OVERVIEW OF CURRENT ANTI-DISCRIMINATION LAW PROTECTING LGBT PERSONS

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Prepared for:

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GILLFOUNDATION

MEMORANDUM

Date July 28, 2017

To Silicon Valley Community Foundation & Gill Foundation

From WilmerHale

Re **Overview of Current Anti-Discrimination Law Protecting LGBT Persons**

CURRENT LGBT ANTI-DISCRIMINATION PROTECTIONS

Despite recent advances in the law for LGBT individuals (most notably marriage equality), LGBT individuals continue to lack protection for their most basic needs: employment, education, health care, housing, credit, and use of public accommodations. Other than prohibiting hate crimes, no federal law explicitly protects LGBT civil rights, although some laws have been interpreted to do so. Most states lack any statewide protection for LGBT persons, although municipalities in almost every state have enacted local anti-discrimination ordinances. There is still a long way to go before federal and state laws protect every person—regardless of their sexual orientation or gender identity—against discrimination.

Below we give an overview of the current state of the law of LGBT rights and briefly discuss litigation challenging rollbacks of LGBT protections.

A. Federal Law

Aside from hate crimes legislation, Congress has never enacted a civil rights statute that explicitly prohibits discrimination on the basis of sexual orientation or gender identity. Executive orders, regulations, and agency guidance issued under President Clinton and President Obama, along with agency and court decisions, are largely responsible for expanding LGBT anti-discrimination safeguards.

Litigation has also expanded LGBT civil rights. Litigants and agencies have helped persuade some federal courts that gender identity discrimination is a form of sex discrimination. Agencies and courts are also beginning to recognize that sexual orientation discrimination is based on sex. Generally, the turning point in gender identity and sexual orientation cases has been recognizing that discrimination on those bases is grounded on impermissible "sex stereotyping": penalizing LGBT people for failing to conform to society's expectations for a particular gender. A related argument is that sexual orientation discrimination is a form of treating someone differently because of her sex: for example, a woman who marries a man is generally celebrated by her colleagues but a man who does the same thing may be viciously harassed. The Supreme Court has never addressed these issues with an LGBT plaintiff.

Employment

Title VII of the Civil Rights Act of 1964[1] ("Title VII") prohibits discrimination in employment on the basis of "sex," but does not expressly mention sexual orientation or gender identity. In recent years, federal agencies and federal courts have begun to recognize that discrimination on the basis of sexual orientation and gender identity is a form of sex discrimination, because it rests on the refusal to conform to stereotypes about how someone of a particular gender should behave. These developments have relied heavily on the Supreme Court's landmark 1989 decision in *Price Waterhouse v. Hopkins*,[2] which interpreted Title VII's prohibition against sex discrimination to protect a female employee who was denied promotion because she was aggressive and abrasive—qualities that were deemed acceptable or even desirable in a male employee, but not a female one. As the Court explained, Title VII's prohibition against sex discrimination means that "that gender must be irrelevant to employment decisions"; "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for '[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.'"[3] *Price Waterhouse* has influenced the way numerous civil rights laws are interpreted and continues to be an important tool in the LGBT civil rights arsenal.

Another landmark case was *Oncale v. Sundowner Offshore Services*,[4] in which the Supreme Court held that harassment by men against men could be sexual harassment. Although the Court acknowledged that Congress was likely not thinking of sexual harassment of men by men when it passed Title VII, the Court stressed that the words of the law—discrimination "on the basis of sex"—must control the Court's interpretation of the statute.

The Equal Employment Opportunity Commission ("EEOC"), which enforces Title VII through litigation involving private parties and administration of the statute involving federal agencies, has relied on *Price Waterhouse* and *Oncale* in interpreting Title VII to encompass both sexual orientation and gender identity discrimination. In *Macy v. Holder*, a case involving a federal employee, the EEOC held that discrimination against a transgender person based on gender identity is discrimination based on sex because, "[a]s used in Title VII, the term 'sex' 'encompasses both sex—that is, the biological differences between men and women—and gender.'"[5] Moreover, "the term 'gender' encompasses not only a person's biological sex but also the cultural and social aspects associated with masculinity and femininity."[6] Thus, an employer might violate Title VII in a number of ways when it discriminates against a transgender person—"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

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[1] 42 U.S.C. §§ 2000e–2000e-17 (2006 & Supp. IV 2010).
[2] 490 U.S. 228 (1989).
[3] 490 U.S. at 251 (brackets in original) (quoting *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)).
[4] 523 U.S. 75 (1998).
[5] EEOC Appeal No. 0120120821, 2012 WL 1435995, at *5 (Apr. 20, 2012) (quoting *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000)).
[6] *Id.* at *6.

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," which is impermissible.[7]

In *Baldwin v. Foxx*, involving another federal employee, the EEOC found that "[d]iscrimination on the basis of sexual orientation is premised on sex-based preferences, assumptions, expectations, stereotypes, or norms. 'Sexual orientation' as a concept cannot be defined or understood without reference to sex."[8] Because the EEOC's decisions are binding on most federal agencies, most federal employees are protected, for now, from discrimination on the basis of sexual orientation and gender identity and can obtain relief under Title VII.

