
THE NEXT FRONTIER TO LGBT EQUALITY: SECURING WORKPLACE-DISCRIMINATION PROTECTIONS

SHALYN L. CAULLEY*

Using the momentum from the landmark decision in Obergefell, LGBT advocates have turned their focus onto the fight for employment discrimination protections in the workplace. Although many Americans believe LGBT individuals are protected from employment discrimination under federal law, Title VII of the Civil Rights Act of 1964 does not ban employers from engaging in discrimination based on sexual orientation or gender identity. Currently, there are two prominent federal proposals that would create protections for LGBT employees: the Equality Act and the Employment Non-Discrimination Act (“ENDA”). This Note contends that the Equality Act, which amends Title VII, is better than ENDA because it is superior to stand-alone legislation and affords better protections to LGBT workers. Because of the makeup of Congress, however, this Note further recommends that states take the initiative in developing their own legislation that provides protections to LGBT employees. When enacting these protections, states should turn to the Utah Compromise as an example of how best to achieve a balanced compromise that satisfies both the LGBT community and religious-rights groups.

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I. INTRODUCTION

The lesbian, gay, bisexual, and transgender (“LGBT”)¹ movement has come to a critical juncture. LGBT advocates are fighting harder than ever to secure equality for LGBT citizens by using the momentum from *Obergefell*,² a landmark Supreme Court decision that gave same-sex couples the right to marry, to catapult themselves into their next battle.³ Despite the fact that the ruling was a huge victory for the LGBT community, a same-sex couple who gets married at 10 a.m. can be fired from their jobs by noon for simply posting their wedding photos on Facebook.⁴ Since the United States has not adopted an explicit, uniform anti-discrimination law that encompasses LGBT citizens, the employer’s actions would be legal in a majority of states.⁵ Thus, the irony of marriage equality is that it makes employment discrimination against LGBT workers even easier, since now, more than ever, employers will be aware of who identifies as LGBT through their marital status and spousal benefits.⁶

Most Americans believe federal law already prohibits discrimination on the basis of sexual orientation and gender identity in the workplace.⁷ This is likely because Title VII of the Civil Rights Act of 1964 (“Title VII”) bans employers from engaging in discrimination on the basis of an employee’s race, color, religion, sex, or national origin.⁸ Courts and legislatures, however, have historically been reluctant to extend these protections to LGBT workers.⁹ Consequently, LGBT employees, who make up 6.28% of the United States workforce,¹⁰ are remarkably

1. This note will use this acronym throughout to represent LGBT people generally. At times, however, I also use the acronym “LGB,” which means the proposition or source did not include transgender people.

2. See generally *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

3. Ted Johnson, *Next LGBT Battle Must Be Legislation on Employment, Housing, Education*, VARIETY (July 1, 2015, 3:00 PM), <http://www.variety.com/2015/biz/news/lgbt-comprehensive-legislation-employment-housing-education-1201531938/>.

4. Brandon Lorenz, *Historic Marriage Equality Ruling Generates Momentum for New Non-Discrimination Law*, HUM. RTS. CAMPAIGN (July 7, 2015), <http://www.hrc.org/blog/entry/historic-marriage-equality-ruling-generates-momentum-for-new-non-discrimina>.

5. *Sexual Orientation Discrimination*, WORKPLACE FAIRNESS, <http://www.workplacefairness.org/sexual-orientation-discrimination#2> (last visited Jan. 25, 2017) (“Outside of the newly clarified right to marry, there is currently no federal law prohibiting other types of sexual orientation discrimination.”).

6. Emma Green, *Can States Protect LGBT Rights Without Compromising Religious Freedom?*, ATLANTIC (Jan. 6, 2016), <http://www.theatlantic.com/politics/archive/2016/01/lgbt-discrimination-protection-states-religion/422730/>.

7. *Exec. Order No. 13,672: Executive Order Prohibits Federal Government and Contraction Employment Discrimination on the Basis of Sexual Orientation or Gender Identity*, 128 HARV. L. REV. 1304, 1305 (2015) [hereinafter *Exec. Order No. 13,672*].

8. 42 U.S.C. § 2000e-2 (2012).

9. Stephanie Rotondo, *Employment Discrimination Against LGBT Persons*, 16 GEO. J. GENDER & L. 103, 104 (2015).

10. Crosby Burns et. al., *The State of Diversity in Today’s Workforce*, CTR. FOR AM. PROGRESS 3 (July 2012), https://cdn.americanprogress.org/wp-content/uploads/issues/2012/07/pdf/diversity_brief.pdf.

unprotected under a “crazy-quilt of laws” and policies.¹¹ This crazy quilt comprises a range of sources including: presidential executive orders, private employer initiatives, city and county ordinances, gubernatorial executive orders, and state legislation—all of which are unable to protect all LGBT workers.¹² Thus, even with all of these protections in place, LGBT employment discrimination in the United States remains rampant.¹³

Part II of this Note discusses why LGBT-discrimination laws are necessary and explains the types of discrimination LGBT employees face. It then delves into the LGBT movement and describes the protections that are currently afforded to some LGBT employees under the United States’ employment scheme. Additionally, Part II explores the two most prominent federal proposals, the Equality Act and the Employment Non-Discrimination Act (“ENDA”), which would establish uniform nondiscrimination protections for LGBT employees. Part III describes the pushback against LGBT protections and explains why each of the most commonly raised concerns surrounding these protections are unwarranted. Part III then demonstrates why the protections LGBT employees currently receive are inadequate and compares the Equality Act to ENDA.

Ultimately, Part IV recommends that Congress adopt the Equality Act because it is superior to stand-alone legislation like ENDA. The Equality Act, however, does not presently have any chance of passing in either chamber of Congress, as the House and Senate are both under Republican control.¹⁴ Thus, Part IV also recommends that states which have not yet enacted LGBT nondiscrimination legislation focus on adopting their own LGBT employment laws. It then recommends that states use the same approach as the Utah Compromise because a balancing/compromise approach gives them the best chance of success. Finally, Part V presents concluding remarks on LGBT employment discrimination in the United States.

II. BACKGROUND

Although sexual orientation and gender identity bear no relationship to workplace performance or ability,¹⁵ LGBT employees have faced

11. Johnson, *supra* note 3.

12. See *infra* Part II.C.

13. Alex Reed, *Redressing LGBT Employment Discrimination Via Executive Order*, 29 NOTRE DAME J.L. ETHICS & PUB. POL’Y 133, 133 (2015).

14. See Gabrielle Levy, *Forget SCOTUS: The Next Fight over Gay Rights Will Be in Congress*, U.S. NEWS (July 23, 2015, 6:19 PM), <http://www.usnews.com/news/articles/2015/07/23/equality-act-continues-push-for-lgbt-rights>.

15. BRAD SEARS & CHRISTY MALLORY, EMPLOYMENT DISCRIMINATION AGAINST LGBT PEOPLE: EXISTENCE AND IMPACT 40–1, 40–2 (Christine Michelle Duffy & Denise M. Visconti eds., 2014).

a long and pervasive history of discrimination.¹⁶ LGBT discrimination in the workplace occurs when an employee is subjected to negative employment action, harassment, or denial of certain benefits because of his or her LGBT status or the LGBT status of someone they are close to.¹⁷ The following Section describes the negative effects of LGBT discrimination in the workplace on employees, employers, and society as a whole. It then explores the array of protections that are currently in place for LGBT workers as well as the two leading federal proposals that would ban sexual orientation and gender identity discrimination: the Equality Act and ENDA.

A. Why LGBT Employment Anti-discrimination Laws and Policies are Necessary

When employees experience or fear discrimination because of their sexual orientation or gender identity, it can negatively impact their mental and physical health, as well as their employment opportunities.¹⁸ “Access to employment lies at the center of American life,”¹⁹ and, for the majority of Americans, employment does more than merely provide a means to receive compensation.²⁰ It also plays an important role in individuals’ lives and can significantly impact a person’s self-concept and well-being.²¹ Consequently, when employees are subject to discrimination in the workplace, it can place a significant burden on their mental health and personal safety.²²

Several studies occurring over various time periods confirmed this phenomenon in regards to LGBT workers.²³ When LGBT people perceive or fear high levels of discrimination, they experience a much higher prevalence of psychiatric disorders, depression, psychological distress, low self-esteem, and loneliness.²⁴ LGBT people who not only fear, but also are subjected to discrimination, anti-gay verbal harassment, and violence, also experience higher rates of suicidal intention, anger, anxiety,

16. *Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 54 F.3d 261, 264 n.1 (6th Cir. 1995), *vacated*, 518 U.S. 1001 (1996).

17. *Sexual Orientation Discrimination*, *supra* note 5.

18. Jennifer C. Pizer et al., *Evidence of Persistent and Pervasive Workplace Discrimination Against LGBT People: The Need for Federal Legislation Prohibiting Discrimination and Providing for Equal Employment Benefits*, 45 LOY. L.A. L. REV. 715, 738–42 (2011–2012).

19. Sarah McBride et al., *We the People: Why Congress and U.S. States Must Pass Comprehensive LGBT Nondiscrimination Protections*, CTR. FOR AM. PROGRESS 7 (Dec. 2014), <https://cdn.americanprogress.org/wp-content/uploads/2014/12/LGBT-WeThePeople-report-12.10.14.pdf>.

20. KELLY M. QUINTANILLA & SHAWN T. WAHL, BUSINESS AND PROFESSIONAL COMMUNICATION: KEYS FOR WORKPLACE EXCELLENCE 298 (Diane McDaniel et al. eds., 2011).

21. *Id.*

22. BRAD SEARS & CHRISTY MALLORY, WILLIAMS INST., DOCUMENTED EVIDENCE OF EMPLOYMENT DISCRIMINATION & ITS EFFECTS ON LGBT PEOPLE 15 (July 2011), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Sears-Mallory-Discrimination-July-20111.pdf> (quoting the Dep’t of Health and Human Serv.).

23. Pizer et al., *supra* note 18, at 741–42.

24. *Id.* at 740.

post-traumatic stress, other symptoms of depression, psychological distress, mental disorders, and deliberate self-harm.²⁵

Moreover, workplace discrimination can negatively affect an LGBT employee's ability to find work and excel in the workplace.²⁶ "One of the most significant instances of discrimination faced by LGBT applicants occurs at the entry point of employment: hiring."²⁷ LGBT people face substantially higher rates of rejection when applying for jobs compared to equally qualified heterosexual candidates.²⁸ In a study conducted in Texas, researchers had equally qualified candidates apply for jobs, with the only variation being the hat they wore when applying.²⁹ Some candidates displayed hats that read "Texas and Proud," while the others' hats said "Gay and Proud."³⁰ Candidates who wore the latter received 11% fewer callbacks.³¹ Another study found that by simply adjusting a résumé to include involvement at a "progressive and socialist" organization instead of a "gay group," it increased the chance of the applicant receiving an interview by 40%.³² This kind of discrimination results in many capable and qualified LGBT workers being unemployed and unable to support their families.³³

Even if employed, however, LGBT employees still face several forms of discrimination within the workplace.³⁴ Many LGBT employees, for example, experience hostile office climates where they "are commonly subject to offensive and hurtful comments, and . . . frequently held to a double standard regarding workplace interactions and behaviors."³⁵ The LGBT workplace double standard arises: while 70% of people believe it is unprofessional for co-workers to talk about their sexual orientation or gender identity in the workplace, 84% of non-LGBT respondents report that they talk about their own social lives and 65% report that they also talk about their dating or married lives.³⁶ This kind of unwelcoming environment is difficult for LGBT employees and can become openly hostile when they are subject to direct or indirect taunting, jokes, or outright harassment.³⁷ Between 7–41% of LGB workers report that they have ex-

25. *Id.* at 740–41.

26. Winnie Stachelberg & Crosby Burns, *10 Things to Know About the Employment Non-Discrimination Act*, CTR. FOR AM. PROGRESS (Apr. 24, 2013), <https://www.americanprogress.org/issues/lgbt/news/2013/04/24/61294/10-things-to-know-about-the-employment-non-discrimination-act/>.

27. McBride et al., *supra* note 19.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Why Gay Men Don't Get Job Interviews*, WEEK (Oct. 6, 2011) <http://theweek.com/articles/481221/why-gay-men-dont-job-interviews>.

33. Stachelberg & Burns, *supra* note 26.

34. McBride et al., *supra* note 19, at 7–8.

35. *Id.* at 11.

36. *Id.*

37. *Id.*

perienced this type of harassment at work either by having their office or workplace vandalized or by being verbally or physically bullied.³⁸

In addition to double standards and harassment in the workplace, many LGBT employees are also discriminated against in their terms of employment. LGBT workers, for example, are commonly paid less than others in their same positions.³⁹ On average, gay male workers are paid 10–32% less than their heterosexual male coworkers, despite the same productivity characteristics.⁴⁰ A national transgender discrimination survey provided further data supporting this disparity in pay when it found that 15% of transgender employees report household incomes of less than \$10,000 per year, versus only 4% of the general population.⁴¹

Additionally, between 11–28% of LGB workers report that they have been denied or passed over for a promotion due to their sexual orientation.⁴² LGBT employees are also often outright fired.⁴³ One in ten LGB workers, and one in four transgender workers, have been fired from a previous job because of his or her sexual orientation or gender identity.⁴⁴ These forms of workplace discrimination have very real consequences for LGBT employees and their families' economic security.⁴⁵

Employment discrimination is similarly a foolish economic business practice from an employer's stance. Allowing LGBT discrimination in the workplace is a costly business practice for four reasons. First, discrimination during recruitment puts employers at a competitive disadvantage and results in inefficient hiring.⁴⁶ Employers limit their candidate pools when they engage in discrimination and lose profits when they do not hire the most qualified candidates.⁴⁷ When an employer decides not to hire individuals based on job-irrelevant characteristics, such as sexual orientation and gender identity, they "are left with a substandard workforce that diminishes their ability to generate healthy profits."⁴⁸ Additionally, victims of employment discrimination will often discourage oth-

38. *Id.* at 12.

39. Pizer et al., *supra* note 18, at 725.

40. *Id.* at 737.

41. McBride et al., *supra* note 19, at 9.

42. *Id.* at 7–8.

43. *Id.*

44. Tammy Baldwin & Neera Tanden, *Marriage Equality Isn't Enough*, U.S. NEWS (Aug. 25, 2015, 6:00AM), <http://www.usnews.com/news/the-report/articles/2015/08/25/more-must-be-done-to-ensure-lgbt-workplace-equality>.

45. Neera Tanden & Ted Strickland, *We Need a Federal LGBT Non-Discrimination Act*, NEWSWEEK (Dec. 10, 2014, 4:04 PM), <http://www.newsweek.com/we-need-federal-lgbt-non-discrimination-act-290907>.

46. Crosby Burns, *The Costly Business of Discrimination: The Economic Costs of Discrimination and the Financial Benefits of Gay and Transgender Equality in the Workplace*, CTR. FOR AM. PROGRESS 8 (Mar. 2012), https://cdn.americanprogress.org/wp-content/uploads/issues/2012/03/pdf/lgbt_biz_discrimination.pdf.

47. *Id.* at 2, 9.

48. *Id.* at 2.

ers from seeking employment with the offending employer, resulting in even more ineffectual recruitment.⁴⁹

Second, tolerating discrimination against employees makes it difficult for employers to retain employees.⁵⁰ A 2011 survey of white-collar LGBT employees found that only one-third of employees who were not open at work about their LGBT identity were happy in their careers, while two-thirds of employees who were open about their LGBT identity reported being content at their workplace.⁵¹ Consequently, LGBT employees who are able to be open about their sexual orientation or gender identity in front of their colleagues were found to be significantly more likely to remain in their current position than those who are not.⁵² Since it “costs somewhere between \$5,000 and \$10,000 for an hourly worker, and between \$75,000 and \$211,000 for an executive making \$100,000 a year” to replace a departing employee, employers who allow discrimination to push their employees out of their positions can waste a substantial amount of money.⁵³

Third, employers experience lower legal costs related to discrimination lawsuits when they prevent discrimination within their organizations before it occurs.⁵⁴ There is yet to be a study of the costs of compliance or lawsuits that arise from sexual orientation and gender identity discrimination in the workplace.⁵⁵ In 2010, however, the top ten private plaintiff employment discrimination lawsuits cost employers \$346.4 million.⁵⁶ Thus, employers can put themselves in a position to save money if they address LGBT discrimination before it occurs.⁵⁷ This rings especially true in states and localities with LGBT-discrimination protections in place, in districts that interpret Title VII to include sexual orientation and gender identity, and for employers covered by the presidential executive orders banning LGBT discrimination.⁵⁸

49. *Id.* at 9.

50. Press Release, Office of the Press Sec’y, White House, Fact Sheet: Taking Action to Support LGBT Workplace Equality is Good for Business (July 21, 2014), <https://www.whitehouse.gov/the-press-office/2014/07/21/fact-sheet-taking-action-support-lgbt-workplace-equality-good-business-0> [hereinafter Taking Action Press Release].

51. SEARS & MALLORY, *supra* note 22, at 13.

52. Karen Higginbottom, *U.S. Economy Could Save \$9B Annually by Creating Inclusive Environment for LGBT Employees*, FORBES (Jan. 30, 2015, 6:54 AM), <http://www.forbes.com/sites/karenhigginbottom/2015/01/30/us-economy-could-save-9bn-annually-by-creating-inclusive-environment-for-lgbt-employees/#1099cab4c2ed>.

53. Burns, *supra* note 46, at 2.

54. Michaela Krejcova, *The Value of LGBT Equality in the Workplace*, GLAAD (Feb. 26, 2015), <http://www.glaad.org/blog/value-lgbt-equality-workplace>.

55. M.V. LEE BADGETT ET AL., WILLIAMS INST., THE BUSINESS IMPACT OF LGBT-SUPPORTIVE WORKPLACE POLICIES 21 (May 2013), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Business-Impact-LGBT-Policies-Full-May-2013.pdf>.

