDA] to be unnecessary.”¹⁰⁸ Consequently, Congress’s failure to pass ENDA could be interpreted to suggest that sexual orientation discrimination is already prohibited under Title VII so as to render ENDA unnecessary.

Although *Price Waterhouse* appeared to provide gender nonconforming lesbian, gay, and bisexual individuals with a viable means of contesting employment discrimination under Title VII beginning in 1989, courts were hesitant to permit sex-stereotyping claims by LGB persons prior to the Supreme Court’s 1998 decision in *Oncale v. Sundowner Offshore Services, Inc.*¹⁰⁹ In holding that same-sex sexual harassment is actionable under Title VII, the *Oncale* Court acknowledged that “male-on-male sexual harassment . . . was assuredly not the principal evil Congress was concerned with when it enacted Title VII.”¹¹⁰ The Court, nonetheless, recognized that “statutory prohibitions often go beyond the principal evil to cover reasonably compara-

¹⁰⁴ *Rapanos v. United States*, 547 U.S. 715, 749 (2006) (quoting *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng’r*, 531 U.S. 159, 169–70 (2001)).

¹⁰⁵ *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) (quoting *United States v. Wise*, 370 U.S. 405, 411 (1962)).

¹⁰⁶ Sunnive Brydum, *Boehner Sees “No Basis or Need” for ENDA*, THE ADVOCATE (Nov. 14, 2013), <http://www.advocate.com/politics/2013/11/14/watch-boehner-sees-no-basis-or-need-enda>, archived at <http://perma.cc/PZM4-JK8F>; see also Sam Stein, *John Boehner Opposes ENDA, Dealing Blow to Bill’s Chances*, HUFFINGTON POST (Nov. 4, 2013), http://www.huffingtonpost.com/2013/11/04/john-boehner-enda_n_4212250.html (noting that one of Speaker Boehner’s aides indicated that this rationale was consistent with the Speaker’s prior positions, stating, “we have always believed this is covered by existing law”), archived at <http://perma.cc/66E3-TYBZ>; Chris Johnson, *Boehner on ENDA: ‘I Haven’t Thought Much About It’*, WASH. BLADE (Apr. 18, 2012), <http://www.washingtonblade.com/2012/04/18/boehner-on-enda-i-havent-thought-much-about-it/> (reporting that Speaker Boehner believes “there are ample laws already in place to deal with” workplace discrimination against LGBT persons), archived at <http://perma.cc/Y4RJ-6ARR>.

¹⁰⁷ S. REP. NO. 113-105, at 26 (2013).

¹⁰⁸ H.R. REP. NO. 110-406, at 59 (2007).

¹⁰⁹ 523 U.S. 75 (1998).

¹¹⁰ *Id.* at 79.

ble evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.”¹¹¹

Fifteen years after *Oncale*, a small but significant number of courts permit openly LGB persons to contest employment discrimination on a sex-stereotyping theory notwithstanding employers’ assertions that such claims are an attempt to bootstrap sexual orientation protection into Title VII. These courts hold that an individual’s homosexual or bisexual status should not be permitted to spoil what would otherwise be an actionable sex-stereotyping claim. This view represents the first of two distinct approaches by which LGB persons are able to challenge employment discrimination under Title VII and, as in the transgender context, will be referred to as the Gender Nonconformity Approach.¹¹²

The Third Circuit Court of Appeals endorsed the Gender Nonconformity Approach in *Prowel v. Wise Business Forms, Inc.*¹¹³ The district court granted summary judgment for the defendant after determining that the plaintiff’s sex-stereotyping claim was, in reality, a claim for sexual orientation discrimination.¹¹⁴ On appeal, the defendant argued that “every case of sexual orientation discrimination cannot translate into a triable case of gender stereotyping discrimination” as that “would contradict Congress’s decision not to make sexual orientation discrimination cognizable under Title VII.”¹¹⁵ The Third Circuit characterized this argument as a straw man designed to obfuscate the more fundamental issue of whether LGB persons may bring sex-stereotyping claims:

[Defendant] cannot persuasively argue that because [plaintiff] is homosexual, he is precluded from bringing a gender stereotyping claim. There is no basis in the statutory or case law to support the notion that an effeminate heterosexual man can bring a gender stereotyping claim while an effeminate homosexual man may not. As long as the employee—regardless of his or her sexual orientation—marshals sufficient evidence such that a reasonable jury could conclude that . . . discrimination occurred “because of sex,” the case is not appropriate for summary judgment.¹¹⁶

The Third Circuit is not alone in allowing openly LGB persons to state viable sex-stereotyping claims. The Ninth Circuit Court of Appeals,¹¹⁷ two U.S.

¹¹¹ *Id.*

¹¹² See Lee, *supra* note 75, at 435 (coining the phrase “Gender Nonconformity Approach” in the context of sex-stereotyping claims brought by transgender persons).

¹¹³ 579 F.3d 285 (3d Cir. 2009).

¹¹⁴ *Id.* at 289.

¹¹⁵ *Id.* at 292.

¹¹⁶ *Id.*

¹¹⁷ See *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061 (9th Cir. 2002).

district courts,¹¹⁸ and the EEOC's Office of Federal Operations¹¹⁹ also utilize the Gender Nonconformity Approach.

Alternatively, some courts permit LGB persons to contest employment discrimination directly using the Per Se Approach.¹²⁰ These courts hold that discrimination on the basis of a person's actual or perceived same-sex sexual attraction is per se actionable under Title VII. The Per Se Approach is predicated on the notion that LGB persons, by definition, do not conform to traditional gender norms to the extent they are sexually attracted to persons of the same sex.¹²¹ Because LGB persons may state cognizable sex discrimination claims notwithstanding their gender-conforming appearance and behavior, the Per Se Approach allows masculine gay and bisexual men and feminine lesbian and bisexual women to raise viable sex discrimination claims under Title VII. In *Heller v. Columbia Edgewater Country Club*, for example, the U.S. District Court for the District of Oregon allowed a feminine lesbian's sex discrimination claim to proceed to trial on the grounds that:

[A] jury could find that [plaintiff's supervisor] repeatedly harassed (and ultimately discharged) [plaintiff] because [plaintiff] did not conform to [her supervisor's] stereotype of how a woman ought to behave. [Plaintiff] is attracted to and dates other women, whereas [plaintiff's supervisor] believes that a woman should be attracted to and date only men.¹²²

The controversial nature of this approach is evidenced by the fact that only two other courts perceive discrimination based on a person's same-sex sexual attraction as actionable sex discrimination under Title VII.¹²³ Although

¹¹⁸ See *Roadcloud v. City of Philadelphia*, No. 13-00777, 2014 WL 43759, at *4 (E.D. Pa. Jan. 6, 2014) (finding that "an openly gay female" employee stated a viable claim for sex discrimination where her supervisor's derogatory comments "focused on plaintiff's perceived lack of femininity"); *Centola v. Potter*, 183 F. Supp. 2d 403, 409-10 (D. Mass. 2002) (denying employer's motion for summary judgment on sex discrimination claim where gay employee produced evidence he "was vilified for not being more manly").

¹¹⁹ See *Baker v. Astrue*, No. 0120110008, 2013 WL 1182258 (E.E.O.C. Jan. 11, 2013). Unlike decisions of the full Commission, the Office of Federal Operations' rulings lack precedential value and do not apply nationwide.

¹²⁰ See *Lee*, *supra* note 75, at 435-36 (coining the phrase "Per Se Approach" in the context of status-based discrimination claims brought by transgender persons).

¹²¹ One commentator has characterized the notion that "real men don't sleep with men" and "real women don't sleep with women" as the "ultimate gender stereotype." Zachary A. Kramer, Note, *The Ultimate Gender Stereotype: Equalizing Gender-Conforming and Gender-Nonconforming Homosexuals under Title VII*, 2004 U. ILL. L. REV. 465, 492 (2004).

¹²² 195 F. Supp. 2d 1212, 1224 (D. Or. 2002). The court separately acknowledged that "one way . . . of satisfying [the 'because of sex'] requirement is to inquire whether the harasser would have acted the same if the gender of the victim had been different. A jury could find that [plaintiff's supervisor] would not have acted as she (allegedly) did if Plaintiff were a man dating a woman, instead of a woman dating a woman. If that is so, then Plaintiff was discriminated against because of her gender." *Id.* at 1223.