The current situation for private-sector and state-government employees (who are also covered by Title VII) is more mixed. The EEOC has authority to bring lawsuits on behalf of private-sector employees who have suffered discrimination (and private employees can bring their own lawsuits as well), but federal courts are not obligated to defer to the EEOC's interpretation of Title VII. Some lower federal courts, relying on the Supreme Court's decision in *Price Waterhouse*, have concluded that discrimination based on gender identity is a form of prohibited sex discrimination.[9]

Some courts are beginning to reach the same conclusion for sexual orientation discrimination. Most courts reviewing the issue have concluded that Title VII does not cover sexual orientation, although the tide may be beginning to turn. Some federal district courts have expressly adopted the EEOC's reading of Title VII regarding sexual orientation.[10] A divided panel of the Eleventh Circuit recently held that Title VII does not prohibit discrimination based on sexual orientation per se, but that the law does protect LGBT employees against sex-based stereotyping.[11] In a landmark decision, the Seventh Circuit became the first federal appellate court to hold that Title VII prohibits discrimination on the basis of sexual orientation.[12] The Second Circuit is also taking up the issue en banc in *Zarda v. Altitude Express, Inc.*[13] The EEOC filed an amicus curiae

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[7] *Id.* at *7.

[8] EEOC Appeal No. 0120133080, 2015 WL 4397641, at *5 (July 15, 2015).

[9] *See, e.g.*, *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011) (holding that transgender individuals are protected from sex discrimination under the Equal Protection Clause); *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004) (reversing district court's dismissal of plaintiff's claims of sex discrimination based on gender identity under both Title VII and equal protection). A number of district courts have also found sex discrimination on similar grounds.

[10] *See, e.g., EEOC v. Scott Med. Health Ctr., P.C.*, 217 F. Supp. 3d 834, 839-42 (W.D. Pa. 2016) (holding that Title VII prohibits discrimination on the basis of sexual orientation and explaining that discrimination "based upon nothing more than the aggressor's view of what it means to be a man or a woman, is exactly the evil Title VII was designed to eradicate"); *Isaacs v. Felder Svcs., LLC*, 143 F. Supp. 3d 1190 (M.D. Ala. 2015) (agreeing with EEOC, on issue of first impression, "that claims of sexual orientation-based discrimination are cognizable under Title VII," but granting defendant's motion for summary judgment due to insufficient evidence of discriminatory intent).

[11] *See Evans v. Georgia Regional Hosp.*, 850 F.3d 1248 (11th Cir.), *rehr'g and rehr'g en banc denied*, No. 15-15234-BB (11th Cir. July 6, 2017). Counsel for Evans has announced that she will appeal to the Supreme Court.

[12] *Hively v. Ivy Tech Cmty. Coll., S. Bend*, 853 F.3d 339 (7th Cir. 2017).

[13] No. 15-3775 (2d Cir. 2017). *See also, e.g., Christiansen v. Omnicom Grp.*, 167 F. Supp. 3d 598 (S.D.N.Y. 2016) (acknowledging that the court was bound to follow Second Circuit precedent that does not allow sexual orientation discrimination claims under Title VII, but stating, "[i]n light of the EEOC's recent [*Baldwin*] decision on Title VII's scope, and the demonstrated impracticability of considering sexual orientation discrimination as categorically different from sexual stereotyping, one might reasonably ask—and, lest there be any doubt, this Court is asking—whether that

brief in *Zarda* arguing that the Second Circuit should reverse its precedents and hold that discrimination on the basis of sexual orientation is sex discrimination.[14] The Justice Department, however, filed an amicus brief in *Zarda* taking the oppose position—that discrimination based on sexual orientation (or gender identity) is not sex discrimination—and disagreeing with the EEOC's position.[15]

Although the EEOC is an "independent agency"—meaning that the President may not fire the commissioners without cause—vacancies will likely soon emerge in the EEOC that President Trump will fill, raising the possibility that the EEOC may reconsider its position on Title VII and whether "sex" discrimination includes sexual orientation and gender identity discrimination. Moreover, should the Title VII issue reach the Supreme Court, the Solicitor General, who handles all litigation, including amicus briefs for the United States before the Court, would be expected to follow the Justice Department's position.

For now, however, the EEOC continues to support gender identity and sexual orientation discrimination claims as sex discrimination claims. In *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*,[16] the EEOC filed suit on behalf of transgender former employee Aimee Stephens against a family-owned funeral home. The owner fired Stephens after she told the owner that she was transitioning from male to female and asked to be allowed to wear female clothing at work. The suit claimed wrongful termination based on gender identity discrimination. The District Court rejected a discrimination claim based on gender identity, but recognized a sex discrimination claim based on sex- or gender-stereotyping. However, the District Court granted summary judgment to the defendant based on its conclusion that the funeral home qualified for a religious exception to Title VII under the federal Religious Freedom Restoration Act[17] ("RFRA").[18] The EEOC appealed that decision to the Sixth Circuit. On February 10, 2017, the Commission filed its brief on her behalf.[19] In its brief, the EEOC argued strongly that the District Court's rulings dismissing the gender identity discrimination claim and granting summary judgment should be overturned. Thus, the EEOC continues to adhere to its view of the law, for now.

Education

Education is probably the area in which the law will be the most in flux in the immediate future. No federal statute explicitly addresses sexual orientation or gender identity discrimination

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line should be erased"). The Second Circuit held that the plaintiff had stated a claim of gender discrimination and that "gay, lesbian, and bisexual individuals do not have less protection under *Price Waterhouse* against traditional gender stereotype discrimination than do heterosexual individuals." *Christiansen v. Omnicom Grp.*, 852 F.3d 195 (2d. Cir. 2017). In a concurring opinion, Chief Judge Katzmann urged the court, in an appropriate case, to adopt the interpretation that discrimination on the basis of sexual orientation is sex discrimination. *Id.* at 201-207.

[14] *En Banc* Br. of *Amicus Curiae* Equal Employment Opportunity Commission in Support of Plaintiffs/Appellants and in Favor of Reversal, *Zarda v. Altitude Express*, No. 15-3775, ECF No. 296 (2d Cir. June 23, 2017).