56. Burns, *supra* note 46, at 15.

57. See BADGETT ET AL., *supra* note 55, at 21.

58. See *infra* Part II.C.1–5.

Lastly, “[i]n today’s business world, it is no secret that publicized discrimination causes current customers to leave”⁵⁹ In 2002, the Human Rights Campaign (“HRC”) began publishing an annual report that rates corporations based on their LGBT policies or lack thereof,⁶⁰ and lists the best places to work for LGBT employees.⁶¹ Corporations scoring high index ratings often receive positive press,⁶² while those who score low often find themselves in articles that may damage their reputation.⁶³ Thus, LGBT policies can impact a consumer’s choice of whether or not to support a business—with LGBT consumers preferring corporations that treat LGBT employees well.⁶⁴

Employers and employees are not the only ones who suffer from LGBT workplace discrimination, though. America’s “economy functions best when workers are matched to the jobs with the best fit, maximizing their productivity, increasing wages and helping the bottom line for businesses.”⁶⁵ Since discrimination hinders qualified workers from maximizing on their potential, and keeps many workers out of positions they are qualified for, it has a negative impact on the economy.⁶⁶ The most recent study found the United States economy could save roughly \$9 billion annually if employers were more effective at implementing inclusive LGBT policies⁶⁷—which is especially concerning during such a financially critical time for our nation.⁶⁸

B. The LGBT Movement

Because of all the negative effects of LGBT discrimination, more than 500 organizations are working towards achieving equality for LGBT citizens in many facets of everyday life, including employment.⁶⁹ The LGBT movement spends approximately \$530 million annually and employs thousands of people across the country.⁷⁰ In June 2015, the LGBT

59. Krejcova, *supra* note 54.

60. HUM. RTS. CAMPAIGN, CORPORATE EQUALITY INDEX 2015: RATING AMERICAN WORKPLACES ON LESBIAN, GAY, BISEXUAL AND TRANSGENDER EQUALITY 3 (2015).

61. *Best Places to Work 2015*, HUM. RTS. CAMPAIGN, <http://www.hrc.org/resources/best-places-to-work-2015> (last visited Jan. 25, 2017).

62. See Courtney Michaluk & Daniel Burnett, *Gayconomics 101: Why the Latest LGBT Rights Legislation Could be the ‘ENDA’ the Road for Some Job Seekers*, HUFFINGTON POST (Nov. 25, 2013 3:08 AM), http://www.huffingtonpost.com/courtney-michaluk/enda_b_4326767.html; Jacquelyn Smith, *The 25 Best Companies for LGBT Employees*, BUS. INSIDER (Mar. 6, 2014, 2:58 PM), <http://www.businessinsider.com/best-companies-for-lgbt-employees-2014-3>.

63. See Amanda Chatel, *7 Companies that Don’t Support Gay Rights*, HUFFINGTON POST (Oct. 16, 2013, 5:08 PM), http://www.huffingtonpost.com/2013/10/16/anti-gay-companies_n_4110344.html.

64. See Krejcova, *supra* note 54.

65. Taking Action Press Release, *supra* note 50.

66. Higginbottom, *supra* note 52.

67. *Id.*

68. Taking Action Press Release, *supra* note 50.

69. *Movement Overviews*, MOVEMENT ADVANCEMENT PROJECT, <http://www.lgbtmap.org/lgbt-movement-overviews> (last visited Jan. 25, 2017).

70. These organizations employ varying approaches and strategies to help progress towards their ultimate goal of total equality. Some work to implement laws and policies through involvement in

movement gained one of its largest victories to date when the Supreme Court granted same-sex couples the right to marry.⁷¹ Prior to this ruling, however, an LGBT donor commissioned a study to examine how other similar civil-rights movements fared in the wake of major victories.⁷²

What the study discovered was that several movements “‘won something and then sat back and relaxed’—only to find themselves with their work still undone many years later.”⁷³ The study provided examples of euphoric high points that devolved into brutal drags, such as the never-ending fight over abortion rights post-*Roe v. Wade*.⁷⁴ It also described how, notwithstanding the fact that the Americans with Disabilities Act was passed over a quarter century ago, disabled people, to this day, struggle to get around and find jobs.⁷⁵ Sobered by these results, LGBT-movement leaders and philanthropists consciously decided that they would not let their movement suffer a similar fate.⁷⁶

Consequently, while LGBT advocates and organizations had every reason to celebrate their hard-fought, marriage-equality win, instead of pausing to rejoice in their victory, they cleverly chose to use the momentum gained from the high-profile decision to steer attention towards other LGBT issues.⁷⁷ In the days following the ruling, advocates across the country used the media hype to illuminate how the decision, while a step in the right direction, was not the end of the road to LGBT equality.⁷⁸

In an interview with CBS, Chad Griffin, president of the HRC, comprehensively tied marriage equality to remaining areas of LGBT discrimination.⁷⁹ Griffin asserted that, even after this ruling, in a majority of states “you can be married at 10:00 a.m., fired from your job by noon,

court cases, lobbying, and elections, while others work directly with LGBT people in need of assistance, and still others work to change people’s negative attitudes about LGBT Americans through education and propaganda. *Id.*

71. Justice Kennedy, writing for a five-justice majority, declared that “[t]hey ask for equal dignity in the eyes of the law,” and “the Constitution grants them that right.” *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015).

72. David Callahan, *No One Left Behind: Tim Gill and the New Quest for Full LGBT Equality*, INSIDE PHILANTHROPY (Aug. 25, 2015, 11:57 AM), <http://www.insidephilanthropy.com/home/2015/8/25/no-one-left-behind-tim-gill-and-the-new-quest-for-full-lgbt.html#>.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. See Erik Eckholm, *Next Fight for Gay Rights: Bias in Jobs and Housing*, N.Y. TIMES, June 27, 2015, at A1; Lorenz, *supra* note 4; Mira Oberman, *Married Sunday, Fired Monday: Next US Gay Rights Fight*, YAHOO NEWS (July 3, 2015), <http://news.yahoo.com/married-sunday-fired-monday-next-us-gay-rights-025339089.html>; Annamarya Scaccia, *4 LGBT Issues to Focus on Now That We Have Marriage Equality*, ROLLING STONE (June 29, 2015), <http://www.rollingstone.com/politics/news/4-lgbt-issues-to-focus-on-now-that-we-have-marriage-equality-20150629>; Matt Smith, *Fired for Being Gay? Activists Say Their Next Fight is for New, Nationwide Protections*, FOX 59 (June 29, 2015, 5:10 PM), <http://fox59.com/2015/06/29/fired-for-being-gay-activists-say-their-next-fight-is-for-new-nationwide-protections/>.

78. Lorenz, *supra* note 4.

79. Melanie Hunter, *Human Rights Campaign Calls for ‘Full and Comprehensive Nondiscrimination Protections’ for LGBT*, CNS NEWS (June 29, 2015, 2:06 PM), <http://www.cnsnews.com/news/article/melanie-hunter/human-rights-campaign-calls-full-and-comprehensive-nondiscrimination>.

and evicted from your home by 2:00 simply for posting that wedding photo on Facebook.”⁸⁰ The Movement Advancement Project (“MAP”) also joined the effort to direct the public conversation towards remaining inequalities.⁸¹ It published a chart post-*Obergefell* explaining how, in June 2015, thousands of LGBT people across America gained the freedom to marry, but in July, 52% of LGBT people were still at risk of being fired from their jobs, kicked out of their homes, and denied access to doctor’s offices and restaurants.⁸²

Griffin and the MAP’s claims are noticeably similar—they “hit a celebratory note, but then pivot[] to unfinished work ahead.”⁸³ This “echo chamber,” however, was no accident.⁸⁴ Instead, it was part of a larger plan that prearranged how LGBT organizations would respond once marriage equality was won.⁸⁵ This strategy was very successful, and their ideas spread like wildfire with headlines like “Married Sunday, Fired Monday: Next US Gay Rights Fight” incessantly circulating newsstands and the Internet.⁸⁶ These are not new or revolutionary concepts; they are vintage ideas receiving the attention they need to move forward. Many LGBT protections do already exist in varying forms, but as the headlines demonstrate, LGBT citizens nevertheless remain unprotected in many areas of everyday life.⁸⁷

C. A Maze of LGBT Employment Protections

Our current employment scheme leaves the estimated⁸⁸ 1 million LGBT workers in the public sector, and 7 million LGBT workers in the private sector⁸⁹ in varying protected states.⁹⁰ The United States is com-

80. *Id.*

81. *In June 2015, Thousands of LGBT People Across America Gained the Freedom to Marry*, MOVEMENT ADVANCEMENT PROJECT, <http://www.lgbtmap.org/image/Infographic-Post-Marriage-01.2.jpg> (last visited Jan. 25, 2017).

82. *Id.*

83. Callahan, *supra* note 72.

84. *Id.*

85. *Id.*

86. Oberman, *supra* note 77.

87. This Note only discusses LGBT rights in the context of the workplace. As this section briefly touched on, however, LGBT advocates are fighting for equality in many other areas of everyday life, such as public accommodations and housing. For discussions on these topics see Carlie Armstrong, *Slow Progress: New Federal Rules Only Begin to Address Housing Discrimination Based on Sexual Orientation and Gender Identity*, 9 MOD. AM. 2 (2013); Justin Muchlmeyer, *Toward a New Age of Consumer Access Rights: Creating Space in the Public Accommodation for the LGBT Community*, 19 CARDOZO J.L. & GENDER 781 (2013).

88. While the Department of Labor collects information on workers’ race, ethnicity, gender, disability, and other demographic characteristics, it does not gather data on workers’ sexual orientation or gender identity. *Labor Force Statistics from the Current Population Survey*, BUREAU OF LAB. STAT., <http://www.bls.gov/cps/demographics.htm> (last visited Jan. 25, 2017).

89. WILLIAMS INST., DOCUMENTING DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION AND GENDER IDENTITY IN STATE EMPLOYMENT 2 (Sept. 2009), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/ExecutiveSummary1.pdf>.

prised of a complex patchwork of anti-discrimination laws and protections for LGBT workers that has led to major geographic inequalities.⁹¹ LGBT employees who do not live on either of the two coasts, or in the Northeast, have predominantly been left behind in terms of legal protection.⁹² Ultimately, while some LGBT workers receive no protection from employment discrimination, others hold some protections, but lack others, and yet others receive full protection from any discriminatory action.⁹³ LGBT employees experience differing protections because, while most Americans mistakenly believe federal law prohibits discrimination on the basis of sexual orientation and gender identity in the workplace, no such uniform law yet exists.⁹⁴ Instead, protections extend from a multitude of other sources including: Title VII, presidential executive orders, private employer initiatives, city and county ordinances, gubernatorial executive orders, and state legislation—none of which are able to encompass all LGBT workers.

*1. Title VII of the Civil Rights Act of 1964*⁹⁵

Some employees who experienced discrimination in the workplace because of their LGBT status have recovered by bringing Title VII lawsuits.⁹⁶ Title VII is a federal statute that bans employers from engaging in discriminatory practices based on an employee's race, color, religion, sex, or national origin.⁹⁷ Under Title VII, it is discriminatory to refuse to hire, or discharge an employee, or discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment.⁹⁸ From 1974 to 1994, Congress considered legislation that would add sexual orientation to the list of protected classes included in Title VII, but the proposals continuously met strong opposition.⁹⁹ While Title VII was not amended to include sexual orientation or gender identity, this has not prevented some LGBT plaintiffs from recovering under other laws because of sex theories.¹⁰⁰

90. See David Wachtel & Karen Tanenbaum, *Employment Law Daily Wrap Up, Strategic Perspectives—Obergefell v. Hodges and the Future of LGBT Rights in the Workplace*, CCH 1–2 (2015), <http://hr.cch.com/ELD/ObergefellvHodgesandthefutureofLGBTrightsintotheworkplace.pdf>.

91. Eckholm, *supra* note 77.

92. *Id.*

93. Wachtel & Tanenbaum, *supra* note 90, at 1–2.

94. *Exec. Order No. 13672*, *supra* note 7, at 1305.

95. 42 U.S.C. § 2000e (2012).

96. See *Examples of Court Decisions Supporting Coverage of LGBT-Related Discrimination Under Title VII*, EQUAL EMP'T OPPORTUNITY COMM'N, http://www.eeoc.gov/eeoc/newsroom/wysk/lgbt_examples_decisions.cfm (last visited Jan. 25, 2017).

97. 42 U.S.C. § 2000e-2(a)(1) (emphasis added).

98. *Id.*

99. See Equality Act of 1974, H.R. 14752, 93rd Cong. (1974).

100. See *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

a. Federal Courts

In *Price Waterhouse v. Hopkins*,¹⁰¹ the plaintiff's employer repeatedly told her to act, speak, and dress in a manner that was more suiting to her sex.¹⁰² The Supreme Court found that the employer's conduct amounted to employment discrimination based on "sex stereotypes," which it concluded constituted unlawful sex discrimination under Title VII.¹⁰³ The Court reasoned that "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group"¹⁰⁴ Ultimately, the Court concluded that gender must be completely irrelevant in employment decisions under Title VII.¹⁰⁵

Following this judgment, many lower federal courts began recognizing the overlap between sexual-orientation and gender-identity discrimination and discrimination based on sex stereotypes.¹⁰⁶ A gay man, for example, could experience discrimination both for stereotypical sex reasons, such as not appearing sufficiently masculine, and for being in a same-sex relationship.¹⁰⁷ Consequently, LGBT plaintiffs have, in at least some circuits, been successful in Title VII lawsuits by building upon a sex-stereotyping theory.¹⁰⁸

In 2001, the Third Circuit ruled that a plaintiff who was harassed on the basis of his sexual orientation alone could not recover under Title VII.¹⁰⁹ The court noted, however, that LGBT plaintiffs may recover for sex discrimination "by presenting evidence that the harasser's conduct was motivated by a belief that the victim did not conform to the stereotypes of his or her gender."¹¹⁰ The court reasoned that, had the plaintiff in *Price Waterhouse* been a lesbian, that fact would not have provided the employer with an excuse for its discrimination.¹¹¹ Similarly, in 2004, the Sixth Circuit found that discrimination against a transgender woman for "failure to conform to sex stereotypes concerning how a man should look and behave" was actionable under Title VII.¹¹² Five circuits now extend the sex-stereotyping principle to LGBT plaintiffs.¹¹³

101. *Id.*

102. Zachary R. Herz, *Price's Progress: Sex Stereotyping and Its Potential for Antidiscrimination Law*, 124 YALE L.J. 396, 398 (2014).

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

104. *Id.* at 251 (citing L.A. DEPT. OF WATER AND POWER V. MANHART, 435 U.S. 702, 707 n.13 (1978)).

105. *Id.* at 240.

106. Pizer et al., *supra* note 18, at 746.

107. Noam Scheiber, *U.S. Agency Rules for Gays in Workplace Discrimination*, N.Y. TIMES, July 18, 2015, at B1.

108. Rotondo, *supra* note 9, at 108.

109. Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 265 (3rd Cir. 2001).

110. *Id.* at 262–63.

111. *Id.* at 265.

112. Smith v. City of Salem, Ohio, 378 F.3d 566, 572 (6th Cir. 2004).

113. Glenn v. Brumby, 663 F.3d 1312, 1320 (11th Cir. 2011); *Smith*, 378 F.3d at 572; *Bibby*, 260 F.3d at 262–63; *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 874 (9th Cir. 2001); *Higgins v. New*

Several other circuits, however, reject that there is an overlap between discrimination based on sex and discrimination based on sexual orientation and gender identity. Their reasoning generally rests on the argument that Congress did not consider, nor intend, Title VII to apply to anything other than the traditional concept of sex.¹¹⁴ They also point to the fact that, repeatedly, Congress has explicitly rejected legislation that would extend Title VII to cover sexual orientation and gender identity.¹¹⁵ These circuits continue to use the pre-*Price Waterhouse* interpretation of sex that does not extend relief to LGBT employees.¹¹⁶

b. Equal Employment Opportunity Commission

The Civil Rights Act of 1974 also created the Equal Employment Opportunity Commission (“EEOC”) to enforce Title VII.¹¹⁷ Congress gave the Commission authority to investigate and bring charges of discrimination against employers covered by Title VII.¹¹⁸ The EEOC, however, only litigates a small number of cases and does not have authority to compel employers to follow their policies or impose fines to violators.¹¹⁹ In 2012, the EEOC held that discrimination based on gender identity is sex discrimination under Title VII.¹²⁰ In 2015, the Commission took it one step further when it held that “allegations of discrimination on the basis of sexual orientation [also] state a claim of discrimination on the basis of sex” under Title VII.¹²¹

The EEOC maintains that federal courts, including the Supreme Court, elucidated sex discrimination over the years in a way that makes it broad enough to encompass sexual-orientation discrimination.¹²² Additionally, the Commission contends that sexual orientation discrimination is sex discrimination because it “rests on stereotypes about how men and women should behave and punishes employees for their association with

Balance Athletic Shoe, Inc. 194 F.3d 252, 259 (1st Cir. 1999). The Seventh Circuit also held that “Title VII does not permit an employee to be treated adversely because his or her appearance or conduct does not conform to stereotypical gender roles,” but the decision was vacated on other grounds. *Doe v. City of Belleville*, 119 F.3d 563, 580 (7th Cir. 1997).

114. *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1221 (10th Cir. 2007); *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662–63 (9th Cir. 1977).

115. *Bibby*, 260 F.3d at 261.

116. *Pizer et al.*, *supra* note 18, at 746.

117. 42 U.S.C. § 2000e-4 (2012).

118. The EEOC also engages in outreach and educational programs to try to prevent discrimination before it occurs. *Overview, EQUAL EMP’T OPPORTUNITY COMM’N*, <http://www.eeoc.gov/eeoc/> (last visited Jan. 25, 2017).

119. Tara Siegel Bernard, *Fired for Being Gay? Protections are Piecemeal*, N.Y. TIMES, June 1, 2013, at B1.

120. EEOC Appeal No. 0120120821, 2012 WL 1435995, at *9 (2012).

121. EEOC Appeal No. 0120133080, 2015 WL 4397641, at *10 (2015).

122. Dale Carpenter, *Anti-Gay Discrimination is Sex Discrimination, Says the EEOC*, WASH. POST (July 16, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/07/16/anti-gay-discrimination-is-sex-discrimination-says-the-eeoc/?utm_term=.edf75cdfb382.

others of the same sex.”¹²³ According to the Commission, sexual orientation as a concept cannot be defined or understood without a reference to sex.¹²⁴ “[I]f an employer discriminated against a lesbian for displaying a photo of her wife, but not a straight man for showing a photo of his wife, that amounts to sex discrimination.”¹²⁵ Thus, under the EEOC’s interpretation, plaintiffs do not have to build upon a sex-stereotyping theory, but instead can simply argue they were discriminated against for their sexual orientation or gender identity.

The EEOC now accepts and investigates Title VII sex discrimination claims that allege sexual-orientation and/or gender-identity discrimination.¹²⁶ The Commission’s interpretation of sex, however, is not binding on federal courts or private employers.¹²⁷ Nevertheless, courts often defer to agencies when interpreting laws that come under their jurisdiction.¹²⁸ The EEOC’s expertise in anti-discrimination laws may also persuade courts wrestling with this question to adopt their interpretation.¹²⁹

2. Presidential Executive Orders

On July 21, 2014, President Obama signed Executive Order 13,672¹³⁰ after months of passionate advocacy¹³¹ from LGBT supporters. The executive order amended Executive Order 11,478, issued by President Nixon in 1969,¹³² which originally banned discrimination against federal employees on the basis of race, color, religion, sex, national origin, disability, and age.¹³³ In 1998, President Clinton amended Nixon’s executive order to also include sexual orientation,¹³⁴ and President Obama’s order further amended it to include gender identity.¹³⁵ Thus, federal

123. *Id.*

124. Carpenter, *supra* note 122.

125. Charlotte Alter, *Discrimination Against LGBT Workers Is Illegal, Commission Rules*, TIME (July 17, 2015), <http://time.com/3962469/lgbt-discrimination-eeoc/>.