¹²³ See *Terveer v. Billington*, No. 12-1290 (CKK), 2014 WL 1280301 (D.D.C. Mar. 31, 2014); *Roadcloud v. City of Philadelphia*, No. 13-00777, 2014 WL 43759 (E.D. Pa. Jan. 6, 2014).

the EEOC has endorsed the Per Se Approach in two separate decisions,¹²⁴ both of these opinions were issued by the Office of Federal Operations rather than the full Commission such that, unlike *Macy*, they are not binding on all federal agencies and do not establish a national precedent.¹²⁵

III. THE CASE FOR ABANDONING ENDA

Although it could be decades before a majority of courts perceive LGBT-related employment discrimination as actionable sex discrimination, the lack of a viable legislative alternative suggests that continued susceptibility to discrimination in the short-run is the price LGBT persons must pay to secure the more robust protections of Title VII in the long-run. ENDA's proponents have sought to downplay the significance of these protections by asserting that (1) LGBT persons would be unable to make the statistical showing necessary to establish a prima facie case of disparate impact;¹²⁶ (2) employers would be unable to show that LGBT persons are significantly underrepresented in the workforce so as to warrant the adoption of LGBT-oriented affirmative action;¹²⁷ and (3) religious organizations would be allowed to discriminate against LGBT persons even in the absence of a categorical exemption.¹²⁸ Nonetheless, a considered analysis reveals that LGBT individuals would benefit from the availability of disparate impact claims, voluntary affirmative action plans, and limited exemptions for religious organizations such that advocates should abandon their efforts to enact ENDA in favor of allowing Title VII's "sex" provision to continue on its LGBT-inclusive evolution.

¹²⁴ See *Castello v. Donahoe*, No. 0120111795, 2011 WL 6960810 (E.E.O.C. Dec. 20, 2011); *Veretto v. Donahoe*, No. 0120110873, 2011 WL 2663401 (E.E.O.C. July 1, 2011).

¹²⁵ See THE ADVOCATE, *supra* note 97; Chris Geidner, *Transgender Breakthrough*, METRO WEEKLY (Apr. 23, 2012), <http://www.metroweekly.com/news/?ak=7288>, archived at <http://perma.cc/V3VA-5WTG>.

¹²⁶ See *Employment Non-Discrimination Act of 2009: Hearing on H.R. 3017 Before the H. Comm. on Educ. & Labor*, 111th Cong. 21 (2010) [hereinafter *2009 House Hearing*] (statement of Stuart J. Ishimaru, Acting Chairman, EEOC); *Employment Non-Discrimination Act of 2007: Hearing on H.R. 2015 Before the Subcomm. on Health, Emp't, Labor and Pensions of the H. Comm. on Educ. & Labor*, 110th Cong. 12 (2008) [hereinafter *2007 House Hearing*] (statement of Rep. Barney Frank, Chairman, H. Comm. on Fin. Servs.).

¹²⁷ See *2007 House Hearing*, *supra* note 126, at 12 (statement of Rep. Barney Frank, Chairman, H. Comm. on Fin. Servs.); 142 CONG. REC. S10054-01 (daily ed. Sept. 9, 1996) (statement of Sen. Edward M. Kennedy).

¹²⁸ See *2009 House Hearing*, *supra* note 126, at 22 (statement of Stuart J. Ishimaru, Acting Chairman, EEOC); CROSBY BURNS & JEFF KREHELY, CTR. FOR AM. PROGRESS, THE FREEDOM TO WORK, THE FREEDOM TO WORSHIP: THE EMPLOYMENT NON-DISCRIMINATION ACT ADVANCES WORKPLACE EQUALITY AND PROTECTS RELIGIOUS LIBERTY 2-6 (2012), available at <http://www.americanprogress.org/issues/lgbt/report/2012/06/11/1728/the-freedom-to-work-the-freedom-to-worship/>, archived at <http://perma.cc/3UF7-YFHA>.

A. *Disparate Impact Claims*

Title VII explicitly recognizes a disparate impact theory of discrimination.¹²⁹ This theory allows plaintiffs to challenge facially neutral employment practices having a disproportionately adverse effect on persons of a particular protected group.¹³⁰ To establish a *prima facie* case of disparate impact, a plaintiff must demonstrate a significant statistical disparity between the percentage of individuals of a particular race, ethnicity, or gender in an employer's workforce and the percentage of such individuals in the qualified labor market and show that the disparity is caused by one or more ostensibly neutral employment practices.¹³¹ Once a plaintiff has established a *prima facie* case, the burden shifts to the employer to demonstrate that the challenged practice is job related and consistent with business necessity.¹³² If the employer meets that burden, the plaintiff may still prevail by showing that the employer refuses to adopt an alternative practice that stands to have a less detrimental effect on persons in the plaintiff's group while still serving the employer's legitimate needs.¹³³

ENDA, conversely, has always stood to preclude disparate impact claims on the basis of sexual orientation and, more recently, gender identity. In disallowing such claims, early versions of ENDA made explicit reference to Title VII: "The fact that an employment practice has a disparate impact, as the term 'disparate impact' is used in section 703(k) of the Civil Rights Act of 1964, on the basis of sexual orientation does not establish a *prima facie* violation of this Act."¹³⁴ More recent versions of ENDA have foregone any mention of Title VII in favor of a standalone provision stating, "Disparate Impact—Only disparate treatment claims may be brought under this Act."¹³⁵

ENDA's proponents have sought to justify the preclusion of disparate impact claims on the grounds that LGBT persons are more likely to face the sort of overt discrimination that is redressable on a disparate treatment theory.¹³⁶ While this assertion may have had merit in 1994, the prohibition on

¹²⁹ 42 U.S.C. § 2000e-2(k) (2006).

¹³⁰ See *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971) ("Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices.").

¹³¹ See *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994–95 (1988).

¹³² See *Ricci v. DeStefano*, 557 U.S. 557, 578 (2009).

¹³³ See *id.*

¹³⁴ S. 2238, 103d Cong. § 5 (1994); see also S. 1284, 107th Cong. § 4(f) (2001); S. 1276, 106th Cong. § 4(f) (1999); S. 869, 105th Cong. § 7(a) (1997); S. 932, 104th Cong. § 6 (1995).

¹³⁵ S. 815, 113th Cong. § 4(g) (2013); S. 811, 112th Cong. § 4(g) (2011); S. 1584, 111th Cong. § 4(g) (2009); H.R. 3685, 110th Cong. § 4(g) (2007); see also S. 1705, 108th Cong. § 4(f) (2003).

¹³⁶ *Employment Non-Discrimination Act of 1994: Hearing on S. 2238 Before the S. Comm. on Labor and Human Resources*, 103d Cong. 129 (1994) [hereinafter *1994 Senate Hearing*] (statement of Chai R. Feldblum, Associate Professor, Georgetown Univ. Law Ctr.).

disparate impact claims has been included in each subsequent version of ENDA without consideration, until recently, as to whether the premise underlying the prohibition was valid.¹³⁷ And despite the recognition of ENDA's sponsors in the 113th Congress that LGBT persons are as likely to be subjected to inadvertent employment discrimination as they are intentional discrimination, the bill still maintained a prohibition on disparate impact claims.¹³⁸

The intervening decades have seen the number of states banning sexual orientation-based employment discrimination increase from eight in 1994¹³⁹ to twenty-one in 2013¹⁴⁰ while the number of states banning gender identity-related employment discrimination has increased from one¹⁴¹ to sixteen¹⁴² over the same period. Similarly, the percentage of Fortune 500 companies adopting sexual-orientation-inclusive nondiscrimination policies has increased from approximately twenty-five percent in 1994¹⁴³ to eighty-eight percent in 2013¹⁴⁴ while the percentage of companies adopting gender-identity-inclusive nondiscrimination policies has increased from approximately zero to fifty-seven percent over the same time period.¹⁴⁵ Finally, and perhaps most significantly, the percentage of Americans who support extending employment protections to LGBT individuals has held steady at seventy-four percent even as the proposed class has expanded beyond gays and lesbians to include bisexuals and transgender persons.¹⁴⁶

¹³⁷ Chris Johnson, *ENDA Under Review Prior to April Reintroduction*, WASH. BLADE (Mar. 21, 2013) <http://www.washingtonblade.com/2013/03/21/enda-under-reconsideration-prior-to-april-introduction/> (noting that ENDA historically “avoided the issue of disparate impact” and stating that “it’s unclear how disparate impact would apply to LGBT people”), archived at <http://perma.cc/GVE8-Z6RL>.

¹³⁸ See Chris Johnson, *ENDA to be Introduced on Thursday*, WASH. BLADE (Apr. 23, 2013) <http://www.washingtonblade.com/2013/04/23/enda-introduction-set-for-thursday/> (reporting that ENDA’s sponsors in the 113th Congress considered revising section four to permit disparate impact claims, ostensibly in recognition of the fact that LGBT persons are as likely to be subjected to inadvertent employment discrimination as they are intentional employment discrimination), archived at <http://perma.cc/XS2D-2TW5>.

¹³⁹ *1994 Senate Hearing*, *supra* note 136, at 67 (statement of Mary Frances Berry, Chairperson, U.S. Comm’n on Civil Rights).

¹⁴⁰ JEROME HUNT, CTR. FOR AM. PROGRESS, *A STATE-BY-STATE EXAMINATION OF NON-DISCRIMINATION LAWS AND POLICIES 1* (2012), available at http://www.americanprogress.org/wp-content/uploads/issues/2012/06/pdf/state_nondiscrimination.pdf, archived at <http://perma.cc/X5E6-C626>.