[15] Br. for the United States as *Amicus Curiae*, *Zarda v. Altitude Express*, No. 15-3775, ECF No. 417 (2d Cir. July 26, 2017).

[16] 201 F. Supp. 3d 837 (E.D. Mich. 2016).

[17] 42 U.S.C. §§ 2000bb–2000bb-4 (2009).

[18] 201 F. Supp. 3d 837, 853-64. The EEOC also brought a claim for an unlawful employment practice because the company paid for male employees' work clothing, but not female employees' work clothing.

[19] Opening Br. of EEOC as Appellant, No. 16-2424, ECF No. 22.

in education. Title IX of the Education Amendments of 1972[20] ("Title IX") bars sex discrimination in educational programs receiving federal financial assistance (which effectively covers all public schools), but does not expressly ban sexual orientation or gender identity discrimination.[21] The Department of Education's regulations implementing Title IX also do not define sex discrimination to include gender identity and sexual orientation.[22]

Under President Obama, the Department of Education sought to protect LGBT students by issuing two guidance letters regarding treatment of transgender students and their access to bathrooms and locker rooms consistent with their gender identity.[23] That guidance was the subject of significant litigation,[24] but was revoked by the Trump Administration. On February 22, 2017, the Departments of Justice and Education issued new guidance, withdrawing the Department of Education's previous guidance letters. Because the Department of Education's previous interpretation was reflected in letters, not formal regulations, the Administration could revoke its guidance quickly and without the need for lengthy notice-and-comment rulemaking. While the joint letter from the Department of Education and the Department of Justice withdrawing the previous guidance means that courts and plaintiffs can no longer rely upon the previous interpretation, the letter takes no position on the question and indicates that the Departments will continue to consider the issue.[25] Even without the Administration's support, transgender students who believe that their school is treating them in discriminatory fashion can bring a lawsuit under Title IX at any time.

The federal courts are now considering whether Title IX provides protections to transgender students. The Fourth Circuit is scheduled to consider the issue on remand from the U.S. Supreme Court after the Department of Education withdrew its guidance.[26] The Seventh Circuit has meanwhile held that Title IX likely prohibits discrimination against transgender

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[20] 20 U.S.C. §§ 1681–1688 (2006 & Supp. IV 2010).

[21] 20 U.S.C. § 1681; 42 U.S.C. § 2000c-6 (2006 & Supp. IV 2010).

[22] 34 C.F.R. pt. 106.

[23] U.S. Dep't of Educ., Letter to Emily T. Prince (Jan. 7, 2015); U.S. Dep't of Educ., Dear Colleague Letter: Transgender Students (May 13, 2016), http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf (last visited Mar. 8, 2017).

[24] *Gloucester County Board of Education v. G.G.*, 822 F.3d 709 (4th Cir.), *cert. granted in part*, No. 16-273, 2016 WL 4565643 (U.S. Oct. 28, 2016), *vacated and remanded*, 580 U.S. --- (2017) (transgender boy challenged his school district's policy requiring students to use the school bathroom consistent with their biological sex, rather than their self-identified gender). Twenty-one states, and two additional governors, signed on to an *amicus* brief in support of the School Board. Br. of *Amici Curiae* the State of West Virginia, 20 Other States, and the Governors of Kentucky and Maine Supporting Petitioner (Jan. 10, 2017). Of the twenty-one states, five (Louisiana, Michigan, Missouri, Montana, and Ohio) have in place executive orders protecting state employees from employment discrimination on the basis of sexual orientation (Louisiana, Michigan, and Montana also protect against gender identity discrimination). Utah has statutory protections against sexual orientation and gender identity discrimination in employment and housing. Wisconsin laws protect against sexual orientation discrimination in housing, employment, and public accommodations. Both Governors who joined the brief have protections in their states. Kentucky has an executive order protecting state employees against employment discrimination on the basis of sexual orientation or gender identity. Maine has state statutes protecting against discrimination on the basis of sexual orientation or gender identity in employment, housing, public accommodations, and credit.

[25] U.S. Dep't of Educ. & U.S. Dep't of Justice, Dear Colleague Letter (Feb. 22, 2017), https://www.justice.gov/opa/press-release/file/941551/download.

[26] *Grimm v. Gloucester County Sch. Bd.*, No. 15-206 (4th Cir. oral argument scheduled Sept. 12, 2017).

students under a "sex stereotyping" theory (as well as the Equal Protection Clause of the Fourteenth Amendment).[27]

Title IX provides most of the anti-discrimination protection in education law, but there are opportunities under state laws, as well. For example, students in a Florida middle school challenged the school board's denial of their application to create a Gay-Straight Alliance school group as violating the First and Fourteenth Amendments and the state Equal Access Act.[28] The Eleventh Circuit recently reversed the district court's dismissal and remanded the case for further proceedings.

Health Care

Section 1557 of the Affordable Care Act (the "ACA") prohibits sex discrimination in health care programs that the Department of Health and Human Services ("HHS") funds or administers, including Medicaid, as well as in health insurance plans issued under the ACA's "marketplaces."[29] In 2016, HHS issued regulations implementing Section 1557 that expressly prohibit discrimination in the provision of medical care and issuance of insurance policies on the basis of gender identity and sex stereotyping.[30] In addition, HHS regulations interpret Section 1557 to prohibit employers from maintaining "a categorical coverage exclusion or limitation for all health services related to gender transition" in their employer-sponsored health care plans.[31] HHS also strongly stated its policy that sexual orientation discrimination is based on sex, but stopped short of deciding "whether discrimination on the basis of an individual's sexual orientation status alone is a form of sex discrimination under Section 1557" in light of the present unsettled nature of the law on this point.[32] The Department explained that some situations are already protected: "Section 1557's prohibition of discrimination on the basis of sex includes, at a minimum, sex discrimination related to an individual's sexual orientation where the evidence establishes that the discrimination is based on gender stereotypes."[33]