126. *What You Should Know About EEOC and the Enforcement Protections for LGBT Workers*, EQUAL EMP’T OPPORTUNITY COMM’N, http://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm (last visited Jan. 25, 2017).

127. *Non-Discrimination Laws*, MOVEMENT ADVANCEMENT PROJECT, http://www.lgbtmap.org/equality-maps/non_discrimination_laws (last visited Jan. 25, 2017).

128. Scheiber, *supra* note 107.

129. *Id.* (“In an area of law where we’re seeing rapid change, courts may well be interested in what the lead anti-discrimination agency has to say.”).

130. Exec. Order No. 13,672, 79 Fed. Reg. 42,971 (July 21, 2014). Immediately preceding signing the order, President Obama held a press conference and announced that “[i]t doesn’t make much sense, but today in America, millions of our fellow citizens wake up and go to work with the awareness that they could lose their job, not because of anything they do or fail to do, but because of who they are—lesbian, gay, bisexual, transgender. And that’s wrong. We’re here to do what we can to make it right—to bend that arc of justice just a little bit in a better direction.” Barack Obama, President, Remarks by the President at Signing of Executive Order on LGBT Workplace Discrimination (July 21, 2014) [hereinafter Remarks by the President].

131. Remarks by the President, *supra* note 130.

132. Exec. Order No. 11,478, 34 Fed. Reg. 12,985 (Aug. 8, 1969).

133. Taking Action Press Release, *supra* note 50.

134. Exec. Order No. 13,087, 63 Fed. Reg. 30,097 (May 28, 1998).

135. Exec. Order No. 13,672, 79 Fed. Reg. 42,971 (July 21, 2014).

employers can no longer discriminate against employees on the basis of their sexual orientation or gender identity.

The executive order also amended Executive Order 11,246, issued by President Lyndon B. Johnson.¹³⁶ Executive Order 11,246 bans federal contractors and federally assisted construction contractors and subcontractors who complete over \$10,000 in government business a year from engaging in workplace discrimination.¹³⁷ The amendment added sexual orientation and gender identity to the list of protected classes that already existed in the executive order,¹³⁸ making “it illegal to fire or harass employees of federal contractors based on their sexual orientation or gender identity.”¹³⁹ The executive order applies to all establishments of contractors and subcontractors, not just those who are directly involved in performing the contract.¹⁴⁰ Roughly 28 million workers employed at 24,000 companies were affected by the amendment.¹⁴¹

3. *Private Employer Initiatives*

Private employers sometimes opt to adopt their own LGBT policies and initiatives within their organizations. Over the past few decades, companies have progressively realized the benefits¹⁴² of providing “[v]oluntarily enacted sexual orientation and gender identity nondiscrimination policies, domestic partner benefits, transition-related health care benefits, and other related policies.”¹⁴³ Employers believe that inclusive employment policies such as these help them attract and retain talented employees, which in turn helps them draw in more customers¹⁴⁴ and improve their bottom line.¹⁴⁵

Research to this effect supports their conclusions. A study of organizations with more than 10,000 employees found that effective implementation of diversity and inclusion policies saved companies between

136. Exec. Order No. 11246, 30 Fed. Reg. 12,319 (Sept. 24, 1965).

137. Taking Action Press Release, *supra* note 50.

138. Exec. Order No. 13,087, 63 FR 30,097; David Hudson, *President Obama Signs a New Executive Order to Protect LGBT Workers*, WHITE HOUSE BLOG (July 21, 2014, 3:00 PM), <https://www.whitehouse.gov/blog/2014/07/21/president-obama-signs-new-executive-order-protect-lgbt-workers>.

139. Jennifer Bendery, *Obama Signs Executive Order on LGBT Job Discrimination*, HUFFINGTON POST (July 21, 2014 10:50 AM), http://www.huffingtonpost.com/2014/07/21/obama-gay-rights_n_5605482.html.

140. Robin Maril, *Executive Order Prohibiting LGBT Discrimination Goes into Effect*, HUMAN RTS. CAMPAIGN (April 8, 2015), <http://www.hrc.org/blog/entry/executive-order-prohibiting-lgbt-discrimination-goes-into-effect>.

141. Elizabeth Dias, *Obama's Executive Order to Protect Gay Workers Will Have No Religious Exemption*, TIME (July 18, 2014), <http://time.com/3006170/obama-executive-order-gay-lgbt-federal-employees-religious-exemption/>.

142. See BADGETT ET AL., *supra* note 55; Krejcova, *supra* note 54.

143. BADGETT ET AL., *supra* note 55.

144. *Opinion Poll: Small Business Owners Oppose Denying Services to LGBT Customers Based on Religious Beliefs*, SMALL BUS. MAJORITY 8 (July 13, 2015), <http://www.smallbusinessmajority.org/sites/default/files/research-reports/071315-National-RFRA-and-ND-poll.pdf>.

145. *Id.* at 7.

\$127,000 and \$944,000 annually.¹⁴⁶ Companies with more than 250,000 employees saved between \$3.2 million and \$23.6 million.¹⁴⁷ Thus, it is unsurprising that an increasing number of private employers are taking matters into their own hands by creating internal initiatives and protections for LGBT employees.¹⁴⁸

Employers can adopt these policies in states and cities that lack LGBT employment laws or in conjunction with preexisting laws to provide additional protections.¹⁴⁹ Currently, 91% of Fortune 500 companies prohibit discrimination based on sexual orientation, and 61% ban gender-identity discrimination.¹⁵⁰ Some corporations, however, go even further than just banning discrimination and also create programs and groups to promote LGBT inclusiveness.¹⁵¹ One illustration of this is the “Gayglers,” Google’s employee resource group that makes suggestions of programs and policies to help Google promote LGBT equality.¹⁵² Shareholders catching onto these trends have also drafted corporate LGBT-inclusive proposals that serve as an important catalyst for change in corporate nondiscrimination policies.¹⁵³

Small businesses are also following suit.¹⁵⁴ Seven out of ten small businesses prohibit discrimination based on sexual orientation, and six out of ten small businesses prohibit gender identity discrimination.¹⁵⁵ Of the small businesses with LGBT nondiscrimination policies, 86% report that the policies cost them nothing or next to nothing.¹⁵⁶

4. City and County Ordinances

Cities and counties may also pass local nondiscrimination ordinances (“NDOs”) that either create or expand protections granted to LGBT employees within their jurisdiction.¹⁵⁷ In 1974, Minneapolis adopted the first NDO encompassing LGB employment protections when it amended the city’s civil-rights ordinance to include “affectional or sexual prefer-

146. Higginbottom, *supra* note 52.

147. *Id.*

148. Matt Dunning, *Lesbian, Gay, Transgender Workers Increasingly Protected by Bias Policies*, BUS. INS. (Feb. 1, 2015, 12:01 AM), <http://www.businessinsurance.com/article/20150201/NEWS06/302019994>.

149. See Burns, *supra* note 46, at 15–16.

150. Taking Action Press Release, *supra* note 50.

151. *Employee Groups*, HUMAN RTS. CAMPAIGN, <http://www.hrc.org/resources/employee-groups> (last visited Jan. 25, 2017).

152. *Google Diversity*, GOOGLE, <https://www.google.com/diversity/at-google.html> (last visited Jan. 25, 2017).

153. Neel Rane, Comment, *Twenty Years of Shareholder Proposals After Cracker Barrel: An Effective Tool for Implementing LGBT Employment Protections*, 162 U. PA. L. REV. 929, 977 (2014).

154. Burns, *supra* note 46, at 23–24.

155. *Id.* at 23.

156. Taking Action Press Release, *supra* note 50.

157. These ordinances are also often referred to as “Human Rights Ordinances” or “Civil Rights Ordinances.” *LGBT Policy Spotlight: Local Employment Nondiscrimination Ordinances*, MOVEMENT ADVANCEMENT PROJECT 1 (2015), <https://lgbtmap.org/file/policy-spotlight-local-NDOs.pdf> [hereinafter *LGBT Policy Spotlight*].

ence.”¹⁵⁸ One year later, Minneapolis amended the ordinance again to include gender identity.¹⁵⁹ Since then, at least 225 cities and counties have enacted similar NDOs banning private and public employers from engaging in employment discrimination on the basis of sexual orientation and/or gender identity.¹⁶⁰ NDOs provide both job safeguards for LGBT individuals living in states that lack statewide protections, and serve as stepping stones toward statewide protections.¹⁶¹

Localities can implement these protections through stand-alone ordinances, but more commonly they are passed as amendments to existing NDOs.¹⁶² When enforcing NDOs, cities generally try to resolve issues through mediation, though they have the authority to criminally prosecute violations or impose fines.¹⁶³ In Phoenix, Arizona, for example, those who violate the local employment NDO may face a misdemeanor charge punishable by a \$2,500 fine.¹⁶⁴ Some localities also adopt sexual orientation and gender identity affirmative-action-like requirements for government contractors.¹⁶⁵ They usually include requirements such as: posting the nondiscrimination policy, filing compliance reports, developing affirmative-action plans, appointing someone to serve as an internal equal-opportunity director, providing equal opportunity and nondiscrimination-requirement training, and reviewing selection procedures.¹⁶⁶

5. *State Action*

Most states allow employers to discriminate against employees for their sexual orientation or gender identity.¹⁶⁷ Several states, however, have adopted statewide LGBT employment protections that ban this type of conduct.¹⁶⁸ Title VII explicitly gave states permission to do this, stating that the law does not “exempt or relieve any person from any lia-

158. *Id.*

159. *Id.*

160. *Cities and Counties with Non-Discrimination Ordinances that Include Gender Identity*, HUMAN RTS. CAMPAIGN, <http://www.hrc.org/resources/entry/cities-and-counties-with-non-discrimination-ordinances-that-include-gender> (last visited Jan. 25, 2017) (listing the cities and counties that prohibit discrimination based on gender identity by state); see also *Local Employment Non-Discrimination Ordinances*, MOVEMENT ADVANCEMENT PROJECT, http://www.lgbtmap.org/equality-maps/non_discrimination_ordinances/policies (last visited Jan. 25, 2017) (providing the percentage of citizens governed by local NDOs that prohibit LGBT workplace discrimination per state).

161. *LGBT Policy Spotlight*, *supra* note 157.

162. *Id.*

163. Maria Polletta, *In Arizona, Clash Over LGBT Rights Plays Out at City Level*, AZCENTRAL (Apr. 28, 2015, 9:12 AM), <http://www.azcentral.com/story/news/local/arizona/2015/04/28/arizona-cities-non-discrimination-laws/26494457/>.

164. *Id.*

165. CHRISTY MALLORY & BRAD SEARS, WILLIAMS INST., AN EVALUATION OF LOCAL LAWS REQUIRING GOVERNMENT CONTRACTORS TO ADOPT NON-DISCRIMINATION AND AFFIRMATIVE ACTION POLICIES TO PROTECT LGBT EMPLOYEES 1 (Feb. 2012), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Sears-Mallory-ContractorNDAA-Feb-2012.pdf>.

166. *Id.* at 5–6.

167. German Lopez, *How Most States Allow Discrimination Against LGBTQ People*, VOX (Aug. 19, 2016, 2:25 PM), <http://www.vox.com/2015/4/22/8465027/lgbt-nondiscrimination-laws>.

168. See *infra* Figure 1.

bility, duty, penalty, or punishment provided by any present or future law of any State.”¹⁶⁹ There are three ways a state can implement statewide protections for LGBT workers including: gubernatorial executive orders,¹⁷⁰ statewide legislation, or constitutional amendments.¹⁷¹ To date, states have only utilized the first two mechanisms.¹⁷²

Governors can unilaterally create limited discrimination protections by signing gubernatorial executive orders.¹⁷³ Montana Governor Steve Bullock, for example, signed an executive order directing Montana’s Department of Administration to expand prohibitions on discrimination in state employment and contracts to include gender identity and gender expression.¹⁷⁴ Missouri Governor Jay Nixon also passed an executive order that bans sexual-orientation discrimination, but his order, unlike Governor Bullock’s, only extends the protections to employees of the executive branch.¹⁷⁵ In total, nine governors have implemented an executive order that prohibits employment discrimination on the basis of sexual orientation and/or gender identity in some area of state employment.¹⁷⁶

The method more commonly used, however, is state legislation.¹⁷⁷ Currently, seventeen states and the District of Columbia have adopted a statute that bans both sexual orientation and gender-identity discrimination, creating an “inclusive non-discrimination law.”¹⁷⁸ Two additional states have adopted similar statutes, but they only ban sexual-orientation discrimination.¹⁷⁹ To accompany these protections, many states created agencies known as “fair employment practices agencies” (“FEPAs”) which, similar to the EEOC, are responsible for enforcing state employment laws.¹⁸⁰ Since states attach different enforcement mechanisms to

169. 42 U.S.C. § 2000e-7 (2012).

170. See *Governors’ Powers and Authority*, NAT’L GOVERNORS ASS’N, <http://www.nga.org/cms/home/management-resources/governors-powers-and-authority.html> (last visited Jan. 25, 2017).

171. *Employment Discrimination*, CORNELL U. L. SCH., https://www.law.cornell.edu/wex/employment_discrimination (last visited Jan. 25, 2017).

172. Jerome Hunt, *A State-by-State Examination of Nondiscrimination Laws and Policies*, CTR. FOR AM. PROGRESS 5 (June 2012), https://www.americanprogress.org/wp-content/uploads/issues/2012/06/pdf/state_nondiscrimination.pdf.

173. See, e.g., Mont. Exec. Order No. 04-2016 (Jan. 18, 2016).

174. *Id.*

175. Igor Volsky, *Missouri Governor Issues EO Banning Discrimination Based on Sexual Orientation in Executive Branch*, THINK PROGRESS (July 26, 2010), <http://thinkprogress.org/justice/2010/07/26/176897/missouri-discrimination-executive/>.

176. See *Laws Prohibiting Discrimination Based on Sexual Orientation and Gender Identity*, INST. OF REAL ESTATE MGMT. (2013), <http://www.irem.org/File%20Library/Public%20Policy/Anti-discrimination.pdf>.

177. See *infra* Figure 1.

178. *Facts on Nondiscrimination Laws*, FAIRNESS PROJECT, <http://equalityfederation.org/fairnessproject/facts/> (last visited Jan. 25, 2017).

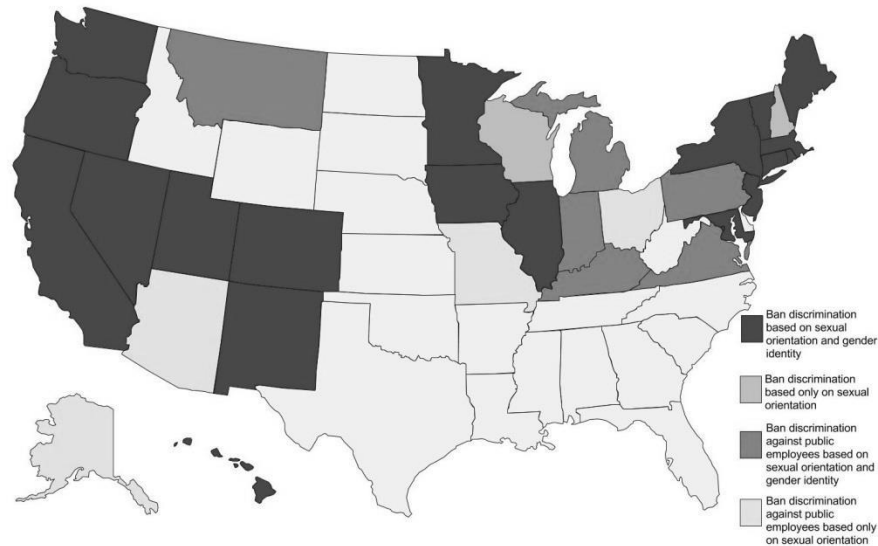
179. *Non-Discrimination Laws*, *supra* note 127.

180. *Fair Employment Practice Agencies (FEPAs) and Dual Filing*, EQUAL EMP. OPPORTUNITY COMM’N, <http://www.eeoc.gov/employees/fepa.cfm> (last visited Jan. 25, 2017).

discrimination statutes, FEPAs have diverse responsibilities.¹⁸¹ Fines and jail time are the most commonly used sanctions.¹⁸²

181. *See* Lopez, *supra* note 167.

182. *Id.*

FIGURE 1¹⁸³

The map above illustrates which states have either a gubernatorial executive order or statewide legislation that bans some forms of sexual orientation and/or gender identity discrimination in the workplace.

D. Proposed Federal Legislation

Since 1974, Congress has consistently seen proposals for legislation that would ban discrimination based on sexual orientation, but has never

183. Legislation: CAL. GOV'T CODE § 12940 (West 2016); COLO. REV. STAT. § 24-34-402 (2012); CONN. GEN. STAT. § 46a-60 (2011); DEL. CODE tit. 19, § 711 (2015); D.C. CODE § 2-1402.11 (2001); HAW. REV. STAT. § 378-2 (2013); 775 ILL. COMP. STAT. 5/1-102 (2015); IOWA CODE § 216.6 (2009); ME. STAT. tit. 5, § 4572 (2010); MD. CODE ANN., STATE GOV'T § 20-606 (West 2014); MASS. GEN. LAWS ch. 151B, § 4 (2015); MINN. STAT. § 363A.08 (2014); NEV. REV. STAT. § 613.330 (2015); N.H. REV. STAT. § 354-A:7 (2007); N.J. STAT. § 10:5-12 (2014); N.M. STAT. § 28-1-7 (2008); N.Y. EXEC. LAW § 296 (McKinney 2015); OR. REV. STAT. § 659A.030 (2008); 28 R.I. GEN. LAWS § 28-5-7 (2014); VT. STAT. tit. 21, § 495 (2015); WASH. REV. CODE § 49.60.180 (2007). Executive orders, administrative orders, and policy statements: Alaska Admin. Order No. 195 (Mar. 5, 2002), <http://gov.alaska.gov/admin-orders/195.html>; Ariz. Exec. Order No. 2003-22 (June 21, 2003), <http://azmemory.azlibrary.gov/cdm/ref/collection/execorders/id/430>; Ind. Policy Statement (Apr. 26, 2005), http://www.in.gov/spd/files/gov_policy.pdf; Ky. Exec. Order No. 2008-473 (June 2, 2008), <https://personnel.ky.gov/Documents/EqualOpportunityEO2008473.pdf>; Mich. Exec. Order No. 2007-24 (July 15, 2007), http://www.michigan.gov/formergovernors/0,4584,7-212-57648_21975-167771--00.html; Mo. Exec. Order No. 10-24 (July 9, 2010), www.americanprogress.org/wp-content/uploads/issues/2012/06/pdf/state_nondiscrimination.pdf; Mont. Exec. Order No. 04-2016 (Jan. 18, 2016), <https://governor.mt.gov/Portals/16/docs/2016EOs/EO-04-2016%20Anti-Discrimination%20in%20workplace.pdf?ver=2016-01-19-161003-600>; Ohio Exec. Order No. 2007-10S (May 17, 2007), <http://www.dot.state.oh.us/Divisions/ODI/EqualOpportunity/EEO%20Documents/Appendix%20E%20-%20Executive%20Order%2007-10S.pdf>; Pa. Exec. Order No. 41-2008 (Nov. 14, 2008), http://www.oa.pa.gov/Policies/co/Documents/1975_5.pdf; Va. Exec. Order No. 1 (Jan. 11, 2014), <https://governor.virginia.gov/media/3039/EO-1-equal-opportunityada.pdf>.

reached a consensus on the matter.¹⁸⁴ The following sections briefly describe the two leading pieces of legislation Congress has considered.