¹⁴¹ Jennifer Levi & Daniel Redman, *The Cross-Dressing Case for Bathroom Equality*, 34 SEATTLE U. L. REV. 133, 134 (2010).

¹⁴² HUNT, *supra* note 140, at 1.

¹⁴³ *1994 Senate Hearing*, *supra* note 136, at 19 (statement of Warren Phillips, Publisher, WALL ST. J.).

¹⁴⁴ HUMAN RIGHTS CAMPAIGN, *CORPORATE EQUALITY INDEX 2013 6* (2012), available at http://www.hrc.org/files/assets/resources/cei_2014_full_report_rev7.pdf, archived at <http://perma.cc/LBG8-YYDH>.

¹⁴⁵ *Id.*

¹⁴⁶ *Compare 1994 Senate Hearing*, *supra* note 136, at 75 (statement of Anthony P. Carnevale, Chair, Nat’l Comm’n for Emp’t Policy) (noting that “recent nation-wide polls show that 74 percent of Americans favor protecting gays and lesbians from job discrimination”), with Jeff Krehely, *Polls Show Huge Public Support for Gay and Transgender Workplace Protec-*

These trends suggest an emerging societal consensus that LGBT-oriented employment discrimination is unacceptable such that employers risk placing themselves at a competitive disadvantage should they be perceived as discriminating on the basis of sexual orientation or gender identity. Consequently, employers wishing to discriminate against LGBT individuals will likely be inclined to forego overt forms of discrimination in favor of more subtle practices having a discriminatory effect on LGBT persons. Whereas these practices would be actionable under Title VII, they stand to be permissible under ENDA.

ENDA's proponents are likely to downplay the risk posed by these more covert forms of discrimination and assert that an employer's adoption of an otherwise neutral employment practice for the purpose of disadvantaging LGBT persons would constitute intentional discrimination actionable on a disparate treatment theory.¹⁴⁷ This argument presumes that LGBT plaintiffs will be able to establish a prima facie case of disparate treatment and, once an employer has articulated some ostensibly legitimate, nondiscriminatory rationale for the adverse employment action, prove that the employer's proffered justification is mere pretext.¹⁴⁸ Although the burden of establishing a prima facie case normally "is not onerous,"¹⁴⁹ plaintiffs are often unable to make the secondary showing of pretext.¹⁵⁰ The difficulty of demonstrating pretext belies the extent to which disparate treatment claims may serve as an effective check on employers' adoption of seemingly neutral employment practices designed to have a disproportionately adverse effect on LGBT persons.¹⁵¹

A second justification for ENDA's preclusion of disparate impact claims focuses on LGBT persons' inability to make the necessary statistical showing.¹⁵² To establish a prima facie case of disparate impact, plaintiffs

tions, *CTR. FOR AM. PROGRESS* 1 (May 2011), http://www.americanprogress.org/wp-content/uploads/issues/2011/06/pdf/protection_poll.pdf ("Nearly three-fourths of [likely 2012] voters (73 percent) support protecting gay and transgender people from workplace discrimination."), archived at <http://perma.cc/7UWN-58YL>.

¹⁴⁷ See 1994 Senate Hearing, *supra* note 136, at 129 (statement of Chai R. Feldblum, Associate Professor, Georgetown Univ. Law Ctr.) (asserting that "facially neutral actions that are pretexts for discrimination" against gays and lesbians would be actionable on a disparate treatment theory under ENDA).

¹⁴⁸ See 2009 House Hearing, *supra* note 126, at 29 (statement of Stuart J. Ishimaru, Acting Chairman, EEOC) (noting ENDA would adopt Title VII's burden-shifting approach for disparate treatment cases).

¹⁴⁹ *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

¹⁵⁰ See 2009 House Hearing, *supra* note 126, at 29 (statement of Stuart J. Ishimaru, Acting Chairman, EEOC) (acknowledging that demonstrating pretext "is not an insurmountable burden, but it is certainly a high burden" such that "sometimes [plaintiffs] make it, sometimes they don't").

¹⁵¹ See Danielle Tarantolo, Note, *From Employment to Contract: Section 1981 and Antidiscrimination Law for the Independent Contractor Workforce*, 116 *YALE L.J.* 170, 199 (2006) (acknowledging the difficulty of showing pretext); 2009 House Hearing, *supra* note 126, at 29 (statement of Stuart J. Ishimaru, Acting Chairman, EEOC).

¹⁵² See 1994 Senate Hearing, *supra* note 136, at 129 (statement of Chai R. Feldblum, Associate Professor, Georgetown Univ. Law Ctr.) ("[ENDA] excludes disparate impact

would have to demonstrate a significant statistical disparity between the percentage of LGBT persons in an employer's workforce and the percentage of LGBT persons in the qualified labor market.¹⁵³ Although obtaining LGBT-specific employment statistics sufficient to support a disparate impact claim would have been exceedingly difficult in 1994, a provision added to ENDA in 1997 and included in each subsequent version of the bill ensured that the lack of access to statistics becomes a self-fulfilling prophecy. A recurring fear among ENDA's opponents in the mid-1990s was that the bill's passage would lead the EEOC to begin collecting statistics on workers' sexual orientation.¹⁵⁴ In an attempt to assuage these concerns and garner additional support for the bill, proponents of ENDA 1997 amended the bill to provide that, "[t]he Commission shall not collect statistics on sexual orientation from covered entities, or compel the collection of such statistics by covered entities."¹⁵⁵ This section has since been revised to provide "the Commission shall neither compel the collection of nor require the production of statistics on actual or perceived sexual orientation or gender identity from covered entities."¹⁵⁶ Because plaintiffs bringing disparate impact claims must often rely on EEOC-compiled data to make the necessary statistical showing,¹⁵⁷ this provision would ensure that LGBT persons could not establish a prima facie case of disparate impact in the event such claims were not already expressly precluded under ENDA. Thus, any assertion that ENDA's prohibition of disparate impact claims is justified by LGBT persons' inability to make the required statistical showing necessarily relies on circular reasoning as ENDA's proponents have chosen to forbid the collection of LGBT-specific employment data in the hopes that by doing so they will be able to enact legislation prohibiting disparate impact claims.

Conversely, if LGBT-related employment discrimination is understood to be actionable sex discrimination under Title VII, the EEOC may require employers to collect information regarding workers' sexual orientation and gender identity such that identifying the percentage of LGBT persons in an employer's workforce would be a relatively simple task. The EEOC's only reporting requirement applicable to private sector employers is the EEO-1

claims primarily because it is difficult to perform an accurate statistical analysis in the context of sexual orientation.").

¹⁵³ See *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 650–51 (1989), *superseded by statute on other grounds*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074, *as recognized in* *Raytheon Co. v. Hernandez*, 540 U.S. 44, 53 (2003) (finding plaintiffs had failed to establish a prima facie case of disparate impact where they had mistakenly compared the affected employee segment with other employees in the company rather than the qualified labor market).

¹⁵⁴ See *e.g.*, 142 CONG. REC. S10066-01 (daily ed. Sept. 9, 1996) (statement of Sen. Don Nickles); 142 CONG. REC. S10129-02 (daily ed. Sept. 10, 1996) (statement of Sen. Orrin Hatch).

¹⁵⁵ S. 869, 105th Cong. § 7(b) (1997); H.R. 1858, 105th Cong. § 7(b) (1997).

¹⁵⁶ S. 815, 113th Cong. § 9 (2013); H.R. 1755, 113th Cong. § 9 (2013).

¹⁵⁷ Robert W. Sikkel & William A. Van Asselt, *Your EEO-1 Report: Coming Soon to a Court Near You?*, 10.4 H.R. ADVISOR: LEGAL & PRAC. GUIDANCE 5 (2004).

Report,¹⁵⁸ which requires employers to compile aggregate data regarding the race, ethnicity, and sex composition of their workforce.¹⁵⁹ The EEOC uses the data contained in these reports to track the representation of female and minority workers within companies, industries, and regions and to supplement the Commission's enforcement activities under Title VII.¹⁶⁰

These same motivations would support amending the EEO-1 Report's "sex" category to include sexual orientation and gender identity, as little is known about LGBT employment patterns and robust administrative enforcement would be critical to ensuring compliance with any LGBT-inclusive interpretation of Title VII. Practical considerations, nevertheless, would require that the EEOC limit its data collection efforts to self-identified LGBT individuals rather than LGBT persons generally as employers would otherwise be forced to make intrusive inquiries regarding their workers' private lives or rely on outmoded and offensive stereotypes to identify suspected LGBT workers.¹⁶¹ Because employers are already required to use self-identification to fulfill their reporting obligations in the areas of race and ethnicity,¹⁶² any additional administrative burden associated with the collection of LGBT-specific data would be minimal.