The HHS regulations have been a tremendous step forward in protecting transgender people against discrimination in much-needed health care, but the future of these protections is highly uncertain. On December 31, 2016, a federal judge preliminarily enjoined the enforcement of the portion of the regulation that includes "termination of pregnancy" and "gender identity" within the definition of discrimination "on the basis of sex."[34] The Trump Administration declined to appeal the preliminary injunction. The court recently granted the Administration's motion to stay the litigation while HHS reconsiders the regulations.[35] The preliminary injunction remains in

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[27] *Whitaker v. Kenosha Unified Sch. Dist.*, 858 F.3d 1034 (7th Cir. 2017).

[28] *Carver Middle Sch. Gay-Straight Alliance v. School Bd. of Lake Cty.*, 842 F.3d 1324 (11th Cir. 2016).

[29] Patient Protection and Affordable Care Act, Pub. L. No. 111-148, tit. I, § 1557 (codified at 42 U.S.C. § 18116) (2010). Section 1557 prohibits discrimination by reference to civil rights statutes, including Title VI, Title IX, the Age Discrimination Act of 1975, and the Rehabilitation Act of 1973.

[30] Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31,375 (May 18, 2016); 45 C.F.R. pt. 92 (2016).

[31] 45 C.F.R. § 92.207(b)(4).

[32] 81 Fed. Reg. at 31,387-390.

[33] *Id.* at 31,390.

[34] *Franciscan Alliance v. Burwell*, No. 7:16–cv–00108–O, 2016 WL 7638311 (N.D. Tex. Dec. 31, 2016).

[35] *Franciscan Alliance v. Burwell*, No. 7:16–cv–00108–O, ECF No. 105 (N.D. Tex. July 10, 2017). The first rulemaking status report is due August 4, 2017. *Id.* at 10.

effect and the court retains jurisdiction over the case, requiring regular status reports from HHS regarding rulemaking activities relating to revising the regulations.

If HHS pursues new rulemaking, it could unwind the regulations implementing Section 1557 of the ACA, a process that could take a year or more to complete and would require HHS to solicit and respond to public comments. Repealing the regulation would likely instigate litigation by affected parties trying to protect their rights. If the regulation's LGBT protections are repealed, or if the ACA itself is repealed, health care providers could again deny treatment to LGBT individuals or their family members, and health insurance companies and state Medicaid programs could refuse to cover treatment for gender transition treatment and related care, such as mental health care.

Housing

The Fair Housing Act[36] (the "FHA") prohibits discrimination on the basis of sex in the sale or rental of housing or transactions related to real estate, but does not specifically include gender identity or sexual orientation.[37] In 2012, the Department of Housing and Urban Development ("HUD") issued a regulation titled "Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity,"[38] and built on it in a 2016 rule titled "Equal Access in Accordance With an Individual's Gender Identity in Community Planning and Development Programs"[39] (together, the "Equal Access Rules"). The regulation prohibits discrimination on the basis of both sexual orientation and gender identity in any HUD program, including shelters. HUD intends the Equal Access Rule to serve as a model for other housing providers, both public and private, but the rule itself does not apply to the private sector.[40] Thus far, one federal court has approved HUD's interpretation of the FHA.[41]

As noted above, the Equal Access Rules do not apply to the private sector. Thus, private landlords or owners may refuse to rent or sell to LGBT people or their families, or evict them based on an individual's sexual orientation or gender identity. Private lenders may refuse to lend LGBT individuals or their families money to buy a home or discriminate in appraising a property (but see Credit section, below). Without protections applicable to both public and private owners and lenders, the LGBT population will continue to have a disproportionately difficult time finding safe, secure housing.

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[36] 42 U.S.C. §§ 3601–3619 (2006 & Supp. IV 2010).
[37] 42 U.S.C. §§ 3604–3606.
[38] Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity, 77 Fed. Reg. 5662 (Feb. 3, 2012) (amending 24 C.F.R. pts. 5, 200, 203, 236, 400, 570, 574, 882, 891, and 982).
[39] Equal Access in Accordance With an Individual's Gender Identity in Community Planning and Development Programs, 81 Fed. Reg. 64,763 (Sept. 21, 2016).
[40] *Id.*
[41] *Thomas v. Osegueda*, No. 2:15–CV–0042–WMA, 2015 WL 3751994 (N.D. Ala. June 16, 2015) (finding HUD's Equal Access Rule ban on sexual orientation discrimination a permissible interpretation of Fair Housing Act's sex discrimination prohibition because the rule grounds sexual orientation claims in sex stereotyping).

Credit

LGBT individuals remain vulnerable to discrimination in access to credit. The Equal Credit Opportunity Act[42] prohibits discrimination in any aspect of a credit transaction on the basis of sex. Regulation B, which implements the Act, explicitly prohibits discrimination based on an applicant's associations and personal relationships, which can be read to protect against discrimination on the basis of sexual orientation.[43] HUD's Equal Access Rule prohibits sex, sexual orientation, and gender identity discrimination in mortgages and financing in HUD programs (see Housing section, above), but it does not apply to private lenders. There are no statutory or regulatory protections for transgender individuals seeking most types of credit, such as small-business loans, credit cards, or participation in credit unions.