1. *Employment Non-Discrimination Act*

ENDA is a proposed federal stand-alone legislation modeled on the Civil Rights Act of 1964 that, in its current form, would ban employment discrimination on the basis of sexual orientation and gender identity.¹⁸⁵ Congress first introduced the bill in 1994, but it did not include gender identity until 2007.¹⁸⁶ The latest version of ENDA, proposed in 2013, would make it unlawful for employers to discriminate based on an individuals “actual or perceived sexual orientation or gender identity” in regards to hiring, discharging, compensation, terms, conditions, or privileges of employment.¹⁸⁷ It also bans employers from discriminating against employees for being associated with co-workers who identify as LGBT.¹⁸⁸ Additionally, the legislation forbids employers from retaliating against employees who report them under ENDA.¹⁸⁹

ENDA got farther in Congress than ever before when it passed the Senate in November 2013.¹⁹⁰ House Speaker John Boehner, however, did not allow the bill to reach the House floor for a vote, even though it likely had majority support.¹⁹¹ Thereafter, legislators deserted ENDA and turned their attention to the Equality Act.¹⁹²

2. *The Equality Act*

In 1974, legislators proposed the first piece of federal legislation banning employment discrimination on the basis of sexual orientation: the Equality Act.¹⁹³ Instead of creating a piece of stand-alone legislation, the Equality Act would have amended Title VII to include sexual orien-

184. Jerome Hunt, *A History of the Employment Non-Discrimination Act*, CTR. FOR AM. PROGRESS (July 19, 2011), <https://www.americanprogress.org/issues/lgbt/news/2011/07/19/10006/a-history-of-the-employment-non-discrimination-act/>.

185. *Employment Non-Discrimination Act (ENDA)*, THE LEADERSHIP CONF., <http://www.civilrights.org/lgbt/enda/?referrer> (last visited Jan. 25, 2017).

186. Hunt, *supra* note 184.

187. *Summary: S.815–113th Congress (2013–2014)*, CONGRESS.GOV, <https://www.congress.gov/bills/113/congress/senate/bills/815> (last visited Jan. 25, 2017).

188. *Id.*

189. *Id.*

190. It passed the Senate sixty-four to thirty-two. *Employment Non-Discrimination Act of 2013*, S. 815, 113th Cong. (2013).

191. Eric S. Dreiband & Brett Swearingen, *The Evolution of Title VII–Sexual Orientation, Gender Identity, and the Civil Rights Act of 1964*, JONES DAY 12 (Apr. 2015), http://www.jonesday.com/files/Publication/07f7db13-4b8c-44c3-a89b-6dcfe4a9e2a1/Presentation/PublicationAttachment/74a116bc-2cfe-42d2-92a5-787b40ee0567/dreiband_lgbt.authcheckdam.pdf.

192. *See* Equality Act, H.R. 3185, 114th Cong. § 3 (2015).

193. Hunt, *supra* note 184.

tation.¹⁹⁴ The passage of the freestanding Americans with Disabilities Act, however, demonstrated that “a stand alone civil rights statute[] was more palatable to Congress than an amendment to existing civil rights legislation.”¹⁹⁵ Thereafter, the Equality Act was abandoned and replaced with ENDA.¹⁹⁶ When ENDA was met with similar opposition in Congress for twenty years,¹⁹⁷ however, legislators returned their efforts once again to the Equality Act.¹⁹⁸

In 2015, Senator Jeff Merkley and Representative David Cicilline introduced the Equality Act with the same idea LGBT groups had after *Obergefell*—namely that they could “harness the momentum” to gain enough support to pass the legislation.¹⁹⁹ The congressmen turned to popular headlines circulating in the media in an effort to gain public and political support, arguing that it is not fair that “[w]hile same-sex couples could today legally marry, tomorrow they could lose their jobs” without any recourse.²⁰⁰ Unlike prior Equality Act proposals, the 2015 legislation adds both sexual orientation *and* gender identity to the protected classes encompassed within Title VII.²⁰¹ The 2015 Equality Act also codifies the EEOC’s existing interpretation that sexual-orientation and genderidentity discrimination are forms of sex discrimination—though this would have little effect in light of the other amendments.²⁰²

III. ANALYSIS

Over the past three decades, public support of LGBT rights in the United States has increased significantly and rapidly.²⁰³ This change is due in part to the fact that the public’s perception of the discrimination

194. Mara Keisling, *Op-ed: The Equality Act is the LGBT Rights Bill We Want and Need*, ADVOCATE (July 23, 2015, 6:00 AM), <http://www.advocate.com/commentary/2015/07/23/op-ed-equality-act-lgbt-rights-bill-we-want-and-need>.

195. 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 (2011).

196. *Id.*

197. Hunt, *supra* note 184.

198. See Equality Act, H.R. 3185, 114th Cong. § 3 (2015).

199. Levy, *supra* note 14.

200. *Id.*

201. Equality Act, H.R. 3185, 114th Cong. § 3(a)(1). The 2015 Equality Act would also add these protections to the Fair Housing Act, the Equal Credit Opportunity Act, and the Jury Selection and Service Act. *Id.* §§ 10–12 (2015). This Note, however, only explores how the legislation would affect Title VII. For further information on the other amendments see German Lopez, *The Equality Act, the Most Comprehensive LGBTQ Rights Bill Ever, Explained*, VOX (Nov. 10, 2015, 6:00 PM), <http://www.vox.com/2015/7/23/9023611/equality-act-lgbt-rights>.

202. Equality Act, H.R. 3185, 114th Cong. § 2(8). See Keisling, *supra* note 194 (“Think of it as wearing both a belt and suspenders. So for instance, if a trans person is discriminated against in their job, it will be clearly illegal as both gender identity discrimination and sex discrimination. This is important for various reasons, including that it will help cement these interpretations under various other laws not directly amended by the bill.”).

203. Andrew R. Flores, WILLIAMS INST. NATIONAL TRENDS IN PUBLIC OPINION ON LGBT RIGHTS IN THE UNITED STATES 5, <http://williamsinstitute.law.ucla.edu/wp-content/uploads/POP-natl-trends-nov-2014.pdf> (last updated Nov. 2014).

LGBT people face has also grown.²⁰⁴ In 2013, 68% of people reported that they believe “lesbians and gay men face a lot of discrimination,” more than double the amount of people that reported having a similar view in 1978.²⁰⁵ When compared with other minorities, the public also rates LGBT people as one of the groups who experience the most discrimination.²⁰⁶

Even with these significant changes in the public’s rhetoric and understanding of the struggles LGBT people face,²⁰⁷ many Americans still oppose adopting LGBT-discrimination policies.²⁰⁸ This part of the Note first analyzes what the most common arguments raised in opposition of LGBT-discrimination protections are, and then describes why they are unwarranted. It then delves further into the LGBT-discrimination policies that are currently in place, and explains how each one, while a step in the right direction, is deficient. Finally, it examines the two federal proposals, ENDA and the Equality Act, to explore what major differences exist between each piece of legislation.

A. Pushback Against LGBT Employment Anti-discrimination Legislation

Currently in the United States, there are what seems to be endless points of contention coming to light involving LGBT rights in areas such as employment, housing, schools, public accommodations, credit, adoption, prisons, and the military.²⁰⁹ Part of the opposition to LGBT equality arises purely from the animus some people harbor against LGBT people.²¹⁰ There are, however, other arguments opponents raise when objecting to LGBT rights.

This Section explores the six objections most commonly raised in opposition to LGBT employment-discrimination laws: 1) they will infringe on religious liberty; 2) federal legislation should not be used to cure LGBT employment discrimination; 3) amending the Civil Rights

204. *Id.* at 6.

205. *Id.*

206. *Id.*

207. See *Beyond Stonewall: 6 Challenges Ahead in a Struggle for LGBT Rights*, PSYCHOLOGY BENEFITS SOCIETY (June 27, 2014), <https://psychologybenefits.org/2014/06/27/beyond-stonewall-5-challenges-ahead-in-the-struggle-for-lgbt-rights/>; Flores, *supra* note 203.

208. Matt Baume, *Debunking Right-Wing Opposition to the Equality Act*, ADVOCATE (July 24, 2015), <http://www.advocate.com/politics/2015/07/24/watch-debunking-right-wing-opposition-equality-act> (“The Equality Act was barely a few hours old before the opponents of LGBT equality went to work recycling the same old, tired arguments that failed against marriage equality—this time using them against nondiscrimination protections.”).

209. Timothy Stewart-Winter, *The Price of Gay Marriage*, N.Y. TIMES, June 28, 2015, at SR1; James Esseks, *After Obergefell, What the LGBT Movement Still Needs to Achieve*, ACLU (July 7, 2015, 10:15 AM), <https://www.aclu.org/blog/speak-freely/after-obergefell-what-lgbt-movement-still-needs-achieve>.

210. See WILLIAMS INST., OTHER INDICIA OF ANIMUS AGAINST LGBT PEOPLE BY STATE AND LOCAL OFFICIALS, 1980–PRESENT, http://williamsinstitute.law.ucla.edu/wp-content/uploads/14_OtherIndiciaOfAnimus.pdf (last visited Jan. 25, 2017).

Act of 1964 would tarnish the civil-rights movement; 4) LGBT-discrimination laws will lead to frivolous lawsuits; 5) the laws would create “special rights” for LGBT people; and 6) LGBT employment-discrimination laws are unnecessary.²¹¹

1. *LGB- Discrimination Laws Will Infringe on Religious Liberty*

Opponents most commonly articulate their disapproval of LGBT employment protections, and LGBT rights generally, in religious-liberty arguments.²¹² Even though there is a much higher acceptance of homosexuality today than ever before, a majority of Americans still believe homosexuality is immoral.²¹³ Thus, religious objectors commonly turn to religious phraseology, such as the immorality of a homosexual lifestyle, to support their objections to LGBT protections.²¹⁴

Consequently, proposals to establish LGBT equality in the workplace are predictably pitting many of the same religious conservatives who disagreed with same-sex marriage against the same LGBT advocates.²¹⁵ Religious objectors, still heated from *Obergefell*, now contend that federal LGBT protections will “transform public opinion on sexuality, and harm the public perception of those who believe in traditional or biblical sexual morality.”²¹⁶ Religious organizations do not want to be seen in the public eye as discriminatory, something they fear may happen amongst those who think these rules, if passed, should apply to everyone.²¹⁷

Religious objectors also believe that LGBT employment protections would be burdensome and threatening to their religious liberty.²¹⁸ Many fear the laws would “inevitably be used to force religious people and institutions to violate their beliefs . . . by employing gay men and lesbians in church-related jobs,” amounting to an abandonment of their

211. See Baume, *supra* note 208; Coleman Lowndes & Carlos Maza, *The Top Five Myths About LGBT Non-Discrimination Laws Debunked*, ADVOCATE (Sept. 24, 2014), <http://www.advocate.com/politics/media/2014/09/24/top-five-myths-about-lgbt-nondiscrimination-laws-debunked>.

212. Alan K. Tannenwald, *An Ironic Twist in Employment Law: The Conservative Case for Amending Title VII to Ban Discrimination on the Basis of Sexual Orientation*, 9 GEO. J. GENDER & L. 269, 273 (2008).

213. Toni Lester, *Queering the Office: Can Sexual Orientation Employment Discrimination Laws Transform Work Place Norms for LGBT Employees?*, 73 UMKCL. REV. 643, 643–44 (2005).

214. Erik S. Thompson, *Compromising Equality: An Analysis of the Religious Exemption in the Employment Non-Discrimination Act and its Impact on LGBT Workers*, 35 B.C. J.L. & SOC. JUST. 284, 298–99 (2015).

215. Eckholm, *supra* note 77; Sarah Pulliam Bailey, *Gay Rights vs. Religious Rights: 7 Issues to Watch*, RELIGION NEWS SERVICE (Sept. 6, 2013), <http://www.religionnews.com/2013/09/06/gay-rights-vs-religious-rights-7-issues-to-watch/>.

216. Andrew T. Walker, *The Equality Act: Bad Policy that Poses Great Harms*, PUBLIC DISCOURSE (July 24, 2015), <http://www.thepublicdiscourse.com/2015/07/15381/>.

217. Shadee Ashtari, *Most Americans Don't Think Churches Should be Exempt from LGBT Non-Discrimination Laws*, HUFFINGTON POST (Oct. 31, 2014, 2:55 PM), http://www.huffingtonpost.com/2014/10/31/lgbt-employment-discrimination-churches_n_6082846.html.

218. Lowndes & Maza, *supra* note 211.

moral principles.²¹⁹ The Witherspoon Institute, for example, recently called the Equality Act “the most invasive threat to religious liberty ever proposed” and said that, if the bill were passed, it would have sweeping historic effects on religious liberty and freedom of conscience.²²⁰ In a letter written to a concerned constituent in 2014, Arkansas Representative Tom Cotton raised the same argument.²²¹ According to Cotton, much of his disapproval for LGBT-discrimination laws stemmed from the undue burdens they place on freedom of religion and association.²²²

These concerns, however, are largely unwarranted. Reaching a compromise between LGBT advocates and religious objectors can be difficult, but it is possible to find a balance that protects LGBT employees without placing an undue burden on religious organizations. The Utah Compromise is a perfect example.²²³

In March 2015, the Utah legislature passed the Utah Compromise to add sexual orientation and gender identity to its protected employment classes.²²⁴ At the time, Utah was under a Republican-controlled legislature with a Republican governor—making it the first instance in which a Republican-controlled government had extended protections to LGBT people.²²⁵ Even more surprising, however, is the fact that the bill was hailed as “a breakthrough in balancing [LGBT] rights and religious freedom” by both LGBT advocates and religious organizations, such as The Church of Latter-day Saints.²²⁶ The legislation took “seven years and a lot of dialogue,” but once legislators found the right balance of LGBT protections and religious exemptions, the bill became unstoppable—passing the Utah Senate twenty-three to five and the Utah House sixty-five to ten.²²⁷

While the Utah Compromise is an anomaly as far as getting support from religious objectors, all statewide legislation adopted to date attaches some form of religious exemptions to the LGBT protections.²²⁸ The exemptions vary in scope, but at a minimum all states allow religious or-

219. Eckholm, *supra* note 77.

220. Walker, *supra* note 216.

221. Zack Ford, *Arkansas Congressman: LGBT Job Protections Would Burden Businesses with ‘Frivolous Lawsuits,’* THINK PROGRESS (May 7, 2014), <http://thinkprogress.org/lgbt/2014/05/07/3435082/arkansas-congressman-lgbt-job-protections-would-burden-businesses-with-frivolous-lawsuits/>.

222. *Id.*

223. S.B. 296, 61st Leg., Gen. Sess. (Utah 2015).

224. Emma Green, *Gay Rights May Come at the Cost of Religious Freedom*, ATLANTIC (July 27, 2015), <http://www.theatlantic.com/politics/archive/2015/07/legal-rights-lgbt-discrimination-religious-freedom-claims/399278/>.

225. Laurie Goodstein, *Utah Passes Antidiscrimination Bill Backed by Mormon Leaders*, N.Y. TIMES (Mar. 12, 2015), <http://www.nytimes.com/2015/03/12/us/politics/utah-passes-antidiscrimination-bill-backed-by-mormon-leaders.html>.

226. *Id.*

227. *Id.*

228. Letter from Dayna K. Shah, Managing Assoc. Counsel, United States Gov’t Accountability Office, to Senator Tom Harkin, Chairman, Comm. on Health, Educ., Labor, and Pensions (Oct. 1, 2009).

ganizations to award preference to those of the same religion in hiring.²²⁹ Federal proposals also provide varying religious exemptions.²³⁰ Thus, while reaching a compromise can be challenging, LGBT employment protections always come with religious-liberty protections that work to eliminate the undue burden that laws could place on religious liberty.

2. *Federal Legislation Should Not be Used to Cure LGBT Discrimination*

Others oppose adopting federal LGBT anti-discrimination policies because they believe it is an issue better left to the states.²³¹ Former Florida Governor Jeb Bush consistently opposed the Florida legislature adopting LGBT nondiscrimination laws.²³² He conceded, however, that if any such laws were going to be passed they should be done state-by-state, not by the federal government.²³³ United States Senator Rand Paul has made similar arguments, stating “that employers should [not] be able to fire LGBT people willy-nilly,” but that “the issue should be left to the states.”²³⁴ Bush and Paul’s arguments mirror exactly what opponents to same-sex marriage argued before the Supreme Court decided *Obergefell*—namely that whether same-sex marriage should be legal is a question for the states.²³⁵

This argument is largely without merit. Over the years, Congress has regularly banned discrimination on a national level through federal legislation.²³⁶ In 1964, Congress adopted Title VII, making it unlawful for employers to discriminate against employees on the basis of their race, color, religion, sex, or national origin.²³⁷ Four years later, in 1967, Congress passed the Age Discrimination in Employment Act, which banned employers from discriminating against employees because of their age.²³⁸ Another year later, Congress passed the Fair Housing Act, making it unlawful to “discriminate against any person in the terms, conditions, or

229. *Id.*

230. Equality Act, H.R. 3185, 114th Cong. (2015); Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. (2013).

231. Theodore Schleifer & Tal Kopan, *Hillary Clinton Campaign Knocks Rand Paul for Comment About Gays*, CNN (Oct. 15, 2015), <http://www.cnn.com/2015/10/14/politics/hillary-clinton-rand-paul-gays-iowa/>.

232. Zeke J. Miller, *Jeb Bush Says Laws on the Books Already Ensure Equal Pay*, TIME (July 16, 2015), <http://time.com/3961603/jeb-bush-equal-pay-lgbt-discrimination/>.