Assuming the EEOC would be inclined to revise its EEO-1 Report to mandate the collection of sexual orientation and gender identity data, LGBT plaintiffs seeking to establish a prima facie case of disparate impact would still need to determine the percentage of LGBT persons in the qualified labor force. Courts have traditionally relied on U.S. Census data to determine the qualified labor force in disparate impact cases,¹⁶³ but no such data exists for the LGBT population as the census has never included questions on sexual orientation or gender identity.¹⁶⁴ Nevertheless, the U.S. Census Bureau's ("Bureau") formation of a new, LGBT-inclusive advisory committee in October 2012¹⁶⁵ indicates that the Bureau may include LGBT-specific questions

¹⁵⁸ 29 C.F.R. § 1602.7 (2009).

¹⁵⁹ EEOC, STANDARD FORM 100, REV. JAN. 2006, EMPLOYER INFORMATION REPORT EEO-1: INSTRUCTION BOOKLET 3 (2006) [hereinafter *EEO-1 Instruction Booklet*], available at http://www.eeoc.gov/employers/eo1survey/upload/instructions_form.pdf, archived at <http://perma.cc/9EYM-4F3A>.

¹⁶⁰ *EEO-1 Frequently Asked Questions and Answers*, EEOC, <http://www.eeoc.gov/employers/eo1survey/faq.cfm> (last visited February 23, 2014), archived at <http://perma.cc/7WTD-TH4S>.

¹⁶¹ See *2007 House Hearing*, *supra* note 126, at 12 (statement of Rep. Barney Frank) (asserting that "the only way you could do a disparate impact would be to compel everybody to tell his or her sexual orientation, which we certainly don't want to have happen"); *1994 Senate Hearing*, *supra* note 112, at 136 (statement of Chai R. Feldblum, Associate Professor, Georgetown Univ. Law Ctr.) (acknowledging that "privacy concerns ordinarily foreclose an accurate statistical count of all gay men, lesbians, bisexuals, and heterosexuals in an employer's workforce").

¹⁶² See *EEO-1 Instruction Booklet*, *supra* note 159.

¹⁶³ See *e.g.*, *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 n.6 (1971).

¹⁶⁴ Ryan H. Nelson, Practitioners' Note, *Affirmative Action for LGBT Applicants & Employees: A Proposed Regulatory Scheme*, 30 HOFSTRA LAB. & EMP. L.J. 179, 201 (2012).

¹⁶⁵ Press Release, U.S. Census Bureau, Census Bureau Establishes National Advisory Committee on Racial, Ethnic and Other Populations (Oct. 12, 2012), available at <http://www>

on an upcoming American Community Survey, formerly known as the “long form” census, or the 2020 decennial census, formerly known as the “short form” census.¹⁶⁶ Should the Bureau decide to include LGBT-related questions on the American Community Survey, determining the percentage of qualified LGBT persons in a particular labor force would be possible within a few years as the Survey is now being administered annually rather than once a decade.¹⁶⁷

Alternatively, if the EEO-1 Report was amended to impose LGBT-inclusive reporting requirements, LGBT plaintiffs may be able to develop a proxy for LGBT-specific census data by aggregating the EEO-1 Reports for employers within a specific geographic area and industry. The EEOC may also compile such data sua sponte as part of its efforts to analyze the employment patterns of LGBT workers. Finally, LGBT plaintiffs may be able to rely on general population data to determine the percentage of qualified LGBT persons in a particular labor force, on the theory that LGBT persons are already represented in every conceivable U.S. demographic such that the percentage of LGBT persons qualified for any particular job must approximate the percentage of LGBT individuals in the general population.¹⁶⁸ While these methods are only hypothetical, they suggest that LGBT persons may be able to establish a prima facie case of disparate impact sometime in the near future such that ENDA stands to preclude a potentially viable cause of action.

One employment practice that could be challenged on a disparate impact theory notwithstanding LGBT plaintiffs’ present inability to make the required statistical showing is the tying of employee benefits to marriage.¹⁶⁹ In the thirty-three states where same-sex marriage is prohibited,¹⁷⁰ an employer’s policy of providing health insurance and retirement benefits only to the legal spouses of employees necessarily has an adverse effect on lesbians, gays, and bisexuals “simply because, regardless of the statistical prevalence of [LGB persons] in the population or work force,” LGB persons living in these states cannot legally marry a person of the same sex.¹⁷¹

.census.gov/newsroom/releases/archives/miscellaneous/cb12-195.html, archived at <http://perma.cc/JW6A-FDDE>.

¹⁶⁶ U.S. CENSUS BUREAU, AMERICAN COMMUNITY SURVEY INFORMATION GUIDE 2 (2013), available at http://www.census.gov/acs/www/Downloads/ACS_Information_Guide.pdf, archived at <http://perma.cc/R6Q9-APES>.

¹⁶⁷ *Id.*

¹⁶⁸ Jeffrey S. Byrne, *Affirmative Action for Lesbians and Gay Men: A Proposal for True Equality of Opportunity and Workforce Diversity*, 11 YALE L. & POL’Y REV. 47, 99 (1993).

¹⁶⁹ See *Developments in the Law—Statutory Protection for Gays and Lesbians in Private Employment*, 109 HARV. L. REV. 1625, 1633–38 (1996).

¹⁷⁰ Same-sex marriage is legal in seventeen states and the District of Columbia. Robert Barnes, *Court Won’t Hear Case of Photographer, Gay Couple*, WASH. POST, Apr. 8, 2014, at A2.

¹⁷¹ J. Banning Jasiunas, Note, *Is ENDA the Answer? Can a “Separate but Equal” Federal Statute Adequately Protect Gays and Lesbians from Employment Discrimination?*, 61 OHIO ST. L.J. 1529, 1551 (2000).

B. Voluntary Affirmative Action Plans

Title VII permits private employers to adopt voluntary affirmative action plans for the purpose of eliminating manifest imbalances in traditionally segregated job categories, provided the plans are temporary and do not unnecessarily trammel the rights of non-minorities.¹⁷² The Supreme Court has upheld such plans notwithstanding Section 703(j)'s admonition that “[n]othing contained in [Title VII] shall be interpreted to require any employer . . . to grant preferential treatment . . . to any group because of the race, color, religion, sex, or national origin of such . . . group on account of” a de facto racial, religious, sexual, or ethnic imbalance in the employer’s workforce.¹⁷³ According to the Court, “[h]ad Congress meant to prohibit all . . . affirmative action . . . it easily could have [included language in Section 703(j)] providing that Title VII would not require or permit” preferential treatment for minorities such that the omission of the word “permit” ostensibly reflected a deliberate determination by Congress “not to forbid all voluntary . . . affirmative action” under Title VII.¹⁷⁴

ENDA has always stood to prohibit voluntary affirmative action for lesbian, gay, bisexual, and—more recently—transgender persons, but the wording of the prohibition has been refined over time.¹⁷⁵ ENDA initially provided that employers “shall not give preferential treatment to an individual on the basis of sexual orientation” nor shall they “adopt or implement a quota on the basis of sexual orientation.”¹⁷⁶ As of April 25, 2013, the prohibition had been revised to track the language of Section 703(j), presumably to ensure that courts would construe ENDA’s affirmative action ban as being coextensive with that of Title VII.¹⁷⁷ The one aspect in which ENDA’s prohibition differs from Section 703(j) is that it includes the word “permit” at the outset of its discussion of preferential treatment: “Nothing in this Act shall be construed or interpreted to require or permit any covered entity to grant preferential treatment . . . to any group because of the actual or perceived sexual orientation or gender identity of such . . . group on account of” a de facto sexual orientation or gender identity imbalance in the employer’s workforce.¹⁷⁸ By eliminating the distinction that allows voluntary affirmative action under Title VII, ENDA guarantees that employers will not be permit-

¹⁷² *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 208–09 (1979).

¹⁷³ 42 U.S.C. § 2000e-2(j) (2006).

¹⁷⁴ *Weber*, 443 U.S. at 205–06.

¹⁷⁵ See S. 815, 113th Cong. § 4(f) (2013); S. 811, 112th Cong. § 4(f) (2011); S. 1584, 111th Cong. § 4(f) (2009); H.R. 3685, 110th Cong. § 4(f) (2007); S. 1705, 108th Cong. § 8 (2003); S. 1284, 107th Cong. § 8 (2001); S. 1276, 106th Cong. § 8 (1999); S. 869, 105th Cong. § 8 (1997); S. 932, 104th Cong. § 7 (1995); S. 2238, 103d Cong. § 6 (1994).

¹⁷⁶ S. 2238, 103d Cong. § 6 (1994); H.R. 4636, 103d Cong. § 5 (1994).

¹⁷⁷ Compare 42 U.S.C. § 2000e-2(j) (2006), with S. 815, 113th Cong. § 4(f) (2013), and H.R. 1755, 113th Cong. § 4(f) (2013).

¹⁷⁸ S. 815, 113th Cong. § 4(f) (2013); H.R. 1755, 113th Cong. § 4(f) (2013).

ted to adopt LGBT-oriented affirmative action plans should the bill become law.