The Consumer Financial Protection Bureau (the "CFPB"), charged with administering Regulation B, has been less proactive than other agencies in protecting LGBT rights. It has only issued a private, unofficial letter regarding its interpretation of the Equal Credit Opportunity Act and Regulation B.[44] In the letter, CFPB Director Richard Cordray acknowledged that "the current state of the law supports arguments that the prohibition of sex discrimination in [the Equal Credit Opportunity Act] and Regulation B affords broad protection against credit discrimination on the bases of gender identity and sexual orientation . . . ." However, Director Cordray did not promise that the CFPB would issue guidance or regulations interpreting the Equal Credit Opportunity Act and Regulation B to prohibit discrimination on the basis of sexual orientation or gender identity. Instead, he said only that the CFPB would "continue to monitor these legal developments closely as we strive to ensure that our interpretation and application of laws and rules under our jurisdiction, including [the Equal Credit Opportunity Act] and Regulation B, appropriately reflect the evolving precedents interpreting sexual discrimination law." Director Cordray's term expires in July 2018, and President Trump is very unlikely to reappoint him; it is possible that he may step down even before that date.

At least one federal court of appeals has held that discrimination based on gender identity violates the Equal Credit Opportunity Act's prohibition against sex discrimination, relying on the *Price Waterhouse* and other arguments discussed above.[45]

Without protection against discrimination in access to credit, individuals and families may have difficulty accumulating savings, purchasing a home, starting a small business, obtaining a line of credit, or engaging in other financial dealings. Thus, LGBT people are more vulnerable to poverty and homelessness, particularly as they age.

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[42] 15 U.S.C. §§ 1691–1691f (2006 & Supp. V 2011).

[43] Finalization of Interim Final Rules (Subject to Any Intervening Amendments) Under Consumer Financial Protection Laws, 81 Fed. Reg. 25,323, 25,325 (Apr. 28, 2016); 12 CFR pt. 1002, Supp. I ¶2(z)-1.

[44] Letter from Director Richard Cordray to Services & Advocacy for GLBT Elders (Aug. 30, 2016), https://www.cfpbmonitor.com/wp-content/uploads/sites/5/2016/09/SAGE-Letter.pdf.

[45] *Rosa v. Parks W. Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000).

Public Accommodations

No federal statute protects LGBT people from discrimination in public accommodations. Title II of the Civil Rights Act of 1964[46] ("Title II") defines public accommodations as hotels, restaurants, and theaters and other entertainment venues.[47] Title II does not prohibit sex discrimination in public accommodations,[48] and so it cannot bar sexual orientation or gender identity discrimination in many public places. In practice, the lack of federal protection in public accommodations also allows private entities to discriminate against LGBT individuals in places such as stores, public spaces, entertainment centers, and public bathrooms unless a state law prohibits the discrimination. State laws vary widely in what, if any, anti-discrimination protections they offer LGBT persons (see Section B, below).

Jury Service

No federal statute prohibits discrimination on the basis of sexual orientation or gender identity in jury service. The Jury Service and Selection Act[49] prohibits discrimination based on sex.[50] Two attempts to introduce federal legislation to protect LGBT potential jurors have been unsuccessful.

The lower courts are currently divided as to whether sexual orientation may be a ground for excluding a potential juror. Those decisions have focused not on the statutory prohibition against sex discrimination in jury service, but on constitutional equal protection principles. In *United States v. Blaylock*,[51] the Eighth Circuit expressed doubt that the law "extend[s] constitutional protection to the sexual orientations of venire persons," but did not ultimately decide that issue. In contrast, the Ninth Circuit held in *Smithkline Beecham Corp. v. Abbott Laboratories*[52] that sexual orientation is a protected class for purposes of equal protection and thus may not be grounds for excluding a prospective juror. *Smithkline Beecham* only governs federal courts in the Ninth Circuit.

Under current law, in most of the country a prospective juror may be excluded solely because he or she is an LGBT person. That fact could deny LGBT defendants a jury that could contain an LGBT member and would allow parties to exclude LGBT people from participation in an important civic institution solely on the basis of their sexual orientation or gender identity.

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[46] 42 U.S.C. §§ 2000a–2000a-6 (2006 & Supp. IV 2010).

[47] The definition in the Americans With Disabilities Act of 1990 is much more broad and also encompasses convention centers, retail stores, service establishments, public transportation stations, museums and libraries, parks, schools, social service establishments, and gyms and other places for exercise and recreation. 42 U.S.C. § 12181 (7) (2006 & Supp. IV 2010). The ADA is unlikely to offer protection, however, because it expressly excludes "gender identity disorders not resulting from physical impairments" from the definition of disability. 42 U.S.C. § 12211(b). That exclusion is currently under challenge in the courts.

[48] 42 U.S.C. § 2000a.

[49] 28 U.S.C. §§ 1861–1878 (2006 & Supp. V 2011).

[50] 28 U.S.C. § 1862.

[51] 421 F.3d 758, 769-770 (8th Cir. 2005).

[52] 740 F.3d 471 (9th Cir. 2014).