233. *Id.*

234. Jon Green, *Rand Paul Retreats to States’ Rights on LGBT Hiring Discrimination*, AM. BLOG (Oct. 16, 2015, 9:00 AM), <http://americablog.com/2015/10/rand-paul-retreats-to-states-rights-on-lgbt-hiring-discrimination.html>.

235. Elizabeth B. Wydra, *Marriage Equality: Not for States to Decide*, REUTERS BLOG (June 26, 2013), <http://blogs.reuters.com/great-debate/2013/06/26/marriage-equality-not-for-states-to-decide/>.

236. See *Constitutional Amendments and Major Civil Rights Acts of Congress Referenced in Black Americans in Congress*, U.S. HOUSE OF REPRESENTATIVES, <http://history.house.gov/Exhibitions-and-Publications/BAIC/Historical-Data/Constitutional-Amendments-and-Legislation/> (last visited Jan. 25, 2017).

237. 42 U.S.C. § 2000e (2012).

238. 29 U.S.C. § 623.

privileges of sale or rental of a dwelling . . . because of race, color, religion, sex, familial status, or national origin.”²³⁹ Since then, Congress has passed several other pieces of legislation banning various forms of discrimination, including the Equal Pay Act,²⁴⁰ the Education Amendments of 1972,²⁴¹ the Americans with Disabilities Act,²⁴² and the Voting Rights Act.²⁴³

Thus, it makes little sense that Congress can, and has, outlawed many other forms of discrimination in several important areas of daily American lives, but that LGBT-discrimination issues should specifically be left to states. “If firing someone for their sexual orientation is wrong, then it should be wrong in, say, Arkansas just as much as it’s wrong in Vermont.”²⁴⁴ LGBT employees face discrimination in the workplace at an alarming rate.²⁴⁵ Thus, both they, and their families, need the same protections from discrimination as other Americans are afforded at a national level in order to fully participate in society.²⁴⁶

3. *Amending the Civil Rights Act of 1964 Would Tarnish the Civil-Rights Movement*

Others raise a similar, but more obscure, argument that the Equality Act, by amending the Civil Rights Act of 1964, would tarnish the legacy of the civil rights movement.²⁴⁷ They believe that if LGBT people were to become a protected class in the nation’s civil-rights laws, it would taint the civil-rights movement’s accomplishments²⁴⁸ and “ultimately usurp rights from legitimate minorities such as blacks by rendering civil rights gains meaningless.”²⁴⁹ Many of these people actually support Congress adopting a broad LGBT-discrimination bill, but are skeptical about reo-

239. 42 U.S.C. § 3604.

240. 29 U.S.C. § 206(d) (“No employer . . . shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex . . .”).

241. 20 U.S.C. § 1681 (“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . .”).

242. 42 U.S.C. § 12112(a) (“No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.”).

243. 52 U.S.C. § 10301(a) (“No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . .”).

244. Chris Johnson, *Paul Clarifies View on Anti-LGBT Bias: Leave Issue to the States*, WASH. BLADE (Oct. 15, 2015, 5:23 PM), <http://www.washingtonblade.com/2015/10/15/paul-clarifies-view-on-anti-lgbt-bias-leave-issue-to-the-states/>.

245. McBride et al., *supra* note 19.

246. *Id.*

247. Roy Steele, *The GOP and Right-Wingers Use Litany of Lies to Justify Anti-Gay Discrimination*, JIVE IN THE [415] (June 20, 2013), <http://www.jiveinthe415.com/2013/06/the-gop-and-right-wingers-use-litany-of.html#axzz3xLldRtCI>.

248. *Id.*

249. AMY L. STONE, *GAY RIGHTS AT THE BALLOT BOX* 26 (2012).

pening the landmark legislation to revisions.²⁵⁰ The National Association for the Advancement of Colored People and the Leadership Conference on Civil and Human Rights²⁵¹ have taken this position—arguing that America’s “hostile Republican House and Senate majorities” will use the amendments as an opportunity to water down Title VII’s protections.²⁵²

Congress, however, has already amended Title VII twice.²⁵³ It was first amended in 1972 by the Equal Employment Opportunity Act, which broadened the Commission’s authority to carry out Title VII.²⁵⁴ In 1978, it was amended again when Congress passed the Pregnancy Discrimination Act,²⁵⁵ which clarified that pregnancy discrimination was a form of sex discrimination.²⁵⁶ Congress could have passed stand-alone legislation, such as the Age Discrimination in Employment Act,²⁵⁷ to ban pregnancy discrimination, but instead legislators chose to amend Title VII so that it specifically banned pregnancy discrimination.²⁵⁸

Neither amendment lead to unintended consequences nor an adverse effect on the legislation.²⁵⁹ Thus, while it is reasonable that people would not want to harm a piece of legislation as important to our nation as Title VII, opening it up to an amendment does not mean the bill will lose any of its power or be watered down.

4. *LGBT-Nondiscrimination Laws Will Lead to Frivolous Law Suits*

Another popular argument is that LGBT employment nondiscrimination laws will open the door to frivolous lawsuits.²⁶⁰ John Boehner blocked ENDA from reaching a vote in the House in 2013 specifically for this reason,²⁶¹ arguing that the legislation will “lead to endless, excessive litigation that will further bog down our courts at a high cost to employers, workers, and taxpayers.”²⁶² Tom Cotton agrees, maintaining that

250. Juliet Eilperin, *Obama Supports Altering Civil Rights Act to Ban LGBT Discrimination*, WASH. POST (Nov. 10, 2015), https://www.washingtonpost.com/politics/obama-supports-altering-civil-rights-act-to-include-gender-discrimination/2015/11/10/3a05107e-87c8-11e5-9a07-453018f9a0ec_story.html.

251. *Id.*

252. Dana Beyer, *The Equality Act, Part One—Introduction*, HUFFINGTON POST (July 27, 2015, 12:48 PM), http://www.huffingtonpost.com/dana-beyer/the-equality-act-part-one_b_7880612.html.

253. See EEOC, THE LAW, <http://www.eeoc.gov/eeoc/history/35th/thelaw/> (last visited Jan. 25, 2017).

254. *Id.*

255. Pregnancy Discrimination Act of 1978, Pub. L. 95-555, 92 Stat. 2076 (1978) (“An Act to amend [T]itle VII of the Civil Rights Act of 1964 to prohibit sex discrimination on the basis of pregnancy.”).

256. EEOC, *supra* note 253.

257. 29 U.S.C. § 623 (2012).

258. Pregnancy Discrimination Act of 1978, Pub. L. 95-555, 92 Stat. 2076.

259. EEOC, *supra* note 253.

260. SUSAN BURGESS, THE NEW YORK TIMES ON GAY AND LESBIAN ISSUES 496 (2011); Hunt, *supra* note 172, at 15.

261. Lauren Fox, *GOP House Leaders Still Oppose ENDA*, U.S. NEWS (June 16, 2014, 5:10 PM), <http://www.usnews.com/news/articles/2014/06/16/gop-house-leaders-still-oppose-enda-despite-obama-action>.

262. Reed, *supra* note 13, at 144.

LGBT employment legislation would make it harder for *all* Americans to find jobs because frivolous lawsuits would increase the cost of doing business, making it less likely that employers would hire more employees.²⁶³ Rand Paul made similar statements, including that he does not want to set “up a whole industry for people who want to sue.”²⁶⁴

Data to this effect, however, provides evidence directly to the contrary of these arguments.²⁶⁵ In both 2002 and 2009, the Government Accountability Office analyzed the number of administrative employment-discrimination complaints filed in states with LGBT employment nondiscrimination laws.²⁶⁶ What they found is that, generally, these states receive “relatively few employment discrimination complaints based on sexual orientation and gender identity.”²⁶⁷ Specifically, four out of every 10,000 LGBT employees in the private sector and three out of every 10,000 employees in state/local positions filed complaints that included allegations based on sexual-orientation or gender-identity discrimination.²⁶⁸

The numbers are equally small when compared to the total amount of complaints filed. For example, in Colorado (712 total complaints in 2008), Illinois (3,855 total complaints in 2008), and Maine (494 total complaints in 2008), less than 4% of total complaints included a claim based on sexual orientation or gender-identity discrimination.²⁶⁹ Analysts also established that, when adjusted for population size, sexual-orientation-discrimination laws are used at a similar frequency as sex discrimination laws.²⁷⁰ Complaints based on race are actually filed at a slightly higher rate.²⁷¹ Therefore, the argument that LGBT-discrimination laws lead to frivolous lawsuits is unwarranted.²⁷²

263. Ford, *supra* note 221.

264. Jonathan Chait, *Rand Paul: Let's Not Impinge on Your Boss's Freedom to Fire Gay People*, N.Y. MAG. (Oct. 14, 2015, 6:35 PM), <http://nymag.com/daily/intelligencer/2015/10/rand-paul-dont-impinge-on-freedom-to-fire-gays.html>.

265. SEAN CAHILL & SARAH TOBIAS, POLICY ISSUES AFFECTING LESBIAN, GAY, BISEXUAL, AND TRANSGENDER FAMILIES 51 (U. Mich. Press, 2007); Hunt, *supra* note 172, at 15–19.

266. Letter from Dayna K. Shah to Sen. Tom Harkin, *supra* note 228.

267. *Id.*

268. BRAD SEARS & CHRISTY MALLORY, WILLIAMS INST., EVIDENCE OF EMPLOYMENT DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION IN STATE AND LOCAL GOVERNMENT: COMPLAINTS FILED WITH STATE ENFORCEMENT AGENCIES 2003–2007 1 (July, 2011), <http://williams.institute.law.ucla.edu/wp-content/uploads/Sears-Mallory-DiscriminationComplaintsReport-July-2011.pdf>.

269. Letter from Dayna K. Shah to Sen. Tom Harkin, *supra* note 228.

270. SEARS & MALLORY, *supra* note 268, at 1.

271. *Id.*

272. CAHILL & TOBIAS, *supra* note 265, at 50.

5. *Nondiscrimination Laws Would Create “Special Rights” for LGBT Employees*

Another argument is that LGBT-employment protections create “special rights” for LGBT people.²⁷³ Some individuals, for example, argue that LGBT-discrimination laws “unnecessarily and unjustly violate[] freedom by creating special privileges based on sexual orientation and gender identity.”²⁷⁴ Others also argue that, unlike race or sex, LGBT protections create special rights, because sexual orientation and gender identity are within a person’s control.²⁷⁵

A film entitled *Gay Rights, Special Rights* used “racialized legalistic messaging” to argue a similar point—that gays just simply want more rights than the average citizen.²⁷⁶ The movie distinguished sexual orientation and gender identity from race, arguing that “[s]ome people, like blacks, deserve special rights, such as those in the 1964 Civil Rights Act, because of a long history of discrimination.”²⁷⁷ It claimed that LGBT people are not as deserving since they have not faced a similarly harsh path.²⁷⁸ The use of special-rights language is extremely powerful, because it can “simultaneously gain the support of African American and liberal voters,” while also “appeal[ing] to the anxiety of the working-class . . . who did not benefit from the gains of the civil rights movement.”²⁷⁹

The problem with the special-rights argument is that LGBT legislation does not create special rights, but instead guarantees equal rights.²⁸⁰ Special-rights arguments build on the common misconception that “civil rights inherently take rights away from someone else, in a zero-sum game.”²⁸¹ It is not a zero-sum game though, and LGBT employees are not looking for anything special.²⁸² There is nothing special about the right to a job for which you are qualified nor is there anything special about the right to perform a job free of fear and harassment.²⁸³ The United States already acknowledged this by passing Title VII,²⁸⁴ as did a majority of states by banning “workplace discrimination against a slew of traits—

273. STONE, *supra* note 249, at 25–27.

274. Ryan T. Anderson, *How So-Called ‘Equality Act’ Threatens Religious Freedom*, DAILY SIGNAL (July 23, 2015), <http://dailysignal.com/2015/07/23/how-so-called-equality-act-threatens-religious-freedom/>.

275. Eugene Volokh, *Is Sexual Orientation Discrimination Like Discrimination Based on Race? Sex? Religion? Politics? Appearance?*, WASH. POST (July 23, 2014), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/07/23/is-sexual-orientation-discrimination-like-discrimination-based-on-race-sex-religion-politics-appearance/?utm_term=.4e155dd7d711.

276. STONE, *supra* note 249, at 25.

277. *Id.* at 26.

278. *Id.*

279. *Id.* at 29.

280. H.R. REP. NO. 110-406(I), at 11 (2007).

281. STONE, *supra* note 249, at 26.

282. H.R. REP. NO. 110-406(I), at 11 (2007).

283. “*Equal Rights Are Not Special*”: *Advocates Call for an End to Anti-Gay Employment Discrimination*, HISTORY MATTERS, <http://historymatters.gmu.edu/d/6463/> (last visited Jan. 25, 2017).

284. See 42 U.S.C. § 2000a (2012).

including marital status, ancestry, pregnancy status, disability, and even smoker status.”²⁸⁵ People should not criticize discrimination laws for creating “special rights” because at the core of America “is the understanding that equality, equal rights, are not special.”²⁸⁶

6. *LGBT-Employment Laws Are Unnecessary*

The final of the sixth most commonly raised arguments is quite simple—LGBT employment nondiscrimination laws are unnecessary.²⁸⁷ John Boehner, for example, argues that LGBT “people are already protected in the workplace.”²⁸⁸ Likewise, Rand Paul contends that these laws would be superfluous since “society is rapidly changing and . . . if you are gay, there are plenty of places that will probably hire you.”²⁸⁹ What these arguments suggest is that even if LGBT discrimination in the workplace occurs, protections are unnecessary because LGBT people are already protected—and even if they are not, someone else will hire them anyway.

These arguments are weak at best. As described in Part II, many LGBT workplace protections already exist,²⁹⁰ but this does not mean LGBT employees are already protected. The protections in place do not provide layers of protection, but instead each serve as part of a larger patchwork scheme.²⁹¹ Unfortunately, under this patchwork many LGBT employees still receive little to no protections,²⁹² and they are more likely to experience employment discrimination than heterosexual individuals.²⁹³ Thus, it is a mischaracterization to argue that LGBT people are already protected.

It is also unfair to say that protections are unnecessary because people can get a different job somewhere more welcoming. LGBT discrimination has significant negative effects upon LGBT employees’ physical and emotional health, job satisfaction, wages, opportunities, and productivity.²⁹⁴ As the Third Circuit expressed in *Bibby v. Philadelphia Coca Cola Bottling Company*, discrimination of this nature “has no place

285. Mark Joseph Stern, *Rand Paul’s Solution for Workplace Discrimination Against Gays? Just Stay in the Closet*, SLATE (Oct. 15, 2015, 1:37 PM), http://www.slate.com/blogs/outward/2015/10/15/rand_paul_to_gay_employees_stay_in_the_closet_to_not_get_fired.html.

286. “*Equal Rights Are Not Special*”: Advocates Call for an End to Anti-Gay Employment Discrimination, *supra* note 283.

287. See Fox, *supra* note 261.

288. *Id.*

289. David Weigel, *Rand Paul: ‘Plenty of Places’ Will Hire You if You’re Fired for Being Gay*, WASH. POST (Oct. 14, 2015), <https://www.washingtonpost.com/news/post-politics/wp/2015/10/14/rand-paul-plenty-of-places-will-hire-you-if-youre-fired-for-being-gay/>.

290. See *supra* Part II.C.

291. See *id.*

292. Eckholm, *supra* note 77.

293. Vickie M. Mays & Susan D. Cochran, *Mental Health Correlates of Perceived Discrimination Among Lesbian, Gay, and Bisexual Adults in the United States*, 91 AM. J. PUB. HEALTH 1869, 1874 (2001).

294. Pizer et al., *supra* note 18, at 742.

in our society.”²⁹⁵ “Access to employment lies at the center of American life” and “[a] steady paycheck is central to a family’s financial security, economic mobility, and ability to secure basic necessities such as food, shelter, and health care.”²⁹⁶ Thus, because of the importance of employment in our society, it is not enough to say that someone who experiences discrimination in one job should just try again at another.

The following Section describes not what is flawed with the arguments raised in opposition of LGBT rights, but instead what is flawed with the protections themselves.

B. Why the Protections We Have Are Not Enough

The foremost flaw with the LGBT-employment-nondiscrimination protections in place is that they do not, and cannot, protect all LGBT workers.²⁹⁷ Thus, while some LGBT employees receive protections, many others are still at risk of being fired or discriminated against for their sexual orientation or gender identity.²⁹⁸ Additionally, since the protections come from a wide array of sources, they are far from uniform or equal.²⁹⁹ This ultimately leads to an imbalanced system where even those who receive protections find themselves in different protected categories.³⁰⁰ Along with this overarching flaw, however, many of the protections also have their own specific downfalls.

1. Title VII of the Civil Rights Act of 1964

Most LGBT plaintiffs, for example, cannot recover under Title VII because courts do not consider claims based solely on sexual orientation or gender identity as discrimination violations of Title VII.³⁰¹ Some circuits allow LGBT employees to recover under Title VII’s ban on sex discrimination, but to do so litigants must prove the discrimination was for failing to conform to their gender stereotypes.³⁰² This basically requires the plaintiff to have looked or acted sufficiently gay at work³⁰³—which is to say a woman acted sufficiently butch or a man acted sufficiently flam-

295. 260 F.3d 257, 265 (3d Cir. 2001).

296. McBride et al., *supra* note 19, at 7.

297. *See id.* at 68.

298. *A Broken Bargain: Unchecked Discrimination Against LGBT Workers*, MOVEMENT ADVANCEMENT PROJECT 1 (May 2014), <http://www.lgbtmap.org/file/unchecked-discrimination-against-lgbt-workers.pdf> (“U.S. workers who are lesbian, gay, bisexual, and transgender (LGBT) continue to face inequality, unfairness, harassment, and discrimination in the workplace, and they often have nowhere to turn for help.”).

299. *See supra* Part II.C.

300. *See Sexual Orientation and Transgender Discrimination*, KATZ, MARSHALL & BANKS, LLP, <http://www.kmblegal.com/practice-areas/discrimination-retaliation/sexual-orientation-transgender-discrimination> (last visited Jan. 25, 2017).