Provided courts perceive discrimination against LGBT persons as discrimination on the basis of sex, private employers would be able to adopt affirmative action plans for openly LGBT persons pursuant to Title VII. These plans would be intellectually justifiable on the grounds that, like plans benefiting racial minorities and women, they are focused on “(1) remedying past and ongoing discrimination, (2) providing role models to combat prejudice and facilitate mentoring, and (3) fostering diversity in the workplace.”¹⁷⁹

First, LGBT persons have been subject to a long and pervasive history of employment discrimination. A 2008 survey found that forty-two percent of lesbian, gay, and bisexual persons had suffered sexual orientation-related employment discrimination at some point during their lives.¹⁸⁰ The survey confirmed that openly lesbian, gay, and bisexual individuals were at greater risk for discrimination than LGB persons choosing to remain closeted.¹⁸¹ Separately, a 2011 study found that ninety percent of transgender persons had suffered gender identity-related employment discrimination at some point during their lives.¹⁸² The study also revealed that the vast majority of transgender persons had taken steps to conceal their gender identity or gender transition in an attempt to protect themselves against employment discrimination.¹⁸³ Voluntary affirmative action plans would help to alleviate these entrenched patterns of discrimination by transforming a person’s LGBT status from a career-limiting characteristic into a potentially career-enhancing characteristic.

Second, the presence of openly LGBT persons in the workplace serves to combat prejudices and stereotypes while at the same time furnishing a set of readily identifiable role models to more junior LGBT workers. Routine workplace interactions between openly LGBT individuals and their heterosexual, cisgender colleagues provide opportunities for LGBT persons to challenge their coworkers’ preconceived notions of homosexuality and transgenderism by affording these coworkers a chance to see LGBT persons as unique individuals rather than as members of an amorphous and potentially

¹⁷⁹ Byrne, *supra* note 168, at 68.

¹⁸⁰ BRAD SEARS & CHRISTY MALLORY, WILLIAMS INST., Documented Evidence of Employment Discrimination & its Effects on LGBT People 4 (2011), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Sears-Mallory-Discrimination-July-2011.pdf>, archived at <http://perma.cc/3KDR-PYJL>.

¹⁸¹ *Id.*

¹⁸² JAIME M. GRANT ET AL., NAT’L GAY AND LESBIAN TASK FORCE & NAT’L CTR. FOR TRANSGENDER EQUALITY, INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 3 (2011), http://www.thetaskforce.org/downloads/reports/reports/ntds_full.pdf, archived at <http://perma.cc/US86-928M>.

¹⁸³ *Id.*

threatening class.¹⁸⁴ Likewise, because so few LGBT persons are out in the workplace, more junior LGBT workers often have difficulty identifying role models with whom they may establish meaningful mentoring relationships.¹⁸⁵ LGBT workers' ability to conceal their identities and pass as members of the majority means that employers wishing to combat prejudice and facilitate mentoring must strive to create an environment in which LGBT individuals feel comfortable coming out and living authentically;¹⁸⁶ implementing affirmative action for openly LGBT workers would be a powerful demonstration of an employer's commitment to creating and maintaining such a culture.

Third, the presence of openly LGBT workers is critical to establishing and maintaining a diverse workplace. In adopting LGBT-inclusive nondiscrimination policies, employers routinely cite the economic benefits associated with a diverse workforce, including the ability to recruit and retain the best talent, increased productivity, and improved customer service.¹⁸⁷ Similarly, employers signing onto an amicus brief in support of same-sex marriage sought to justify their decision to intervene in what would seem to be a policy debate devoid of any business implications by noting that, "[a]mici embrace diversity both as an end unto itself and as a business imperative that permits us to attract and retain the most talented and productive workforce in order to compete effectively on a domestic and global level;" accordingly, "laws like [California's] Proposition 8 are not only an affront to those values but also an impediment to our competitive success."¹⁸⁸ The competitive advantages afforded by a diverse workforce, thus, counsels in favor of allowing employers to adopt LGBT-oriented affirmative action plans.

The fact that affirmative action for openly LGBT persons would be intellectually defensible as a policy matter does not answer the more fundamental question of whether such plans would be legally justifiable under Title VII. The decision to adopt an LGBT-oriented affirmative action plan would have to be supported by the existence of a manifest imbalance in an employer's workforce that reflected an underrepresentation of openly LGBT persons in traditionally segregated job categories.¹⁸⁹ Although "the requirement that the 'manifest imbalance' relate to a 'traditionally segregated job

¹⁸⁴ Byrne, *supra* note 168, at 70 ("The inclusion of openly gay and lesbian people in the work force combats prejudice and stereotypes and promotes acceptance through daily interaction among heterosexual employees and their openly gay and lesbian co-workers.").

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 59–61.

¹⁸⁷ BRAD SEARS & CHRISTY MALLORY, WILLIAMS INST., ECONOMIC MOTIVES FOR ADOPTING LGBT-RELATED WORKPLACE POLICIES 2–3 (2011), available at <http://williamsinstitute.law.ucla.edu/research/workplace/economic-motives-for-adopting-lgbt-related-workplace-policies/>, archived at <http://perma.cc/6QES-E6W4>.

¹⁸⁸ Brief for American Companies as Amici Curiae Supporting Respondents at 7, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No. 12-144), 2013 WL 795548.

¹⁸⁹ See *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 208–09 (1979) (upholding a race-based affirmative action plan that was "designed to eliminate conspicuous racial imbalance in traditionally segregated job categories").

category' [ostensibly] provides assurance both that [the relevant characteristic] will be taken into account in a manner consistent with Title VII's purpose of eliminating the effects of employment discrimination, and that the interests of those employees not benefiting from the plan will not be unduly infringed,"¹⁹⁰ the Supreme Court has shown a willingness to presume the existence of a traditionally segregated job category when confronted with evidence of a manifest imbalance. Thus, just as "a plethora of proof is hardly necessary to show that women are generally underrepresented in such positions" as electricians, mechanics, and heavy machine operators,¹⁹¹ employers should be able to rely on the existence of a manifest imbalance to justify their adoption of LGBT-oriented affirmative action plans as long as the plans do not extend to job categories perceived as being overtly welcoming of LGBT persons, e.g., certain retail and hospitality positions.

In determining whether such an imbalance exists, a comparison of the percentage of LGBT persons in an employer's workforce with the percentage of LGBT persons in the area labor market or general population would be appropriate for unskilled jobs whereas jobs requiring special expertise would warrant comparison with the percentage of LGBT persons in the qualified labor force.¹⁹² An employer may choose to calculate the percentage of LGBT persons in its workforce voluntarily as discussed in greater detail *infra* or be compelled to do so by the EEOC as discussed in Section III(A). Either way, an employer would have access to the first of two data points necessary to demonstrate the existence of a manifest imbalance.

The second data point could be ascertained by consulting LGBT population surveys as discussed in greater detail *infra*, provided that the jobs at issue did not require any special expertise. Conversely, for skilled positions an employer would be unable to determine the second data point as calculating the percentage of LGBT persons in the qualified labor force would require access to data that does not currently exist. The present inability to justify LGBT-oriented affirmative action for skilled positions does not mean that employers will never be able to do so, however. As discussed in Section III(A), the inclusion of LGBT-specific questions on census materials or the EEOC's revision of its EEO-1 Report may allow employers to ascertain this information sometime in the near future such that ENDA's preclusion of voluntary affirmative action programs stands to provide a permanent solution to what is likely only a temporary problem.

Having determined that affirmative action for LGBT persons is both legally and intellectually justified, an examination of how such plans might actually be implemented is needed to ensure that LGBT-oriented affirmative action is not only permitted in theory but also possible in practice. In his seminal work on affirmative action for lesbian, gay, and bisexual persons,

¹⁹⁰ *Johnson v. Transp. Agency, Santa Clara Cnty., Cal.*, 480 U.S. 616, 632 (1987).

¹⁹¹ *Id.* at 634 n.12.

¹⁹² *Id.* at 631-32.

Jeffrey Byrne identified several issues associated with the implementation of sexual orientation-based affirmative action plans.¹⁹³ Although Byrne did not foresee such plans arising under Title VII or extending to transgender persons,¹⁹⁴ much of his analysis is transferable to the LGBT-oriented plans that would be available pursuant to Title VII.

Byrne correctly notes that “one of the most common arguments against affirmative action for [LGBT persons] is that such a program would necessitate an improper and infeasible invasion of individuals’ privacy rights.”¹⁹⁵ Representative Barney Frank invoked this concern as recently as 2007 when he stated, “you couldn’t do affirmative action [for LGBT workers] because we still respect people’s right of privacy.”¹⁹⁶ The privacy argument, however, “assumes a model of affirmative action in which the employer somehow seeks to determine an applicant’s or employee’s sexual orientation [or gender identity].”¹⁹⁷ After acknowledging the legitimacy of the concerns underlying this argument, Byrne concludes that “self-identification offers the only feasible means of implementing an affirmative action plan for [LGBT persons],” stating,

[R]espect for individual privacy require[s] that affirmative action for [LGBT persons] be, more precisely, affirmative action for openly (or self-identified) [LGBT] people. Far from outing people or inquiring as to applicants’ and employees’ sexual orientations [or gender identities], affirmative action provides an incentive to self-identify as it affirms the minority status of [LGBT persons].¹⁹⁸

Self-identification becomes an even greater imperative for affirmative action plans governed by Title VII. Privacy concerns notwithstanding, Title VII generally forbids employers from making inquiries regarding an individual’s race, ethnicity, religion, or sex even where the employer would utilize that information for the individual’s benefit.¹⁹⁹ Thus, to the extent discrimination on the basis of sexual orientation or gender identity is understood to be sex discrimination within the purview of Title VII, employers could not law-

¹⁹³ Byrne, *supra* note 168, at 90–106.