The Potential Complication of RFRA

Even assuming that the federal statutes discussed above do reach anti-LGBT discrimination, a defendant may argue that application of the statute to its conduct would violate its rights to religious freedom under the federal Religious Freedom Restoration Act ("RFRA").[53] RFRA was enacted in 1993 to overturn a Supreme Court decision that, in the view of critics, gave insufficient weight to claims of religious freedom against the application of government regulations. Under RFRA, once a party shows that government action substantially burdens its exercise of religion, the government must prove that the application of the burden to that person is the least restrictive means of furthering a compelling governmental interest.[54]

Until recently, claims that application of anti-discrimination laws would violate RFRA were thought to have very little chance of success. In 2014, however, the Supreme Court decided in *Burwell v. Hobby Lobby Stores, Inc.*[55] that a regulation issued under the Affordable Care Act requiring employer-provided health insurance plans to provide free contraceptive coverage to employees violated RFRA, as applied to closely held corporations whose owners held a sincere religious objection to contraception. One of the issues much discussed in the briefing in that case was whether a victory for the employer would potentially imperil application of federal anti-discrimination laws to employers who claimed that they had a sincere religious objection to working with persons defined by a particular protected category, such as race or sex. The dissent in *Hobby Lobby* suggested that the Court's decision could open the door to religious objections to anti-discrimination laws, including objections to prohibitions against discrimination against LGBT persons.[56] The majority rejected that criticism, stating that "[t]he Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal."[57]

The majority opinion in *Hobby Lobby* may offer some reassurance that RFRA would not interfere with the application of anti-discrimination laws that protect LGBT people, but the decision does not definitively resolve the issue.[58] In addition, as discussed below, the Supreme Court is scheduled to decide whether the First Amendment limits the application of anti-discrimination laws to public accommodation laws prohibiting discrimination on the basis of sexual orientation.

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[53] 42 U.S.C. §§ 2000bb–2000bb-4 (2009).
[54] 42 U.S.C. § 2000bb-1.
[55] 134 S. Ct. 2751 (2014).
[56] *Id.* at 2804.
[57] *Id.* at 2783. The majority did not discuss anti-LGBT discrimination—perhaps reflecting a doubt whether federal law reaches such discrimination, whereas federal law unquestionably reaches discrimination on the basis of race.
[58] A district court in Michigan has already relied on *Hobby Lobby* in finding that a funeral home was entitled to a federal RFRA exemption for firing a transgender female employee after she informed her colleagues that she intended to begin presenting at work as a woman and dismissed the case on summary judgment. *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 201 F. Supp. 3d 837 (E.D. Mich.), *appeal filed*, No. 16-2424 (Oct. 13, 2016). See Employment section, above.

Summary

Federal anti-discrimination protections are a patchwork of executive orders, regulations, agency guidance, and court decisions. This inconsistency undermines the message that discrimination on the basis of sexual orientation and gender identity is not acceptable. LGBT individuals and their families are at risk for discrimination and social ostracism in every area of their lives, leaving them disproportionately likely to be deprived of necessities such as safe housing and vital health care.

B. State Laws

State laws vary widely in what, if any, anti-discrimination protections they offer on the basis of sexual orientation or gender identity. Most states have no explicit protections at all, although in virtually every state some cities and towns have adopted anti-discrimination measures. However, some states prohibit more protective local ordinances.[59] A minority of states have enacted laws prohibiting such discrimination in various sectors of the economy, but they are not uniform. In some additional states, governors have issued executive orders offering some protections for state employees or in state programs, but those protections are vulnerable if a new governor not favorably disposed to protecting LGBT individuals is elected. For example, in 2015, Kansas Governor Sam Brownback rescinded a prior executive order that had established employment protections for both sexual orientation and gender identity for state employees.[60] Furthermore, action through executive order can apply only to participants in state programs and state employees, or at most, employees of companies that contract with the state government.

In one example of an incremental movement toward greater protections in a conservative state, Utah recently enacted a law, referred to as the "Utah Compromise" and endorsed by the Church of Latter-day Saints as well as gay rights organizations in Utah, that protects individuals from discrimination in housing or employment based on their sexual orientation or gender identity.[61] The Utah law does not reach public accommodations; thus, restaurants and hotels could still discriminate against LGBT patrons (but not their employees).

The Utah law allows reasonable accommodation of religious beliefs in the workplace, but only in such a manner as does not harass others or interfere with legitimate employer needs. Unlike some states, Utah does not have a broad religious-freedom statute modeled on the federal RFRA statute; thus, crucially, the law does not exempt privately owned businesses based on the religious beliefs of their owners (unlike in *Hobby Lobby*). As a fundamental part of the compromise, however, the law exempts small businesses (fewer than fifteen employees) and religious institutions and affiliates, such as charities and schools, and it may not be interpreted to infringe on protections for freedom of expression or free exercise of religion. For employers, the Utah law specifically allows sex-segregated bathrooms and similar facilities, but it requires that gender-

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[59] *See, e.g.*, *Protect Fayetteville v. City of Fayetteville*, 510 S.W.3d 258, 259 (2017) (striking down Fayetteville's anti-discrimination ordinance extending protections to cover discrimination based on sexual orientation and gender identity as incompatible with a state law that bans municipalities from "adopt[ing] or enforc[ing] an ordinance, resolution, rule, or policy that creates a protected classification or prohibits discrimination on a basis not contained in state law").

[60] Kan. Exec. Order No. 15-01 (Feb. 10, 2015), http://kslib.info/DocumentCenter/View/4171.

[61] Utah Senate Bills 296 and 297 (2015).

specific needs be accommodated, which could be done through locked bathroom stalls. Employees are also protected from adverse treatment based on their speech and activity outside the workplace (*e.g.*, attending an anti-gay-rights or pro-gay-rights rally). Finally, the Utah law contains a non-severability clause, meaning that if any part of the law is declared invalid, the entire compromise will fail.