301. Siegel Bernard, *supra* note 119.

302. *Id.*

303. Brian Soucek, *Perceived Homosexuals: Looking Gay Enough for Title VII*, 63 AM. UNIV. L. REV. 715, 716 (2014).

boyant.³⁰⁴ Even if an LGBT plaintiff's coworkers or employers knew or thought that they were gay, this would not be enough to prove a gender stereotype theory without more outward perceptions.³⁰⁵ Consequently, people who were persecuted because coworkers saw or heard them behaving in ways typically coded as gay are really the only ones who can survive dismissal or summary judgment in Title VII suits.³⁰⁶

Thus, even the circuits that allow LGBT plaintiffs to recover under Title VII have failed to protect "normal gays"—those who are the most assimilationist or straight acting.³⁰⁷ Normal gays have no way to build on a sex-stereotyping theory because they generally act in conformity with their gender norms.³⁰⁸ This creates an incentive for workers to flaunt their sexual orientation or gender identity, which merely reinforces the perceived differences separating gay and straight employees.³⁰⁹ Requiring LGBT plaintiffs to use a sex-stereotyping theory also creates an environment where employers and workers must constantly be "on the watch for visible markers of homosexuality" in order to determine "who is and is not protected" by Title VII.³¹⁰

Courts also often mischaracterize all Title VII claims brought by openly LGBT plaintiffs as being based on sexual orientation as opposed to sex.³¹¹ LGBT plaintiffs are even more likely to lose if they add a sex-stereotyping claim after previously making a sexual-orientation or gender-identity claim.³¹² In *Swift v. Countrywide Home Loans, Inc.*,³¹³ for example, the plaintiff was "referred to as acting and dressing like a girl, a pussy and a fag and had been told to man up."³¹⁴ The plaintiff, fed up with the harassment, wrote a letter to his CEO stating "he was a victim of discrimination because he is [a] 'gay man in a straight man's world,' and was a victim of harassment due to an alleged 'deep hatred for gay people.'"³¹⁵ Even though the discrimination was undoubtedly based on sex stereotypes, the court did not allow him to recover under Title VII.³¹⁶

There is also a lack of consistency among courts in Title VII cases involving LGBT plaintiffs.³¹⁷ Even some individual judges have failed to

304. *Id.* at 717.

305. *Id.* at 716 ("If . . . your coworkers or employers simply know or think you are gay, you are not only unprotected under federal law, but your claim is that of a 'bootstrapper' trying to force sexual orientation into Title VII against the will of Congress.").

306. *Id.* at 768.

307. *Id.* at 781.

308. *Id.* at 81–82.

309. *Id.* at 784.

310. *Id.* at 769.

311. Anthony E. Varona & Jeffrey Monks, *En/gendering Equality: Seeking Relief Under Title VII Against Employment Discrimination Based on Sexual Orientation*, 7 WM. & MARY L. REV. 67, 122 (2000).

312. Soucek, *supra* note 303, at 758.

313. 770 F. Supp. 2d 483, 485–88 (E.D.N.Y. 2011).

314. Soucek, *supra* note 303, at 758–59 (internal quotation marks omitted).

315. *Swift v. Countrywide Home Loans, Inc.*, 770 F. Supp. 2d 483, 488 (E.D.N.Y. 2011).

316. *Id.*

317. Varona & Monks, *supra* note 311, at 121.

be consistent with their own prior sex-discrimination rulings involving LGBT plaintiffs.³¹⁸ These inconsistencies make it extremely difficult for both employers trying to shape their policies and LGBT workers experiencing discrimination to predict how the court will rule with any degree of certainty.³¹⁹ Additionally, while the EEOC has ruled that Title VII encompasses sexual-orientation and gender identity discrimination, “[t]he next president could appoint commission members who feel differently about the meaning of Title VII, and they could reverse th[e] divided opinion.”³²⁰ Thus, while Title VII is a good option for some LGBT plaintiffs, it has several drawbacks and fails to offer much to a majority of LGBT workers.³²¹

2. *Private Employer Initiatives*

Private employer initiatives and protections are another area that, while encouraging, are not without flaws. Unlike protections afforded by state or federal law, corporate policies do not provide a private right of action for plaintiffs to seek redress in court.³²² Thus, the protections are not enforceable or actionable in court unless the employee is able to bring a breach of contract claim.³²³ Most employment policies, however, are designed to ensure that making a breach of contract claim is difficult, if not completely precluded.³²⁴ Consequently, many LGBT workers employed with companies that provide their own protections are really no more protected than the general public.³²⁵

3. *City and County Ordinances*

Local ordinances also have several shortcomings.³²⁶ Local administrative agencies in charge of enforcing NDOs, for example, “often lack the resources, knowledge, enforcement mechanisms, or willingness to accept and investigate” LGBT complaints.³²⁷ Thus, many NDOs go largely unenforced.³²⁸ NDOs are also extremely vulnerable to repeal.³²⁹ As NDOs have become more popular, opponents have mounted numerous ballot initiatives to repeal them.³³⁰ From 1974 to 2009, more than 120 bal-

318. *Id.*

319. *Id.* at 121–22.

320. Carpenter, *supra* note 122.

321. Burton F. Peebles, Comment, *Blurred Lines: Sexual Orientation and Gender Nonconformity in Title VII*, 64 EMORY L.J. 911, 950 (2015).

322. Pizer et al., *supra* note 18, at 759.

323. *Id.*

324. *Id.*

325. *Id.* at 759–60.

326. *Id.* at 760.

327. *Id.* at 757.

328. *Id.* at 760.

329. *Id.* at 759.

330. *LGBT Policy Spotlight*, *supra* note 157, at 3.

lot measures were proposed to repeal or prevent LGBT-discrimination laws—half of which passed.³³¹

The Houston Equal Rights Ordinance (“HERO”) is a good illustration of how vulnerable NDOs are.³³² Houston’s city council passed HERO in 2014 to create an array of nondiscrimination protections, based on race, religion, sex, disability, sexual orientation, and gender identity, in employment.³³³ Three months later, citizens sued the city demanding that it either repeal the ordinance or have it put to a popular vote.³³⁴ Once it was announced that the ordinance would be up for a popular vote, the debate “turned into a costly, ugly war of words,”³³⁵ with several fear-mongering campaign advertisements streaming relentlessly across Houston.³³⁶ Thereafter, voters easily repealed the statute in a 61%–39% defeat.³³⁷

Local ordinances are also extremely vulnerable to legislative repeal.³³⁸ Nashville, for example, adopted an NDO that banned city contractors from discriminating against employees for their sexual orientation or gender identity.³³⁹ The Tennessee legislature, unhappy with this ordinance, passed legislation mandating that “[n]o local government shall by ordinance, resolution, or any other means impose . . . an anti-discrimination practice, standard, definition, or provision that shall deviate from . . . [the] types of discrimination recognized by state law.”³⁴⁰ Since Tennessee does not prohibit discrimination based on sexual orientation or gender identity, the new legislation bans municipalities from enforcing or passing NDOs prohibiting discrimination on these bases.³⁴¹ Thus, NDOs can provide important protections, but they are largely unenforced and extremely vulnerable to legislative repeal.

4. *Gubernatorial Executive Orders*

Gubernatorial executive orders have many of the same ills as the other sources described above.³⁴² Like local ordinances, gubernatorial ex-

331. Pizer et al., *supra* note 18, at 758.

332. HOUS., TEX., ORDINANCE 2014-530.

333. *Id.*

334. Justin Wm. Moyer, *Why Houston’s Gay Rights Ordinance Failed: Fear of Men in Women’s Bathrooms*, WASH. POST (Nov. 4, 2015), <https://www.washingtonpost.com/news/morning-mix/wp/2015/11/03/why-houstons-gay-rights-ordinance-failed-bathrooms/>.

335. Manny Fernandez & Mitch Smith, *Houston Voters Reject Broad Anti-Discrimination Ordinance*, N.Y. TIMES (Nov. 3, 2015), <http://www.nytimes.com/2015/11/04/us/houston-voters-repeal-anti-bias-measure.html>.

336. Moyer, *supra* note 334.

337. Emma Margolin, *LGBT Measure Fails in Houston, Signals Equality Movement Far from Over*, MSNBC (Nov. 4, 2015), <http://www.msnbc.com/msnbc/lgbt-measure-fails-houston-signals-equality-movement-far-over>.

338. Pizer et al., *supra* note 18, at 758.

339. Leslie Fenton, *The Anti-Gay Tennessee Bill No One’s Talking About*, SALON (May 26, 2011, 1:29 PM), http://www.salon.com/2011/05/26/tennessee_antigay_bill_open2011/.

340. S.B. 632, 108th Gen. Assemb., Reg. Sess. (Tenn. 2011).

341. Fenton, *supra* note 339.

342. Pizer et al., *supra* note 18, at 756.

ecutive orders are easily repealed.³⁴³ In 2007, the governor of Kansas signed an executive order that provided protections to LGBT employees who worked for the state.³⁴⁴ Eight years later, in 2015, the newly elected governor eliminated all of the protections—returning Kansas to a state without any LGBT-employment protections.³⁴⁵ Over the past twenty years, executive orders in Kentucky, Louisiana, Iowa, Ohio, and Virginia have met the same fate.³⁴⁶ Additionally, like private-employer initiatives, gubernatorial executive orders do not provide a private right of action—leaving workers without recourse if they experience the prohibited discrimination.³⁴⁷

Lastly, at least one gubernatorial executive order protecting LGBT workers has been held unconstitutional.³⁴⁸ In April 2016, Louisiana Governor John Bel Edwards signed an executive order banning state employers and state contractors from discriminating against LGBT workers.³⁴⁹ In December 2016, a Louisiana district court judge declared that the order “constitutes an unlawful ultra-vires act because” it “creates new and/or expands upon existing Louisiana Law as opposed to directing the faithful execution of the existing laws of th[e] state pursuant to the authority granted unto the office of the Governor to issue executive orders.”³⁵⁰ The court ruled that the order violated “the Louisiana Constitution’s separation of powers doctrine” and amounted to “an unlawful usurp of the constitutional authority vested only in the legislative branch of government.”³⁵¹ Thus, gubernatorial executive orders do not provide very strong protections to LGBT workers.

5. State Legislation

State legislation is by far the best protection currently in place. The laws empower LGBT workers to seek legal recourse if they experience discrimination and provide additional penalties to violators, such as jail time or fines.³⁵² Moreover, they are much harder to overturn or eliminate

343. *Id.*

344. Matt Pearce, *Kansas Governor Removes Protections for LGBT Employees*, L.A. TIMES (Feb. 10, 2015), <http://www.latimes.com/nation/la-na-kansas-governor-gay-protection-20150210-story.html>.

345. *Id.*; Taylor Wofford, *Kansas Gov. Brownback Rolls Back Employment Protections for LGBT Workers*, NEWSWEEK (Feb. 11, 2015), <http://www.newsweek.com/kansas-gov-brownback-rolls-back-employment-protections-lgbt-workers-306189> (“Brownback said that if Kansas voters want sexual orientation and gender identity to qualify as protected categories for the purposes of workplace discrimination, the Legislature should pass a law to that effect.”).

346. Pizer et al., *supra* note 18, at 756.

347. *Id.*

348. Louisiana Dep’t of Justice v. Edwards, No. 652,283 (D. La. Filed Dec. 14, 2016), <https://www.scribd.com/document/334198754/Lgbt-Exec-Order-Ruling>.

349. Louisiana Exec. Order No. JBE 2016–11, Equal Opportunity and Non-Discrimination, <http://media.nola.com/politics/other/Exec Order.PDF>.

350. Louisiana Dep’t of Justice, No. 652,283 at 2.

351. *Id.*

352. Hunt, *supra* note 172, at 5.

than the other protections.³⁵³ Like the other protections, however, state legislation is not without flaw.

Many states, in an attempt to stave off same-sex marriage, passed religious freedom restoration acts (“state RFRAs”), which have the power to undercut state nondiscrimination laws.³⁵⁴ Indiana, for example, passed a state RFRA that allows organizations facing discrimination lawsuits to claim the discrimination laws substantially burden their religious freedom.³⁵⁵ If employers successfully meet this burden, they become exempt from the laws via court order.³⁵⁶ Thus, state RFRAs have the ability to undermine LGBT state-employment legislation by exempting more organizations than the bills themselves provide for.³⁵⁷

Additionally, state legislation is far from uniform or equal.³⁵⁸ There are “strong states” that provide protections against both sexual-orientation and gender-identity discrimination to all employees, “good states” that provide protections against sexual-orientation discrimination to all employees, and then there are states that provide no protections at all.³⁵⁹ Thus, LGBT people receive different levels of protection depending on the state in which they reside.³⁶⁰ States also provide different enforcement mechanisms to their discrimination protections and provide different remedies for violations.³⁶¹ Thus, even if two states offer the same protections, the laws may be enforced in different ways.³⁶²

Other than a Supreme Court ruling that sex discrimination includes sexual-orientation and gender-identity discrimination, federal legislation is the only way to create protections that are uniform nationwide.³⁶³ The following Section examines the two federal proposals Congress has considered that would ban LGBT workplace discrimination.

353. *Id.*

354. Stephanie Francis Ward, *After Obergefell: States Deal with Religious and Gay Rights in the Wake of the High Court's Same-Sex Marriage Ruling*, 101 A.B.A. J. 17, 17 (2015); see *State Religious Freedom Restoration Acts*, NAT'L CONF. OF STATE LEGIS. (Oct. 15, 2015), <http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx> (last visited Jan. 25, 2017).

355. Editorial Board, *In Indiana, Using Religious as a Cover for Bigotry*, N.Y. TIMES, Mar. 31, 2015, at A24.

356. See Sean Davis, *How RFRA Works, Explained in One Chart*, FEDERALIST (Apr. 1, 2015), <http://thefederalist.com/2015/04/01/how-rfra-works-explained-in-one-chart/> (last visited Jan. 25, 2017).

357. See David Johnson & Katy Steinmetz, *This Map Shows Every State with Religious-Freedom Laws*, TIME (Apr. 2, 2015), <http://time.com/3766173/religious-freedom-laws-map-timeline/> (“Critics worry that states will use such laws to combat existing non-discrimination measures in court, providing legal cover for . . . businesses to fire LGBT employees.”).

358. See *supra* Figure 1.

359. Hunt, *supra* note 172, at 5–6.

360. *Id.*

361. *Id.* at 7–14.

362. See *id.*

363. McBride et al., *supra* note 19, at 68.

C. Examination of Proposed Federal LGBT Legislation: ENDA and the Equality Act

For the past forty years, Congress has considered adopting either ENDA or the Equality Act—two different pieces of federal legislation that would ban employers from engaging in discrimination on the basis of sexual orientation or gender identity.³⁶⁴ As described above, ENDA is stand-alone legislation that creates its own unique protections for LGBT workers, while the Equality Act amends Title VII to include sexual orientation and identity.³⁶⁵ This difference in form, however, is not the only dissimilarity between the bills.³⁶⁶ This Section analyzes the issues ENDA and the Equality Act treat differently, including: religious exemptions, the Religious Freedom Restoration Act of 1993, disparate-impact claims, employer reporting requirements, affirmative action plans, alternative theories of discrimination, and the Title VII circuit split.

1. Religious Exemptions

Perhaps the most drastic distinction between the two pieces of legislation is the exemptions they provide to religious employers.³⁶⁷ The 2015 Equality Act does not include any new religious exemptions that would allow religious organizations to discriminate on the basis of sexual orientation or gender identity.³⁶⁸ Instead, the religious exemptions already in Title VII would apply.³⁶⁹ Under Title VII, religious organizations are exempt from the ban on religious discrimination and are allowed to give employment preference to members of their own religion.³⁷⁰ This exemption does not allow religious organizations to discriminate on the basis of race, color, national origin, or sex.³⁷¹

Title VII also provides a slightly broader exemption, the ministerial exemption, which permits religious institutions to discriminatorily hire employees for certain special positions if they are responsible for the transmission of religious beliefs.³⁷² Under this exemption, the organizations can discriminate on a basis other than religion.³⁷³ Unlike the general exemption, however, institutions using the ministerial exemption must show the employee has a *bona fide* occupational qualification where he

364. Keisling, *supra* note 194.

365. *See supra* Part II.D.

366. *See* Sung, *supra* note 195, at 508–14.

367. *See id.* at 508–09.

368. Keisling, *supra* note 194.

369. *Id.*

370. U.S. Equal Emp't Opportunity Comm., EEOC Compliance Manual, § 12-I(C)(1), http://eeoc.gov/policy/docs/qanda_religion.html (last modified July, 2008) [hereinafter EEOC Compliance Manual].

371. *Id.*

372. Thompson, *supra* note 214, at 306.

373. *Id.*

or she is primarily charged with duties of carrying out and expressing a church's religious beliefs.³⁷⁴

The purpose of these exemptions is to permit religious organizations to hire people who share its faith to carry out its work.³⁷⁵ Accordingly, the exemptions only apply to hiring and discharge and do not allow religious organizations to discriminate with regard to an employee's terms, conditions, or privileges of employment, like wages and benefits.³⁷⁶ Under established case law, the religious exemptions only apply to institutions whose "purpose and character are primarily religious."³⁷⁷ Federal courts have been very generous in determining which organizations qualify for the religious exemption,³⁷⁸ and the general exemption has been interpreted to apply even if an employee's work is not itself religious.³⁷⁹ Since nothing in the 2015 Equality Act changes the exemptions that religious organizations already enjoy, religious organizations would be allowed to continue to give preference to individuals of their own faith and give particularized preference to those in ministerial-like positions.³⁸⁰ Religious organizations would not be exempt from the ban on sexual-orientation or gender-identity discrimination.³⁸¹

"Much like the rest of the bill, ENDA's religious exemption has undergone a number of modifications over the years"³⁸²—with the exemption expanding with each rewriting.³⁸³ The original ENDA, proposed in 1994, carved out certain exemptions to accommodate religious organizations, but banned religious organizations from discriminating in any of its for-profit activities on the basis of sexual orientation.³⁸⁴ By 2007, ENDA exempted all religious organizations whose "primary purpose [was] religious ritual or worship or the teaching or spreading of religious doctrine

374. *Id.*

375. Dena Sher & Ian S. Thompson, *Why ENDA's Religious Exemption Must be Narrowed*, AM. CIVIL LIBERTIES UNION (Apr. 30, 2013, 10:21 AM), <https://www.aclu.org/blog/why-endas-religious-exemption-must-be-narrowed>.

376. Equal Emp't Opportunity Comm'n, EEOC Compliance Manual, § 2-III(B)(4)(b)(i), <http://www.eeoc.gov/policy/docs/threshold.html#2-III-B-4-b-i> (last modified 1997).

377. Letter from Reed L. Russell, Legal Counsel, Equal Emp't Opportunity Comm'n, to Kevin Cummings, Branch Chief, Business and Trade Services, Dep't of Homeland Sec. (Dec. 28, 2007), https://www.eeoc.gov/eeoc/foia/letters/2007/religious_organization_exception_dec_28_2007.html.

While no one factor is dispositive, courts consider several factors including whether: the entity is not for profit; its day-to-day operations are religious; it is owned, affiliated with, or financially supported by a formally religious entity; the entity's articles of incorporation state a religious purpose; a formally religious entity participates in the management; the entity regularly includes prayer or other forms of worship in its activities; the entity holds itself out to the public as secular or sectarian; it includes religious instruction in its curriculum, to the extent it is an educational institution; and its membership is made up of coreligionists. *Id.*

378. Thompson, *supra* note 214, at 300.

379. Sher & Thompson, *supra* note 375.

380. Keisling, *supra* note 194.

381. *Id.*

382. Julie Dabrowski, *The Exception that Doesn't Prove the Rule: Why Congress Should Narrow ENDA's Religious Exemption to Protect the Rights of LGBT Employees*, 63 AM. U. L. REV. 1957, 1968 (2013–2014).