¹⁹⁴ *Id.* at 106.

¹⁹⁵ *Id.* at 94.

¹⁹⁶ 2007 House Hearing, *supra* note 127 (statement of Rep. Barney Frank, Chairman, H. Comm. on Fin. Servs.).

¹⁹⁷ Byrne, *supra* note 168, at 94.

¹⁹⁸ *Id.*

¹⁹⁹ Naomi Schoenbaum, *It’s Time That You Know: The Shortcomings of Ignorance as Fairness in Employment Law and the Need for an “Information-Shifting” Model*, 30 HARV. J. L. & GENDER 99, 103 (2007); see also Sujata S. Menjoge, Comment, *Testing the Limits of Anti-Discrimination Law: How Employers’ Use of Pre-Employment Psychological and Personality Tests Can Circumvent Title VII and the ADA*, 82 N.C. L. REV. 326, 337–38 (2003) (noting that courts are split as to whether such inquiries constitute per se violations of Title VII or merely provide evidence of a Title VII violation).

fully inquire whether an individual identifies as LGBT for the purposes of participating in the employer's affirmative action program.

Instead, employers would need to be proactive in creating opportunities for LGBT individuals to self-identify. One option would be to notify the individual both verbally and in writing of the plan's existence, along with any LGBT-inclusive nondiscrimination policies or benefits programs the employer has established, while stressing that participation in the program requires explicit self-identification.²⁰⁰ Alternatively, employers may wish to provide an affirmative action opt-in form as part of their standard employment application.²⁰¹ Finally, if the EEOC were to revise its EEO-1 Report to require that employers furnish data regarding their employees' sexual orientation and gender identity, employers would have yet another opportunity to invite LGBT individuals to self-identify.²⁰²

In terms of implementation, Byrne recommends that employers utilize a "goals and timetables" model where "'goals' are numerical targets for the hiring or promotion of qualified members of a particular group [and] 'timetables' are the deadlines for achieving the goals."²⁰³ Unlike more rigid quota-based plans, a goals and timetables model would regard an individual's self-identified LGBT status as one of several factors to be considered in making hiring and promotion decisions.²⁰⁴ Although Byrne is arguably correct in asserting that employers would find the goals and timetables model preferable as it is less overtly preferential and therefore less controversial than other forms of affirmative action,²⁰⁵ Byrne's suggestion that employers seek to attain a workforce in which 5% of employees are openly LGBT is flawed to the extent it relies on outmoded data and assumptions.²⁰⁶

Byrne starts from the premise that 10% of the population is LGBT such that ideally, openly LGBT persons would comprise 10% of an employer's workforce were there perfect equality of opportunity and no lingering underrepresentation owing to historical discrimination.²⁰⁷ He then proposes that employers establish an affirmative action goal of 5% on the grounds that

²⁰⁰ See Byrne, *supra* note 168, at 95.

²⁰¹ See *id.*

²⁰² Employers who are subject to Title VII and have one hundred or more employees must file an EEO-1 Report annually. 29 C.F.R. § 1602.7 (2009). The EEO-1 Report requires employment data to be categorized by gender, race, ethnicity, and job category. *EEO-1 Instruction Booklet*, *supra* note 159, at 3. As of 2006, "self-identification is the preferred method of identifying the race and ethnic information necessary for the EEO-1 Report" such that "employers are required to attempt to allow employees to use self-identification to complete the EEO-1 Report." *Id.* The EEOC uses EEO-1 data "to support civil rights enforcement and to analyze employment patterns, such as the representation of female and minority workers within companies, industries, or regions." *EEO-1 Frequently Asked Questions and Answers*, *supra* note 160.

²⁰³ Byrne, *supra* note 168, at 51.

²⁰⁴ See *Johnson v. Transp. Agency, Santa Clara Cnty., Cal.*, 480 U.S. 616, 641 (1987).

²⁰⁵ See Byrne, *supra* note 141, at 51.

²⁰⁶ See Byrne, *supra* note 141, at 100.

²⁰⁷ See Byrne, *supra* note 141, at 99.

“many [LGBT persons] remain closeted for reasons that will not be changed by workplace policies.”²⁰⁸

Studies conducted within the last few years, however, indicate that an affirmative action goal of 5% is far too high with respect to openly lesbian, gay, and bisexual individuals and wholly unrealistic in regard to transgender persons. These studies estimate that 3.5% of adults identify as lesbian, gay, or bisexual whereas 0.3% of adults identify as transgender.²⁰⁹ Applying Byrne’s methodology to these newly revised and newly inclusive figures, employers may assume that 3.8% of the adult population is LGBT such that an aggregate affirmative action goal of 1.9% for openly LGBT workers would be appropriate assuming that half of LGBT workers are disinclined to be out in the workplace irrespective of whether their employers have implemented LGBT-inclusive policies.

Yet, a goal of 1.9% is ostensibly too low in that it fails to consider the dramatic legal, cultural, and political transformations that have taken place in the twenty years since Byrne’s work was first published.²¹⁰ Indeed, 59% of LGBT persons now report being out at work,²¹¹ with studies indicating a strong correlation between employers’ adoption of LGBT-inclusive policies and workers’ decision to come out.²¹² These findings contradict Byrne’s assumption that one-half of LGBT employees will choose to remain closeted for purely personal reasons unrelated to their work environment. Instead, these studies suggest that employers should engage in aspirational goal setting as part of a larger, company-wide effort to create an affirming environment for LGBT persons. This article proposes that employers strive to achieve a workforce in which 3% of employees are openly LGBT. A 3% target would serve to increase the percentage of LGBT persons who are open from 59% at present to almost 80% upon attainment.²¹³

²⁰⁸ See Byrne, *supra* note 141, at 100.

²⁰⁹ GARY J. GATES, WILLIAMS INST., HOW MANY PEOPLE ARE LESBIAN, GAY, BISEXUAL, AND TRANSGENDER? 1 (2011), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-How-Many-People-LGBT-Apr-2011.pdf>, archived at <http://perma.cc/R9XM-RECK>.

²¹⁰ These transformations include the overturning of *Bowers v. Hardwick*, 478 U.S. 186 (1986), the repeal of Don’t Ask Don’t Tell, the enactment of LGBT-inclusive federal hate crimes legislation, and the legalization of same-sex marriage in seventeen states and the District of Columbia, among others. See also Brian Montopoli, *Poll: With Higher Visibility, Less Disapproval for Gays*, CBSNEWS.COM (June 9, 2010), http://www.cbsnews.com/8301-503544_162-20007144-503544.html (finding that the percentage of Americans saying they know someone who is gay or lesbian increased from 42% in 1992 to 77% in 2010), archived at <http://perma.cc/5SCU-CJ77>.

²¹¹ SYLVIA ANN HEWLETT ET AL., CTR. FOR TALENT INNOVATION, THE POWER OF “OUT” 2.0: LGBT IN THE WORKPLACE 14 (2013).

²¹² *Id.* at 29–30.

²¹³ Provided the percentage of LGBT employees in a given workforce mirrors the percentage of LGBT persons in the population generally, i.e. 3.8%, a workforce in which 3% of employees are openly LGBT would indicate that 78.9% of the LGBT persons in that particular workforce are open regarding their non-heterosexual or non-cisgender status.

Employers seeking to establish more nuanced goals may wish to consult a 2013 study providing estimates of the LGBT population by state.²¹⁴ As an initial matter, state-level data would aid employers in determining whether affirmative action for LGBT persons is legally justified by allowing employers to more accurately assess whether a manifest imbalance exists between the percentage of LGBT persons in the employer's workforce and the percentage of LGBT persons in the local population.²¹⁵ In the absence of state-level data, a workforce in which openly LGBT persons comprise 2.7% of workers might prompt an employer to adopt an affirmative action program given that 3.8% of U.S. adults identify as LGBT. If the employer was located in Pennsylvania, however, affirmative action ostensibly would not be justified as only 2.7% of Pennsylvanians identify as LGBT.²¹⁶ Rather than having a workforce in which openly LGBT persons are significantly underrepresented, the employer conceivably would have achieved a workforce perfectly mirroring the local labor pool. Conversely, affirmative action would likely be warranted if the employer was based in Nevada as 4.2% of Nevadans identify as LGBT.²¹⁷ Courts, meanwhile, would be more likely to uphold state-specific plans on the grounds they reflect a tailored approach to remedying LGBT underrepresentation.²¹⁸

Establishing affirmative action goals based on state-specific data is not without risks, however. That only one study has attempted to provide estimates of the LGBT population by state should give employers pause as yet-undiscovered flaws in the study's methodology may render its conclusions suspect. To avoid establishing state-specific affirmative action goals based on potentially inaccurate information, employers should continue to rely on national data pending independent confirmation of the study's results.