The decisions of federal courts and agencies have affected the way that some states interpret their own laws, so a reversal of federal LGBT-protective policies could have a ripple effect on state policies as well. Virginia is an example of the impact federal court decisions can have on interpretations of state laws. Virginia does not have any statutes that explicitly prohibit sexual orientation and gender identity discrimination, but the state's Attorney General Mark R. Herring issued an advisory opinion regarding the scope of sex discrimination in Virginia's civil rights laws.[62] He opined that, based on federal court decisions such as *Price Waterhouse*, "courts interpreting the [Virginia Human Rights Act] and Virginia's other statutory prohibitions on sex discrimination would most likely conclude that discrimination against LGBT individuals constitutes impermissible sex discrimination when it is similarly based on sex-stereotyping or treating individuals less favorably on account of their gender."[63] A decision by the U.S. Supreme Court disapproving the reliance in *Price Waterhouse* to prohibit anti-LGBT discrimination could deter state courts and agencies from adopting the same reasoning under their own laws. Nearly every state has municipalities that have granted protected status on the basis of sexual orientation or gender identity through local ordinances, but, as seen in North Carolina with H.B.2, the state legislature may override municipalities. Another example is a Houston ordinance, enacted before the Supreme Court's same-sex marriage decision in *Obergefell v. Hodges*, that provided benefits to same-sex partners of city employees. The Supreme Court of Texas recently remanded the case challenging that ordinance to the trial court for further consideration of the impact of the *Obergefell* decision on state laws governing the "benefits" of marriage.[64] However, the U.S. Supreme Court said, nearly simultaneously, "a State may not 'exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples.'"[65]

Employment

Twenty-two states and the District of Columbia have legislation protecting both public and private employees from employment discrimination on the basis of sexual orientation: California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Utah, Vermont, Washington, and Wisconsin. Notably absent are Texas and Florida, the

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[62] Va. Att'y Gen. Mark R. Herring, Opinion Letter on Whether Virginia Law Prohibits Discrimination on the Basis of Sexual Orientation and Gender Identity (May 10, 2016), http://www.oag.state.va.us/files/Opinions/2016/15-070Messrs_GarrettPlumLaRock.pdf.

[63] *Id.* at 4.

[64] *Pidgeon v. Turner*, --- S.W.3d ---, No. 15-0688, 2017 WL 2829350 (Tex. June 30, 2017). The Supreme Court of Texas originally declined to hear the case, letting stand the Fourteenth Court of Appeals' decision remanding for proceedings consistent with *Obergefell*. However, after many state Republicans, including the current Governor and Attorney General, filed *amici* letters or briefs supporting appellants' petition for review and motion for rehearing, the court granted the petition for review and heard oral argument in the case on March 1, 2017.

[65] *Pavan v. Smith*, 137 S. Ct. 2075, 2078 (2017) (quoting *Obergefell v. Hodges*, 135 S. Ct. 2584, 2605 (2015)).

second and third most populous states, as well as the heavily populated states of Michigan, North Carolina, Ohio, and Pennsylvania (which have executive orders in place protecting state employees).

An additional eleven states currently have executive orders in effect that protect state employees, and sometimes employees of state contractors and subcontractors, from sexual orientation discrimination in employment decisions: Alaska (state employees), Arizona (state employees), Kentucky (state employees), Louisiana (state and state contractor employees), Michigan (state employees), Missouri (state employees), Montana (state and state contractor employees), North Carolina (state employees), Ohio (state employees), Pennsylvania (state and state contractor employees), and Virginia (state and state contractor employees).

For gender identity, twenty states and the District of Columbia have a statute prohibiting both state and private employers from discriminating: California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, Rhode Island, Utah, Vermont, and Washington.

Eight more states protect against gender identity discrimination in employment decisions by public employers or state contractors and subcontractors through executive orders: Kentucky (state employees), Louisiana (state and state contractor employees), Michigan (state employees), Montana (state and state contractor employees), New Hampshire (state and state contractor employees), North Carolina (state employees), Pennsylvania (state and state contractor employees), and Virginia (state and state contractor employees).

Public Accommodations

Twenty-one states—California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Washington, and Wisconsin—and the District of Columbia prohibit discrimination in public accommodations on the basis of sexual orientation.

Nineteen states—California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington—and the District of Columbia prohibit discrimination in public accommodations on the basis of gender identity.

Housing

Twenty-two states and the District of Columbia protect against housing discrimination on the basis of sexual orientation: California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Utah, Vermont, Washington, and Wisconsin.

Twenty states and the District of Columbia protect against housing discrimination on the basis of gender identity: California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, Rhode Island, Utah, Vermont, and Washington.

Credit

Fourteen states protect access to credit on the basis of sexual orientation: Colorado, Connecticut, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Jersey, New Mexico, New York, Rhode Island, Vermont, and Washington.

Thirteen states protect access to credit on the basis of gender identity: Colorado, Connecticut, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Jersey, New Mexico, Rhode Island, Vermont, and Washington.

Religious Freedom and Other Constitutional Claims

Increasingly, some parties are arguing that the application of state anti-discrimination laws—in particular, laws prohibiting discrimination in public accommodations—violate the Free Speech and Free Exercise Clauses of the First Amendment. These claims have been raised by merchants who claim to be engaging in a form of artistic expression when they provide goods or services to the public. Although the Supreme Court declined to hear one such case, brought by a wedding photographer, in 2014,[66] it recently agreed to hear such a claim in a case involving a baker who declined to create a wedding cake for a same-sex wedding.[67] Another, similar case involving a florist has been filed with the Court.[68]

In addition, like the federal government, many states have religious-freedom protection laws. These statutes are sometimes more protective of religious freedom than the federal RFRA statute. For example, not all state religious freedom laws require a plaintiff to demonstrate a "substantial burden" to his or her free exercise of religion, although they apply a similar balancing test to determine whether the burden or restriction is the least restrictive means of furthering a compelling governmental interest.[69] Defendants accused of discrimination against LGBT individuals have argued that their conduct is protected by those "little RFRAs," as well as by the First Amendment's protections of religious freedom and free speech. Thus far, most of these claims have not been successful, but a change in the composition of the courts could affect how these cases are decided.[70]

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[66] *See Elane Photography v. Willock*, 309 P.3d 53 (N.M. 2013), *cert. denied*, 134 S. Ct. 1787 (U.S. 2014).