383. Sung, *supra* note 195, at 509.

384. *Id.*

or belief.”³⁸⁵ It also had an exemption similar to Title VII’s ministerial exemption, which allowed religious organizations to discriminate when hiring employees whose primary duties consist of “teaching or spreading religious doctrine or belief, religious governance, [or] supervision of a religious order”³⁸⁶ Even with the expansion, Republicans believed the exemption was too narrow and blocked the bill’s passage.³⁸⁷

In an effort to win over the objectors, the 2013 ENDA drafters incorporated Title VII’s religious exemption, but in a drastically different way.³⁸⁸ Under the 2013 ENDA, the religious organizations permitted to give religious preference in hiring under Title VII would be completely exempt from ENDA.³⁸⁹ Thus, religious organizations could engage in any form of sexual-orientation or gender-identity discrimination regardless of whether the discrimination was grounded in a religious objection.³⁹⁰ All LGBT people employed by religious organizations would be vulnerable to discrimination, regardless of whether they have a role in conveying the religious organization’s beliefs or promoting its views.³⁹¹ This includes those who have no contact with congregants or members of the public.³⁹² Thus, courts confronted with any ENDA claims of discrimination based on sexual orientation or gender identity involving a religious organization would be required to find the claims deficient as a matter of law, since they would be expressly precluded.³⁹³

The 2013 exemption was partially successful in that it attracted enough Republican support to pass in the Senate.³⁹⁴ Republicans in the House, however, still refused to let the bill come to a vote and the 2013 ENDA died in committee.³⁹⁵ The legislation also lost the support of many important LGBT advocates including: the American Civil Liberties Union, the Gay & Lesbian Advocates & Defenders, Lambda Legal, the National Center for Lesbian Rights, and the Transgender Law Center.³⁹⁶ In a joint press release, the organizations stated that they could no longer support ENDA because the religious exemptions fail to provide ade-

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

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

387. Thompson, *supra* note 214, at 298.

388. *Id.*

389. Sher & Thompson, *supra* note 375.

390. Dabrowski, *supra* note 382, at 1972.

391. *Id.* at 1973.

392. *Id.*

393. Alex Reed, *Abandoning ENDA*, 51 HARV. J. LEGIS. 277, 313 (2014) [hereinafter *Abandoning ENDA*].

394. Timothy M. Phelps, *Gay Rights Groups Halt Support for ENDA Workplace Discrimination Bill*, L.A. TIMES (July 8, 2014), <http://www.latimes.com/nation/la-na-gay-rights-20140709-story.html>.

395. Richard Socarides, *Kennedy’s ENDA: A Seventeen-Year Gay-Rights Fight*, NEW YORKER (Nov. 5, 2013), <http://www.newyorker.com/news/news-desk/kennedys-enda-a-seventeen-year-gay-rights-fight>.

396. Jennifer Bendery & Amanda Terkel, *Gay Rights Groups Pull Support for ENDA Over Sweeping Religious Exemption*, HUFFINGTON POST (July 8, 2014, 8:28 PM), http://www.huffingtonpost.com/2014/07/08/enda-religious-exemption_n_5568736.html.

quate protections to LGBT workers.³⁹⁷ Legislators have not amended ENDA's religious exemption since 2013, and, therefore, as the bill stands, its religious exemptions are exceedingly different from those in the Equality Act.³⁹⁸

2. *Religious Freedom Restoration Act of 1993*

Another difference is how each bill treats the Religious Freedom Restoration Act of 1993.³⁹⁹ RFRA bans the government from “substantially burden[ing] a person’s exercise of religion, even if the burden results from a rule of general applicability,” unless it “is in furtherance of a compelling governmental interest” and “is the least restrictive means of furthering that compelling governmental interest.”⁴⁰⁰ In *Burwell v. Hobby Lobby*, the Supreme Court ruled that RFRA applies not only to people, but also to closely held corporations, when it found that the government could not force a religious entity to cover insurance that includes contraception, against the employer’s religious beliefs.⁴⁰¹ Writing for the majority, Justice Alito reasoned that there was a substantial burden, because the plaintiffs were confronted with an impossible choice—pay millions of dollars in taxes and fines for remaining true to their faith or provide contraception and violate their sincerely held religious beliefs.⁴⁰²

Hobby Lobby sparked fear in many LGBT advocates⁴⁰³ who realized that the decision gave “courts the green light to extend RFRA’s protections to corporations posing religious objections to [LGBT] discrimination laws.”⁴⁰⁴ The Equality Act of 2015, however, explicitly states that “[t]he Religious Freedom Restoration Act of 1993 . . . shall not provide a . . . basis for challenging the application or enforcement of a covered title.”⁴⁰⁵ Thus, religious organizations could not use RFRA to gain exemptions they are not otherwise granted under Title VII. Conversely, ENDA has always been silent in regards to RFRA.⁴⁰⁶ This silence means courts could rule that ENDA “substantially burdens” an organization’s free exercise of religion in violation of RFRA.⁴⁰⁷ Therefore, while organizations could not use RFRA to acquire exemptions from the Equality Act, those that are not already exempt from ENDA may obtain exemp-

397. *Id.*

398. See Equality Act, H.R. 3185, 114th Cong. (2015); Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. § 6 (2013).

399. 42 U.S.C. § 2000bb (2012).

400. 42 U.S.C. § 2000bb-1.

401. 134 S. Ct. 2751, 2759 (2014).

402. Alex Reed, *RFRA v. ENDA: Religious Freedom and Employment Discrimination*, 23 VA. J. OF SOC. POL’Y & L. 1, 10 (2016).

403. *Id.* at 2.

404. Dabrowski, *supra* note 382, at 1977; Vincent J. Samar, *Interpreting Hobby Lobby to Not Harm LGBT Civil Rights*, 60 S.D. L. Rev. 457, 464 (2015).

405. Equality Act, H.R. 3185, 114th Cong. § 1107 (2015).

406. Dabrowski, *supra* note 382, at 1977.

407. *Id.*

tions by showing that ENDA “substantially burdens” their religious freedom.⁴⁰⁸

3. *Disparate-Impact Claims*

Another distinction between the proposals is whether they allow for disparate-impact claims.⁴⁰⁹ In *Griggs v. Duke Power Company*,⁴¹⁰ the Supreme Court extended Title VII to include “facially neutral employment practices with an adverse impact on persons of a particular race, national origin, sex, or religion.”⁴¹¹ Since then, Title VII plaintiffs have been able to file discrimination claims based on inadvertent discrimination under a disparate-impact theory.⁴¹² Disparate-impact claims do not require proof of an intent to discriminate, and the terms of the policy do not have to explicitly discriminate.⁴¹³ Practices that may be subject to a disparate-impact challenge under Title VII include: educational requirements, written tests, height and weight requirements, and subjective procedures like interviews.⁴¹⁴

In order to prove disparate impact, a plaintiff must demonstrate that there is a significant statistical disparity between the percentage of individuals in the protected class in an employer’s workforce, compared to those individuals in the qualified labor market, and that the disparity is due to “one or more ostensibly neutral employment practices.”⁴¹⁵ The employer, however, gets the opportunity to demonstrate that the challenged practice is consistent with business necessity and is simply job-related.⁴¹⁶ If the employer successfully proves this, the plaintiff will not prevail unless he or she can show that the employer could adopt alternative practices that would result in a less detrimental effect on the protected group, while still serving the employer’s needs.⁴¹⁷

Since Title VII allows for disparate-impact claims, the Equality Act would as well.⁴¹⁸ Thus, if an employer’s policies have a disparate impact on LGBT workers, then they may have a cognizable claim under Title VII.⁴¹⁹ The 2013 ENDA, on the other hand, explicitly states that “[o]nly

408. *Id.*

409. *Fact Sheet: Employment Non-Discrimination Act*, AM. CIVIL LIBERTIES UNION, <https://www.aclu.org/fact-sheet-employment-non-discrimination-act> (last visited Jan. 25, 2017).

410. 401 U.S. 424 (1971).

411. George Rutherglen, *Disparate Impact Under Title VII: An Objective Theory of Discrimination*, 73 VA. L. REV. 1297, 1297 (1987).

412. *See id.*

413. *Fact Sheet: Employment Non-Discrimination Act*, *supra* note 409.

414. LAURIE WARDELL & MICHAEL K. FRIDKIN, *TITLE VII AND SECTION 1981: A GUIDE FOR APPOINTED ATTORNEYS IN THE NORTHERN DISTRICT OF ILLINOIS* 12 (2006).

415. Reed, *supra* note 393, at 295.

416. *Id.*

417. WARDELL & FRIDKIN, *supra* note 414, at 12–13.

418. Equality Act, H.R. 3185, 114th Cong. § 7 (2015).

419. Reed, *supra* note 393, at 280–81.

disparate *treatment* claims may be brought under this Act.”⁴²⁰ As a result, employment practices that are facially neutral but have a disproportionately adverse effect on LGBT persons would be actionable under the Equality Act, but not ENDA.⁴²¹

4. *Employer Reporting Requirements*

Furthermore, Title VII and ENDA regulate employer reporting requirements differently.⁴²² Under the authorization of Title VII, the EEOC requires that all employers with more than 100 employees provide data about their employees’ gender and race/ethnicity.⁴²³ The data is then shared anonymously with other agencies and the public.⁴²⁴ The purpose of the reporting requirement is to help the EEOC identify and investigate any significant statistical disparities that may be potential Title VII violations.⁴²⁵ Under the Equality Act, the EEOC could also require employers to gather data on employees’ sexual orientation and gender identity.⁴²⁶ On the contrary, ENDA provides that neither the EEOC nor the Secretary of Labor can “compel the collection of nor require the production of statistics on actual or perceived sexual orientation or gender identity from covered entities.”⁴²⁷ Thus, under ENDA, the Commission may not require employers to gather data on LGBT employees, whereas under the Equality Act it could.⁴²⁸

5. *Affirmative-Action Plans*

The Equality Act and ENDA also treat affirmative-action plans differently.⁴²⁹ Under Title VII, organizations can adopt affirmative-action plans in order to combat barriers to equal employment opportunities.⁴³⁰ When evaluating affirmative-action plans under Title VII, courts apply a three-part test requiring that: 1) there is “a manifest imbalance in the relevant workforce,” 2) the plan is temporary and seeks to eradicate traditional patterns of segregation, and 3) the plan does not “unnecessarily trammel the rights of non-beneficiaries.”⁴³¹ The Equality Act does not modify a company’s ability to create affirmative-action plans in any way,

420. Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. § 4(g) (2013) (emphasis added).

421. Reed, *supra* note 393, at 281.

422. Reed, *supra* note 402, at 28.

423. *EEO Reports/Surveys*, EQUAL EMP’T OPPORTUNITY COMM’N, <http://www.eeoc.gov/employers/reporting.cfm> (last visited Jan. 25, 2017).

424. *Id.*

425. Reed, *supra* note 402, at 28.

426. See Equality Act, H.R. 3185, 114th Cong. (2015).

427. Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. § 9 (2013).

428. Reed, *supra* note 402, at 28.

429. Reed, *supra* note 393, at 301.

430. Letter from Peggy R. Mastroianni, Assoc. Legal Counsel, Equal Emp’t Opportunity Comm’n (Aug. 17, 2006), http://www.eeoc.gov/eeoc/foia/letters/2006/vii_affirmative_action.html.

431. *Id.*

so under the Act, companies may create affirmative-action plans for LGBT employees if they meet the requirements of the three-part test.⁴³²

ENDA, conversely, has always prohibited voluntary affirmative-action programs for LGBT people, though the wording has been refined over time.⁴³³ The original ENDA banned employers from giving preferential treatment to individuals on the basis of sexual orientation and from adopting any type of quota on the basis of sexual orientation.⁴³⁴ The 2013 ENDA goes farther than this and expressly prohibits employers from granting “preferential treatment to any individual or to any group because of the actual or perceived sexual orientation or gender identity . . . on account of an imbalance which may exist with respect to the total number or percentage of persons.”⁴³⁵ It also bans employers from adopting or implementing any quotas for LGBT employees.⁴³⁶ Thus, if LGBT people were significantly underrepresented in a particular workforce, the Equality Act would allow the employers to adopt voluntary affirmative-action plans while ENDA would not.⁴³⁷

6. *Alternative Theories of Discrimination*

Moreover, the nature of the proposals affect whether a plaintiff can plead multiple theories of discrimination. The Equality Act, by amending Title VII, allows plaintiffs who experience sexual-orientation or gender-identity discrimination to recover exactly what other plaintiffs can recover in Title VII lawsuits.⁴³⁸ The Equality Act also codifies sexual-orientation and gender-identity discrimination as sex discrimination under Title VII.⁴³⁹ Consequently, under the Equality Act, LGBT plaintiffs would never have to choose whether to pursue more than one discrimination claim.

ENDA, however, would promote plaintiffs to file alternative theories of discrimination. ENDA specifically provides that “[a]n individual who files claims alleging that a practice is an unlawful employment practice under this Act and an unlawful employment practice because of sex under title VII . . . shall not be permitted to recover damages for such practice under both.”⁴⁴⁰ Congress, however, clarified that this section does not ban LGBT plaintiffs from recovering under Title VII.⁴⁴¹ Instead, it “is intended to be a restatement of current law”—which is that a plaintiff may plead alternative claims that challenge the same conduct under

432. See Equality Act, H.R. 3185, 114th Cong. § 7 (2015).

433. Reed, *supra* note 393, at 301.

434. *Id.*

435. Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. § 4(f)(1) (2013).

436. *Id.* § 4(f)(2).

437. Reed, *supra* note 393, at 281.

438. Equality Act, H.R. 3185, 114th Cong. § 7 (2015).

439. *Id.* § 2(1).

440. Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. § 10(d).

441. S. REP. NO. 113-105, at 9–10 (2013).

different legal theories, but can only recover once for claims based on the same facts.⁴⁴²

Congress also clarified that ENDA, if passed, would not “overrule, displace, or in any other way affect a plaintiff’s ability to bring suit under title VII, particularly given that Federal courts have interpreted title VII in such a way that protects LGBT individuals on the basis of sex.”⁴⁴³ Thus, under the Equality Act, LGBT plaintiffs would not have to choose between alternative theories, while under ENDA they would have to choose between bringing a claim under ENDA, Title VII, or both—though they could only recover under one.⁴⁴⁴

7. *Title VII Circuit Split*

The last major difference between ENDA and the Equality Act is how each piece of legislation would affect the Title VII circuit split.⁴⁴⁵ Courts have struggled with how to treat Title VII lawsuits brought by LGBT employees⁴⁴⁶ since the Supreme Court decided that sex-stereotyping was actionable sex discrimination under Title VII.⁴⁴⁷ Currently, several circuits allow LGBT plaintiffs to recover by building on a sex-stereotyping theory, while others outright prohibit LGBT plaintiffs from using this theory—arguing that they would be unlawfully bootstrapping onto Title VII.⁴⁴⁸

By both adding sexual orientation and gender identity to the protected classes in Title VII, and codifying these forms of discrimination as sex discrimination, the Equality Act reconciles this circuit split.⁴⁴⁹ ENDA, on the other hand, would do just the opposite and complicate matters further. While ENDA bans plaintiffs from recovering under both Title VII and ENDA, it does not ban LGBT from bringing Title VII suits altogether.⁴⁵⁰ Thus, under ENDA, circuits would have to continue to try and distinguish where the fine line between sexual-orientation and gender-identity discrimination lies within sex discrimination, whereas, under the Equality Act, the issue would be resolved.⁴⁵¹

442. *Id.*

443. *Id.* at 10.

444. See Kerry Eleveld, *Lawyers Tweak ENDA Language*, ADVOCATE (Nov. 17, 2009, 5:10 PM), <http://www.advocate.com/news/daily-news/2009/11/17/lawyers-tweak-enda-language>.

445. See *supra* Part II.C.1.a.

446. See *id.*

447. Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989).

448. Peebles, *supra* note 321, at 918–19.

449. Equality Act, H.R. 3185, 114th Cong. § 2 (2015).

450. Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. § 10(d) (2013).

451. See Peebles, *supra* note 321, at 942.

IV. RECOMMENDATION

Several entities, both public and private, have done their part to create protections for LGBT workers.⁴⁵² While this is an encouraging trend, there is no substitute for being explicitly protected on a national level. “[I]t’s a very powerful statement to see that it is the law of the land that discrimination against individuals because of their sexual orientation or gender identity is wrong and illegal.”⁴⁵³ Consequently, federal anti-discrimination legislation has the ability to create social norms that govern what behaviors are acceptable and unacceptable towards different classes of people.⁴⁵⁴ Thus, civil-rights laws are an effective tool, not because people fear punishment for violations of the laws, but because they carry the authority to set morals of a community.⁴⁵⁵

LGBT employees deserve the same level of protection, as well as the norms developed around these protections, that has been afforded to so many others at a national level. Congress already passed legislation prohibiting employers from engaging in discrimination on the basis of race, color, religion, sex, national origin,⁴⁵⁶ age,⁴⁵⁷ and disability⁴⁵⁸—it is time to protect sexual orientation and gender identity as well.

Of the two most prominent pieces of legislation that would ban employment discrimination on the basis of sexual orientation and gender identity, the best is the newly re-proposed Equality Act.⁴⁵⁹ ENDA’s twenty years of compromises and concessions, along with its inherent structure, show several reasons why the Equality Act will be more effective at combatting LGBT employment discrimination.⁴⁶⁰

First, the Equality Act provides the best balance of protections for LGBT workers and religious organizations. Any piece of LGBT-discrimination legislation that has “too narrow of a [religious exemption] would violate free expression, while any exemption fashioned too broadly may undermine the very purpose” of the bill.⁴⁶¹ Thus, for federal LGBT-discrimination legislation to be successful, it is essential that there be the right balance—creating equality for LGBT workers while maintaining the autonomy religious organizations need to adhere to their beliefs and continue their faith teachings.

The Equality Act does not change Title VII’s religious exemption in any way.⁴⁶² Thus, if passed, religious organizations could continue to give

452. See *supra* Part II.C.

453. Lopez, *supra* note 167.

454. *Id.*

455. *Id.*

456. 42 U.S.C. § 2000e-2 (2012).

457. 29 U.S.C. § 623.

458. 42 U.S.C. § 12112(a).

459. Equality Act, H.R. 3185, 114th Cong. (2015).

460. Frank J. Cavico et al., *Sexual Orientation and Gender Identity Discrimination in the American Workplace: Legal and Ethical Considerations*, 2 INT’L J. HUMAN. & SOC. SCI. 1, 8 (2012).