Separately, state-specific goals may serve in some instances to perpetuate LGBT underrepresentation. The study's authors note that:

While the variation in LGBT identification across states is relatively small, findings do suggest some evidence that the variation is not entirely random. Social climates that promote acceptance of or stigma toward LGBT individuals could affect how many adults disclose an LGBT identity. LGBT people who live in places where they feel accepted may be more likely than those who live in

²¹⁴ Gary J. Gates & Frank Newport, *LGBT Percentage Highest in D.C., Lowest in North Dakota*, GALLUP (Feb. 15, 2013), <http://www.gallup.com/poll/160517/lgbt-percentage-highest-lowest-north-dakota.aspx>, archived at <http://perma.cc/Z3C4-PNU3>.

²¹⁵ See Kenneth R. Davis, *Wheel of Fortune: A Critique of the "Manifest Imbalance" Requirement for Race-Conscious Affirmative Action Under Title VII*, 43 GA. L. REV. 993, 997 (2009) (arguing that the "manifest imbalance" requirement should be abandoned in the context of private, voluntary affirmative action under Title VII).

²¹⁶ Gates & Newport, *supra* note 214.

²¹⁷ Gates & Newport, *supra* note 214.

²¹⁸ See *Johnson v. Transp. Agency, Santa Clara Cnty., Cal.*, 480 U.S. 616, 635 (1987) (upholding affirmative action plan where plan "sought annually to develop even more refined measures of the underrepresentation in each job category").

places where they feel stigmatized to reveal their sexual orientation or gender identity to a survey interviewer.

The states with proportionally larger LGBT populations generally have supportive LGBT legal climates. With the exception of South Dakota, all of the states that have LGBT populations of at least 4% have laws that prohibit discrimination based on sexual orientation and gender identity and allow same-sex couples to marry, enter into a civil union, or register as domestic partners. Of the ten states with the lowest percentage of LGBT adults, only Iowa has such laws.²¹⁹

Thus, a North Dakota employer choosing to implement a state-specific affirmative action plan may seek to attain a workforce in which 1.3% of employees are openly lesbian, gay, bisexual, or transgender given that only 1.7% of North Dakotans identify as LGBT.²²⁰ If the percentage of LGBT persons in the state is actually closer to the 3.8% national average but a majority of LGBT North Dakotans are reluctant to self-identify because they perceive the state as being an unwelcoming place for LGBT persons, then establishing a goal of 1.3% would effectively give sanction to discrimination. Alternatively, if the 1.7% figure is accurate it may indicate that a majority of LGBT North Dakotans feel compelled to leave the state on account of its perceived intolerance toward LGBT individuals such that an affirmative action goal of 1.3% would reinforce a culture of discrimination.

C. *Limited Exemptions for Religious Organizations*

As originally drafted, Title VII would have provided an absolute exemption to religious organizations such that these entities would have been free to consider an individual's race, color, religion, sex, or national origin in making employment decisions.²²¹ As enacted, however, Title VII permits religious organizations to discriminate only on the basis of religion.²²² The relevant language is found in Section 702(a), which provides that Title VII "shall not apply . . . to a religious corporation, association, educational insti-

²¹⁹ Gates & Newport, *supra* note 214.

²²⁰ *See id.* Provided the percentage of LGBT employees in a given North Dakota workforce mirrors the percentage of LGBT persons in North Dakota generally, i.e. 1.7%, a workforce in which 1.3% of employees are openly LGBT would indicate that 76.4% of the LGBT persons in that particular workforce are open regarding their non-heterosexual or non-cisgender status. Thus, an affirmative action goal of 1.3% would be consistent with the proposed objective of increasing the percentage of LGBT persons who openly identify as such from 59% at present to almost 80% upon attainment.

²²¹ Christopher C. Lund, *In Defense of the Ministerial Exception*, 90 N.C. L. REV. 1, 7 (2011).

²²² Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 255 (codified as amended at 42 U.S.C. § 2000e-1(a) (2006)). *See also* Janet S. Belcove-Shalin, *Ministerial Exception and Title VII Claims: Case Law Grid Analysis*, 2 NEV. L.J. 86, 90-91 (2002) (noting that religious officials who had lobbied in support of the bill were surprised when the Senate voted to narrow the exemption for religious employers).

tution, or society with respect to the employment of individuals of a particular religion”²²³ The exemption covers individuals performing religious as well as secular activities so that even maintenance and administrative personnel may be discriminated against on account of their religion consistent with Title VII.²²⁴

While religious educational institutions are exempt, religiously owned or operated educational institutions technically are not.²²⁵ Practically, however, they are also permitted to engage in religious discrimination. Section 703(e)(2) provides, in pertinent part, “it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of higher learning to hire and employ employees of a particular religion if such . . . [institution] is in whole or substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association or society.”²²⁶ Educational institutions operated by wholly secular entities are similarly exempt provided the institution’s curriculum “is directed toward the propagation of a particular religion.”²²⁷

Separately, the Supreme Court has confirmed the existence of a “ministerial exception” to employment nondiscrimination laws, including Title VII.²²⁸ The ministerial exception is grounded in the Religion Clauses of the First Amendment and precludes application of Title VII to claims concerning the employment relationship between a religious organization and its ministers.²²⁹ Although the Supreme Court has been careful to note that the ministerial exception is not limited to the heads of religious congregations, the Court has declined to provide any guidance as to when and under what circumstances an employee will be deemed a minister so as to fall outside the scope of Title VII.²³⁰

For its part, ENDA has always contained an exemption for religious organizations, but the scope of the exemption has broadened over time. The first four iterations of the bill sought to distinguish between religious organizations’ non-profit and for-profit activities, with only the former warranting

²²³ 42 U.S.C. § 2000e-1(a) (2006).

²²⁴ *See* Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 339 (1987) (upholding the 1972 amendment extending the exemption to secular employees against an Establishment Clause challenge).

²²⁵ 42 U.S.C. § 2000e-1(a) (2006).

²²⁶ 42 U.S.C. § 2000e-2(e)(2) (2006).

²²⁷ *Id.*

²²⁸ *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 705–06 (2012).

²²⁹ *See id.* at 706.

²³⁰ *See id.* at 707. Circuit courts have construed the ministerial exception liberally. *See* Molly A. Gerratt, Note, *Closing a Loophole: Headley v. Church of Scientology Int’l as an Argument for Placing Limits on the Ministerial Exception from Clergy Disputes*, 85 S. CAL. L. REV. 141, 171 (2011) (noting that a press secretary for the Catholic Church, the principal of a Catholic school, an organist, and a choir director had all been deemed ministers subject to the exception).

exemption from ENDA's coverage.²³¹ This distinction was subsequently abandoned in favor of a categorical exemption for religious organizations.²³² When ENDA's proponents attempted to amend the bill to provide that (1) the religious exemption applied only to organizations having "religious ritual or worship or the teaching or spreading of religious doctrine or belief" as their primary purpose; and (2) the ministerial exception applied only to individuals "whose primary duties consist of teaching or spreading religious doctrine or belief, [or] religious governance,"²³³ opponents demanded that the language be revised to parallel the religious exemptions contained in Title VII.²³⁴

The three most recent iterations of ENDA have contained a religious exemption explicitly referencing the analogous provisions of Title VII.²³⁵ As passed by the U.S. Senate on November 7, 2013, ENDA's exemption for religious organizations provides, "[t]his Act shall not apply to a corporation, association, educational institution or institution of learning, or society that is exempt from the religious discrimination provisions of Title VII of the Civil Rights Act of 1964 . . . pursuant to section 702(a) or 703(e)(2) of such Act."²³⁶ Whereas a number of religious organizations have endorsed the exemption as "respect[ing] the protections for religious institutions afforded by the First Amendment and Title VII,"²³⁷ others have criticized the provision for failing to protect secular employers whose opposition to homosexuality and transgenderism is predicated on sincerely-held religious beliefs.²³⁸

Provided courts perceive LGBT-related employment discrimination as actionable sex discrimination under Title VII, LGBT plaintiffs bringing discrimination claims against religious organizations would likely experience mixed success. Claims brought by LGBT persons serving in a ministerial capacity would continue to be dismissed outright, not because LGBT persons are unable to state cognizable discrimination claims under Title VII, but because such claims are precluded by the ministerial exception.²³⁹ Non-ministerial LGBT employees, in contrast, would have a viable argument that their discrimination claims should be permitted to go to trial for although

²³¹ See S. 1276, 106th Cong. § 9 (1999); S. 869, 105th Cong. § 9 (1997); S. 932, 104th Cong. § 8 (1995); S. 2238, 103d Cong. § 7 (1994).