[67] *See Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272 (Colo. App. 2015), *cert. denied sub nom. Masterpiece Cakeshop, Inc. v. Colo. Civil Rights Comm'n*, No. 15SC738, 2016 WL 1645027 (Colo. Apr. 25, 2016), *cert. granted*, No. 16-111, 2017 WL 2722428 (U.S. June 26, 2017).

[68] *See State v. Arlene's Flowers*, 389 P.3d 543 (Wash. 2017), *petition for cert. filed*, No. 17-108 (U.S. July 21, 2017).

[69] *See, e.g.*, ALA. CONST. ART. 1, § 3.01 (2016) ("The purpose of the Alabama Religious Freedom Amendment is to guarantee that the freedom of religion is not burdened by state and local law; and to provide a claim or defense to persons whose religious freedom is burdened by government."); CONN. GEN. STAT. ANN. § 52-571b (West 2017) ("The state or any political subdivision of the state shall not burden a person's exercise of religion under section 3 of article first of the Constitution of the state even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section."); N.M. STAT. ANN. § 28-22-3 (West 2017) ("A government agency shall not restrict a person's free exercise of religion unless" it meets the requirements of the balancing test.); 42 R.I. GEN. L. ANN. § 80.1-3 (West 2016) ("Except as provided for in subsection (b), a governmental authority may not restrict a person's free exercise of religion.").

[70] *See Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272 (Colo. App. 2015) (First Amendment did not bar application of human rights ordinance to cake shop that refused to sell wedding cake), *cert. denied sub nom. Masterpiece Cakeshop, Inc. v. Colo. Civil Rights Comm'n*, No. 15SC738, 2016 WL 1645027 (Colo. Apr. 25, 2016), *cert. granted*,

More than 200 bills restricting LGBT rights have been recently introduced in state legislatures across the country, but very few have passed. The most notorious such law was H.B.2 in North Carolina.[71] H.B.2 prevented local governments from enacting LGBT anti-discrimination ordinances—in effect legalizing all forms of private discrimination—and required individuals to use only those bathrooms in public facilities that were consistent with the gender indicated on their birth certificate, effectively prohibiting transgender individuals from using the bathroom consistent with their gender identity.[72] Following more than a year of litigation, debate, and a strong stance by organizations like the National Collegiate Athletic Association, North Carolina lawmakers reached a compromise. On March 30, 2017, the North Carolina legislature enacted H.B.142, which repealed H.B.2. However, the new law also prohibits many state entities, including state agencies, state colleges, and cities and towns from regulating "access to multiple occupancy restrooms, showers, or changing facilities, except in accordance with an act of the General Assembly."[73] H.B.142 also bars local governments from enacting or amending "an ordinance regulating private employment practices or regulating public accommodations."[74]

LGBT advocates challenged a Mississippi "religious liberty" bill called H.B.1523 that granted "special rights to citizens who hold one of three 'sincerely held religious beliefs or moral convictions' reflecting disapproval of lesbian, gay, transgender, and unmarried persons."[75] That law permits individuals—including some public officials—professing certain religious beliefs or moral convictions to decline to provide an array of services to individuals on the basis of those beliefs, and prohibits the state government from taking any action against any individual who acts on those beliefs in the ways permitted by the statute. Mississippi has no statewide legislation protecting LGBT individuals, but the law invalidates "all city, county, and public school ordinances and policies that prohibit discrimination on the basis of sexual orientation or gender identity."[76] A federal district judge granted an injunction against H.B.1523, concluding that the law was a deliberate, targeted attack against the LGBT community in violation of the Equal Protection Clause and also violated the Establishment Clause by preferring certain religious doctrines over others.[77] However, the Fifth Circuit reversed the injunction and dismissed the case for lack of standing by the plaintiffs. The court did not discuss the merits of H.B.1523.[78]

No. 16-111, 2017 WL 2722428 (U.S. June 26, 2017); *Elane Photography, LLC v. Willock*, 309 P.3d 53 (N.M. 2013) (rejecting claim that First Amendment precluded application of state human rights ordinance to photography studio that refused offer services at same-sex wedding), *cert. denied*, 134 S. Ct. 1787 (2014); *Gifford v. McCarthy*, 23 N.Y.S.3d 422 (N.Y. App. Div. 2016) (First Amendment did not bar application of human rights measure to operator of wedding facility that refused to allow rental for same-sex wedding); *State v. Arlene's Flowers, Inc.*, 389 P.3d 543 (Wash. 2017) (rejecting florist's claim that state public accommodations anti-discrimination law and state Consumer Protection Act did not apply to her and her business and holding that applying the laws to her conduct does not violate her federal First Amendment or state constitutional free exercise rights).

[71] 2016 N.C. Sess. Laws 3.

[72] *Carcaño v. McCrory*, 203 F. Supp. 3d 615, 625-26 (M.D.N.C. 2016).

[73] 2017 N.C. Sess. Laws 4, § 2.

[74] *Id.* at § 3.

[75] *Barber v. Bryant*, 193 F. Supp. 3d 677, 688 (S.D. Miss. 2016).

[76] *Id.* at 708-09.

[77] *Id.*

[78] *Barber v. Bryant*, 860 F.3d 345 (5th Cir. 2017).

Summary

Protection for LGBT people at the state level is checkered, at best. Moreover, most of the states that have extended broad protections have been dominated by the Democratic Party in recent years. It is noteworthy, though, that Iowa, Nevada, and Utah have extended some protections, suggesting the possibility of bipartisan progress on this issue at the state level.