²³² See S. 1705, 108th Cong. § 9 (2003); S. 1284, 107th Cong. § 9 (2001).

²³³ H.R. 2015, 110th Cong. § 6 (2007).

²³⁴ See Ann C. McGinley, *Erasing Boundaries: Masculinities, Sexual Minorities, and Employment Discrimination*, 43 U. MICH. J.L. REFORM 713, 729–30 (2010).

²³⁵ See S. 815, 113th Cong. § 6 (2013); S. 811, 112th Cong. § 6 (2011); S. 1584, 111th Cong. § 6 (2009).

²³⁶ S. 815, 113th Cong. § 6 (2013); H.R. 1755, 113th Cong. § 6 (2013).

²³⁷ *Employment Non-Discrimination Act: Ensuring Opportunity for All Americans: Hearing on S. 1584 Before the S. Comm. on Health, Educ., Labor, and Pensions*, 111th Cong. 189–90 (2009) (letter from various religious organizations).

²³⁸ See *id.* at 42–47 (statement of Craig L. Parshall, Senior Vice President and Gen. Counsel, Nat'l Religious Broads.); 2009 *House Hearing*, *supra* note 126, at 87–97 (report from the Traditional Values Coal., Educ. & Legal Inst.).

²³⁹ *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 705–06 (2012).

religious organizations may discriminate on the basis of religion consistent with Title VII, they are not similarly immune from claims of sex discrimination.

In response, religious organizations would likely assert that—notwithstanding LGBT persons' characterization of their claims as discrimination on the basis of sex—it was LGBT persons' failure to comport with established religious doctrine that led to the challenged employment decision. Whether a court would dismiss such claims after concluding that “the permission to employ persons ‘of a particular religion’ includes permission to employ only persons whose beliefs and conduct are consistent with the employer’s religious precepts”²⁴⁰ or instead allow them to proceed on the grounds that a religious employer’s disapproval of its employee’s actions “does not automatically exempt the [challenged employment decision] from Title VII scrutiny”²⁴¹ is unclear and is likely to vary from circuit to circuit.

Nonetheless, an examination of cases in which female, non-ministerial employees were terminated by their religious employers after becoming pregnant out of wedlock provides insight as to how courts might resolve such claims. In *Redhead v. Conference of Seventh-day Adventists*, for example, the U.S. District Court for the Eastern District of New York denied a religious organization’s motion for summary judgment on a pregnancy discrimination claim after noting that although the plaintiff “must concede both the existence of defendant’s policy [against fornication] and the genuineness of defendant’s belief in that policy, a jury remains the proper instrument for determining ‘whether it was pregnancy or fornication that caused the [d]efendant to dismiss the [p]laintiff.’”²⁴² Conversely, in *Boyd v. Harding Academy of Memphis, Inc.*, the Sixth Circuit Court of Appeals affirmed summary judgment in favor of a religious organization where the record indicated that the defendant applied its policy against extramarital sex in a gender-neutral manner.²⁴³ *Boyd*, therefore, suggests that a religious organization may be able to avoid liability for LGBT-related discrimination by ensuring that it applies any religiously mandated policies disfavoring homosexuality or transgenderism without regard to sex, i.e., discriminating against both gay men and lesbian women or, as the case may be, against both transgender women and transgender men.

The fact that only a few courts have been confronted with such claims cautions against any attempt to characterize *Redhead* or *Boyd* as reflecting the “majority” position or to draw sweeping conclusions regarding the implications for sex discrimination claims brought by non-ministerial LGBT

²⁴⁰ *Little v. Wuerl*, 929 F.2d 944, 951 (3d Cir. 1991).

²⁴¹ *Vigars v. Valley Christian Ctr. of Dublin, Cal.*, 805 F. Supp. 802, 808 (N.D. Cal. 1992).

²⁴² 566 F. Supp. 2d 125, 137 (E.D.N.Y. 2008). Courts have likewise held that a religious employer may not give male employees preferential treatment insofar as compensation or benefits decisions are concerned even if such a policy is religiously motivated. See e.g., *EEOC v. Fremont Christian Sch.*, 781 F.2d 1362, 1366 (9th Cir. 1986).

²⁴³ 88 F.3d 410, 414 (6th Cir. 1996).

persons. This very uncertainty, however, would allow non-ministerial LGBT plaintiffs to argue that their discrimination claims should be allowed to go to trial so that a jury may determine whether it was these individuals' failure to conform to religious doctrine or their failure to identify as heterosexual, cis-gender persons that prompted the challenged employment action.

No such questions of fact would exist under ENDA. Courts confronted with sexual orientation or gender identity discrimination claims involving a religious organization would find the claims deficient as a matter of law to the extent they are expressly precluded by ENDA's statutory text.²⁴⁴ ENDA, thus, stands to provide religious organizations free rein to discriminate against LGBT persons, a fact that has troubled several LGBT groups advocating for ENDA's passage. On April 25, 2013, four of these groups issued a joint press release stating:

While we applaud the progress that has been made, we stand united in expressing very grave concerns with the religious exemption in ENDA. It could provide religiously affiliated organizations – far beyond houses of worship – with a blank check to engage in employment discrimination against LGBT people. Some courts have said that even hospitals and universities may be able to claim the exemption; thus, it is possible that a religiously affiliated hospital could fire a transgender doctor or a religiously affiliated university could terminate a gay groundskeeper. It gives a stamp of legitimacy to LGBT discrimination that our civil rights laws have never given to discrimination based on an individual's race, sex, national origin, age, or disability. This sweeping, unprecedented exemption undermines the core goal of ENDA by leaving too many jobs, and LGBT workers, outside the scope of its protections.²⁴⁵

If they are truly concerned about the plight of non-ministerial LGBT persons, these groups should be advocating for ENDA's wholesale abandonment rather than seeking revisions to ENDA's existing religious exemption. The current exemption represents a series of compromises calculated to win the support, or at least lessen the opposition, of some of ENDA's staunchest opponents and is therefore unlikely to be revised by ENDA's drafters for fear of inciting additional opposition to the bill.²⁴⁶ Indeed, the current religious exemption was put forth as a floor amendment just before the U.S. House voted to pass ENDA 2007.²⁴⁷ The House adopted the amendment by a vote

²⁴⁴ See S. 815, 113th Cong. § 6 (2013); H.R. 1755, 113th Cong. § 6 (2013).

²⁴⁵ See Press Release, ACLU, Employment Non-Discrimination Act Statement (April 25, 2013), available at <http://www.aclu.org/lgbt-rights/employment-non-discrimination-act-statement> (last visited March 12, 2014), archived at <http://perma.cc/9KHZ-39L7>.

²⁴⁶ See Sung, *supra* note 40, at 508–09 (noting that ENDA's religious exemption has become broader with each rewriting).

²⁴⁷ See Rhodes, *supra* note 63, at 9–10.

of 402 to 25 with current House Speaker John Boehner and current House Majority Leader Eric Cantor both supporting the revised religious exemption.²⁴⁸ Meaningful employment protections for non-ministerial LGBT persons, thus, cannot be attained under ENDA such that Title VII represents LGBT individuals' only hope of contesting employment discrimination at the hands of religious organizations.

CONCLUSION

Moments after the U.S. Supreme Court issued its ruling in *United States v. Windsor*, the lead sponsor of ENDA in the U.S. Senate declared "let's make this year not only the year in which the federal government recognizes [same-sex] marriage but also the year in which we ban discrimination for LGBT Americans."²⁴⁹ Whereas the Senate ostensibly heeded the sponsor's call and passed ENDA by a vote of 64 to 32, the U.S. House has been a model of inaction insofar as ENDA is concerned. Indeed, even before the Senate voted to begin debate on ENDA, Speaker Boehner announced that the bill would not receive a floor vote in the U.S. House. ENDA, therefore, appears destined to die with the adjournment of the 113th Congress and, depending on the outcome of the 2014 midterm elections and the 2016 presidential election, the bill's prospects for passage may only worsen in the coming years.

Ironically, lawmakers' opposition to ENDA may have the unintended consequence of allowing LGBT persons to contest employment discrimination under the more robust provisions of Title VII. Courts and the EEOC are increasingly likely to perceive LGBT-related employment discrimination as actionable sex discrimination under Title VII. The last decade, in particular, has seen a small but marked shift in favor of allowing LGBT individuals to state cognizable sex discrimination claims. This trend suggests that advocates should abandon their seemingly quixotic quest to enact ENDA in favor of allowing Title VII's "sex" provision to continue on its LGBT-inclusive evolution.

²⁴⁸ See 153 CONG. REC. H13228-02 (daily ed. Nov. 7, 2007).

²⁴⁹ Meredith Shiner, *ENDA Could Ride Gay Rights Wave*, ROLL CALL (June 26, 2013, 5:52 PM), <http://blogs.rollcall.com/wgdb/gay-rights-momentum-could-lend-push-to-enda/>, archived at <http://perma.cc/UU9-T3DB>.