461. Thompson, *supra* note 214, at 299–300.

462. See Equality Act, H.R. 3185, 114th Cong. (2015).

preference to those of the same faith in hiring and firing and discriminate while hiring people in positions that fall under the ministerial exemption.⁴⁶³ Religious organizations, however, could not discriminate against average employees for their sexual orientation or gender identity.⁴⁶⁴ The legislation would also not allow organizations to use RFRA in order to expand the protections they already receive by bringing a substantial-burden claim.⁴⁶⁵ ENDA, on the other hand, wholly exempts all religious organizations that receive Title VII's religious preference exemption—meaning they could discriminate against LGBT employees at-will.⁴⁶⁶ ENDA also allows organizations to use RFRA in order to gain more exemptions from the court.⁴⁶⁷

At first glance, it may seem that these exemptions do not really make a huge difference since they only apply to religious organizations.⁴⁶⁸ In the United States, however, religious entities run several organizations and businesses, including 13% of hospitals, 76% of private elementary and secondary educational institutions, and 50% of adoption services.⁴⁶⁹ Thus, ENDA's broad religious exemption would have a massive impact on many workers, including those in primarily secular organizations.⁴⁷⁰

The number of LGBT workers that would be unprotected under ENDA is unacceptable. While “it is one thing to allow . . . a Catholic school to hire only a straight, male Catholic priest” under Title VII and the Equality Act's ministerial exemption, “it is quite another to permit the school to [discriminate against or] fire anyone for any position simply because that person is, or is perceived to be, homosexual or transsexual.”⁴⁷¹ ENDA's exemption essentially “provide[s] religiously affiliated organizations—far beyond houses of worship—with a blank check to engage in employment discrimination against LGBT people.”⁴⁷² To allow this would allow the very type of invidious discriminatory behavior the statute was designed to prevent.⁴⁷³

When Title VII was originally drafted, it too would have provided an absolute exemption to religious organizations—granting them the right to consider an individual's race, color, religion, sex, or national origin when making employment decisions.⁴⁷⁴ Congress rejected this blank-check approach and instead limited the exemption to only allow

463. See *supra* Part III.C.1.

464. See *id.*

465. See *supra* Part III.C.2.

466. See *supra* Part III.C.1.

467. See *supra* Part III.C.2.

468. Thompson, *supra* note 214, at 302.

469. *Id.* at 302–03.

470. *Id.*

471. Sung, *supra* note 195, at 510.

472. Press Release, Am. Civil Liberties Union, Employment Non-Discrimination Act Statement (Apr. 25, 2013).

473. Sung, *supra* note 195, at 510.

474. Reed, *supra* note 393, at 309.

religious organizations to give preference to those of the same religion.⁴⁷⁵ Consequently, a religious organization, for example, cannot “engage in racially discriminatory hiring by asserting that a tenet of its religious beliefs is not associating with people of other races.”⁴⁷⁶ There is no more of a justification or reason to grant this type of exemption now than there was then. While religious liberty is an extremely important right that guarantees Americans the freedom to hold any belief they choose, it should not allow people to freely harm or discriminate against others.⁴⁷⁷

Second, the Equality Act would resolve the circuit split regarding whether sex discrimination under Title VII includes sexual-orientation and gender-identity discrimination, while ENDA would merely complicate matters further.⁴⁷⁸ The Equality Act both adds sexual orientation and gender identity to the protected classes in Title VII, and it codifies that these forms of discrimination also constitute sex discrimination—thus solving the split.⁴⁷⁹ ENDA, however, allows LGBT plaintiffs to choose whether to bring an ENDA, Title VII claim, or even both.⁴⁸⁰ Thus, ENDA would not only leave the circuit split intact, but would further complicate matters, because judges would have to figure out how to treat Title VII claims in light of the new legislation.⁴⁸¹ It is significant that the Equality Act solves this split because it will make pleadings easier for LGBT plaintiffs and make it easier for judges to properly handle Title VII lawsuits brought by LGBT plaintiffs.

Third, by excluding sexual orientation and gender identity from Title VII and instead adopting a separate bill, Congress would itself be engaging in symbolic contradiction.⁴⁸² Congress enacted Title VII in order to protect discrimination against groups that are especially vulnerable and to promote equality in the workplace.⁴⁸³ By not amending Title VII, Congress is suggesting that “while employees should benefit from a discriminatory-free workplace, gender and sexual orientation discrimination is distinct from other protected characteristics in Title VII.”⁴⁸⁴ This would simply reinforce the notion that LGBT people are different and less deserving and should be treated as such—making an amendment to Title VII a better solution.

Fourth, the Equality Act is more effective because it allows plaintiffs to bring disparate-impact claims and permits employers to adopt af-

475. Sher & Thompson, *supra* note 375.

476. EEOC Compliance Manual, *supra* note 370.

477. Sher & Thompson, *supra* note 375.

478. See *supra* Part III.C.7.

479. Equality Act, H.R. 3185, 114th Cong. § 2 (2015).

480. See Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. § 10(d) (2013).

481. See *id.*

482. Shawn Clancy, *The Queer Truth: The Need to Update Title VII to Include Sexual Orientation*, 37 J. LEGIS. 119, 135 (2011).

483. *Id.*

484. *Id.* at 136.

firmative-action plans.⁴⁸⁵ Disparate-impact claims are highly controversial, with legal scholars such as Justice Scalia speculating that they may even be unconstitutional.⁴⁸⁶ Thus, ENDA's sponsors, in hopes of avoiding controversy and distraction, dodged the subject by barring disparate-impact claims altogether.⁴⁸⁷ These same sponsors, however, admit that LGBT employees are just as likely to be subjected to inadvertent employment discrimination as they are intentional discrimination.⁴⁸⁸ Thus, disparate impact claims should not be seen as throw away concessions.

The law of disparate impact is "a powerful tool for promoting the inclusion of women and minority groups in the workplace,"⁴⁸⁹ and "a considered analysis reveals that LGBT individuals would benefit from the availability of disparate impact claims."⁴⁹⁰ Additionally, inadvertent discrimination against LGBT employees will likely increase once federal legislation is passed, since employers that wish to engage in discrimination will have to forego overt forms of discrimination in favor of more subtle practices.⁴⁹¹ Thus, the Equality Act is better than ENDA because it permits LGBT employees to bring disparate impact claims to the same extent as others under Title VII.

The Equality Act is also better than ENDA because it allows the sister of disparate-impact claims—affirmative-action plans.⁴⁹² Sponsors eliminated affirmative-action plans from ENDA, because, like disparate-impact claims, they are highly controversial.⁴⁹³ These plans, however, are also important and should not be easily conceded. Affirmative-action plans help employers alleviate discrimination in the workplace and serve as important tools for employers who may otherwise be liable under a disparate-impact claim.⁴⁹⁴

Additionally, affirmative action plans can be powerful evidence of an employer's commitment to creating and maintaining a welcoming culture, which can help LGBT individuals feel comfortable coming out and acting authentically in the workplace.⁴⁹⁵ This is important because "the presence of openly LGBT persons in the workplace serves to combat prejudices and stereotypes while at the same time furnishing a set of

485. See *supra* Part III.C.3-5.

486. *The Disparate Impact Non-Issue*, NAT'L. CTR. FOR TRANSGENDER EQUALITY BLOG (Sept. 30, 2009, 1:50 PM), <https://transgenderequality.wordpress.com/2009/09/30/the-disparate-impact-non-issue/>.

487. *Id.*

488. Reed, *supra* note 393, at 296.

489. *The Disparate Impact Non-Issue*, *supra* note 486; see Brad Lindeman, *Diversifying the Work Place: Affirmative Action in the Private Sector After 1991*, 42 S.D. L. REV. 434 (1996).

490. Reed, *supra* note 393, at 294.

491. *Id.* at 297.

492. See *supra* Part III.C.5.

493. Lindeman, *supra* note 489, at 434 ("Affirmative action has emerged as one of the most divisive political issues in America. Conservatives tend to support the complete elimination of affirmative action. Liberals often defend affirmative action programs as having shifted the focus of employment selection systems to the qualifications of the individual.").

494. *Id.* at 460.

495. Reed, *supra* note 393, at 303.

readily identifiable role models to more junior LGBT workers.”⁴⁹⁶ Having openly LGBT employees also establishes an environment where there are routine interactions between heterosexual and openly LGBT employees.⁴⁹⁷ This environment provides opportunities for LGBT workers “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 threatening class.”⁴⁹⁸ Therefore, the Equality Act is also better than ENDA because it allows organizations to voluntarily adopt affirmative-action plans that help combat discrimination in the workplace.

Fifth, by allowing LGBT plaintiffs to still recover under Title VII, ENDA sets up an unfair system where Title VII provides distinct advantages to LGBT employees in certain circuits. ENDA, for example, explicitly gives religious organizations free range to discriminate against LGBT employees at their will.⁴⁹⁹ In reality, however, ENDA actually leaves a class of religious organizations open to suit—religious organizations sued in circuits that allow LGBT plaintiffs to recover by building upon sex-stereotyping theories.⁵⁰⁰ These organizations may still be found liable under Title VII for the exact discrimination ENDA exempts them from. Thus, some plaintiffs will be able to sue religious organizations for sexual-orientation and gender-identity discrimination, while most others will not.

Additionally, if some circuits perceive discrimination against LGBT people as discrimination on the basis of sex, then private employers within those circuits could adopt affirmative-action plans pursuant to Title VII, while employers in other circuits could not.⁵⁰¹ Thus, by allowing LGBT plaintiffs to still bring Title VII lawsuits, ENDA creates an unfair scheme where practices that it explicitly prohibits will be allowed in circuits that interpret Title VII favorably to LGBT plaintiffs—rendering the Equality Act a more effective and operational bill.

Moreover, the Equality Act is simply easier in application than ENDA because plaintiffs will never have to decide if they should bring alternative theories. Under the Equality Act, there would be no need for LGBT plaintiffs to raise alternative theories, because sexual-orientation and gender-identity discrimination would both be actionable and understood as forms of sex discrimination. Plaintiffs using ENDA, however, would have to determine whether their circuit allows for recovery under Title VII and then decide whether to sue under ENDA, Title VII, or both. Thus, the Equality Act is better than ENDA because it makes it

496. *Id.* at 302.

497. *Id.*

498. *Id.* at 302–03.

499. *See supra* Part III.C.1.

500. *See supra* Part II.C.1.a.

501. *Reed, supra* note 393, at 302.

easier for LGBT plaintiffs who experience discrimination to bring suit since they will not have to deal with alternative theories or conflicting circuits.

Lastly, there are several advantages that are simply inherent to amending Title VII over adopting a new piece of stand-alone legislation. The EEOC, for example, already interprets sex to include sexual orientation and gender identity.⁵⁰² Thus, the Commission would not have to change any of its current practices if Title VII were amended, unlike the undertaking of a new piece of legislation. Similarly, employers are already familiar with Title VII, because they have been subjected to it for over fifty years.⁵⁰³ Therefore, it would naturally be easier for them to amend their current discrimination policies that already comply with Title VII to include sexual orientation and gender identity, than to adopt their practices to match a new, specially tailored law.

Additionally, since ENDA is a brand new statute it lacks any judicial doctrinal development, whereas the Equality Act would benefit from Title VII's fifty years of development.⁵⁰⁴ Freestanding statutes such as ENDA are also substantially more vulnerable to future legislative tinkering than legislation under established civil-rights laws.⁵⁰⁵ Thus, ENDA's protections are more likely to be watered down by crafty future amendments than the protections in the Equality Act. Therefore, the Equality Act not only has several provisions that are more beneficial than those in ENDA, but also has many inherent qualities that make it a stronger piece of legislation.

The best cure for discrimination against LGBT workers is the Equality Act. There is, however, currently no chance that ENDA, nor the Equality Act, stands to become law.⁵⁰⁶ Republicans, who have historically opposed LGBT-discrimination protections, are currently in control of both chambers of Congress.⁵⁰⁷ Thus, even the staunchest of LGBT advocates recognize that the Democrats need to gain a supermajority in Congress during the next election to have any chance of overcoming Republican stonewalling to push either bill through.⁵⁰⁸ Therefore, since federal legislation is not yet a realistic possibility, the next best course of action is for the thirty-eight states that do not yet ban LGBT-employment discrimination to pass statewide legislation.⁵⁰⁹

State legislation is the second-best option, because, of the nonfederal options, it will protect the most workers while legislators continue to work on passing federal legislation. State legislation also allows victims

502. Scheiber, *supra* note 107.

503. 42 U.S.C. § 2000e-e (2012).

504. Sung, *supra* note 195, at 511.

505. *Id.* at 512.

506. Reed, *supra* note 402, at 36.

507. The bill has support of thirty-seven democrats and two independents in the senate and 170 democrats in the house. Eilperin, *supra* note 250.

508. Baume, *supra* note 208.

509. Scheiber, *supra* note 107.

to seek legal recourse, establishes penalties for violators, and is much more difficult to overturn than other protection mechanisms.⁵¹⁰ Additionally, state legislation traditionally serves as stepping stones towards federal legislation,⁵¹¹ and it operates as mini pilot studies that help determine what terms are most effective.⁵¹² Thus, states that do not have LGBT-employment protections should pass their own legislation while Democrats in Congress continue to rally support for the Equality Act.

State legislation, however, is not necessarily an easy feat either. States are also struggling with LGBT-discrimination protections, and the debates around them “produce[d] some of the biggest political fights of 2016.”⁵¹³ Thus, states should follow the Utah Compromise approach.⁵¹⁴ This does not mean that states should enact the same legislation as Utah, but instead that states should follow how Utah passed their legislation—via compromise. Utah legislators consciously decided not to “rattle every cage” so they could reach an agreement.⁵¹⁵ The legislators agreed to certain concessions for organizations like the Boy Scouts, in exchange for ensuring that LGBT people could work for any for-profit company free of discrimination.⁵¹⁶ While describing how the legislation was drafted, Clifford J. Rosky, a member of the board of directors of Equality Utah, stated that “[y]ou could say that we agreed on some things and disagreed on others, but we decided to focus on what we agreed on. It’s very simple, but it’s rarely done.”⁵¹⁷

Thus, while “Utah’s solution may not fit perfectly with the specific needs of other states,” its principles of balancing rights, its fairness-for-all approach, and its collaborative process is “worthy of emulation.”⁵¹⁸ This equal-rights approach is the reason why the legislation is the first time a Republican controlled legislature with a Republican governor extended protections to LGBT people.⁵¹⁹ The Utah Compromise marks the first time that LGBT legislation received equal support from religious organizations and LGBT advocates alike—with the bill being “hailed by Mormon leaders and gay rights advocates as a breakthrough in balancing rights and religious freedom, and as a model for other conservative states.”⁵²⁰ Therefore, while the Equality Act is the best way to provide protections to LGBT workers, states should take action in the meantime by following Utah’s compromise approach.

510. Hunt, *supra* note 172, at 5.

511. See Lester, *supra* note 213, at 645.

512. *Id.*

513. Green, *supra* note 6.

514. *Id.*

515. *Id.*

516. *Id.*

517. Francis Ward, *supra* note 354, at 18.

518. *Id.*

519. Goodstein, *supra* note 225.

520. *Id.*

V. CONCLUSION

The irony of same-sex marriage becoming legal in the United States is that it has actually made discrimination against LGBT people easier because now, more than ever, employers will be aware of their employees' sexual orientation and gender identity.⁵²¹ Discrimination of this nature has no place in society or the workplace. Employment discrimination is a lose-lose situation that negatively impacts employees, employers, and the national economy alike.⁵²² Congress acknowledged this over fifty years ago when it adopted Title VII with the goal of eradicating employment discrimination.⁵²³ Courts, however, have generally been reluctant to extend Title VII to LGBT plaintiffs, and LGBT workers continue to face alarmingly high rates of discrimination in the workplace every day.⁵²⁴

Many entities, both public and private, are progressively creating their own limited LGBT workplace protections, which suggests that there is an "emerging societal consensus that LGBT-oriented employment discrimination is unacceptable."⁵²⁵ While this is a promising trend, it has created an unworkable scheme where LGBT people receive mismatched protections depending on where they live and work.⁵²⁶ Thus, the best solution is for Congress to pass the Equality Act—legislation that, by amending Title VII to explicitly include sexual orientation and gender identity,⁵²⁷ is superior to stand-alone legislation like ENDA.⁵²⁸ The Equality Act would help put an end to the pervasive history of discrimination that LGBT workers have faced⁵²⁹ and make it so that LGBT employees can focus on performing their jobs without having to worry that they will be discriminated against for who they are or who they love.⁵³⁰

An overwhelming majority of likely voters support Congress passing a federal LGBT nondiscrimination law, including 72% of Independents and 51% of Republicans,⁵³¹ and national politics are shifting in favor of passage of the Equality Act as well.⁵³² There is not yet a clear pathway, however, for Congress to pass either the Equality Act or ENDA.⁵³³ Thus, in the meantime, states, the second-best mechanisms for supplying dis-

521. Green, *supra* note 6.

522. See *supra* Part II.A.

523. 42 U.S.C. § 2000e (2012).

524. Hunt, *supra* note 172, at 1.

525. Reed, *supra* note 393, at 296–97.

526. See *supra* Part II.C.

527. See Equality Act, H.R. 3185, 114th Cong. (2015).

528. See Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. (2013).

529. Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 54 F.3d 261, 264 n.1 (6th Cir. 1995), *vacated*, 518 U.S. 1001 (1996).

530. See Dunning, *supra* note 148.

531. *Breaking Comprehensive: New LGBT Non-Discrimination Legislation to be Introduced this Week*, HUM. RTS. CAMPAIGN (July 21, 2015), <http://www.hrc.org/blog/breaking-comprehensive-new-lgbt-non-discrimination-legislation-to-be-introd>.

532. Keisling, *supra* note 194.

533. *Id.*

crimination protections, should adopt their own LGBT employment laws.⁵³⁴ States should utilize the Utah Compromise approach, because it offers the best chance at reaching a consensus and securing protections for LGBT workers.

LGBT employees comprise a significant part of the American labor force, and every day they go to work to support themselves and their families, helping the economy grow along the way.⁵³⁵ Far too many of these same workers must unfairly live in fear that they will lose their job based on factors that have no bearing on their job performance or ability.⁵³⁶ Thus, while the average LGBT worker's legal and social standing is gradually improving,⁵³⁷ it is important that America does not stop adopting more protections until *all* LGBT workers are protected from discrimination.⁵³⁸

534. *Id.*

535. Crosby Burns & Jeff Krehely, *Gay and Transgender People Face Higher Rates of Workplace Discrimination and Harassment*, CTR. FOR AM. PROGRESS (June 2, 2011), <https://www.americanprogress.org/issues/lgbt/news/2011/06/02/9872/gay-and-transgender-people-face-high-rates-of-workplace-discrimination-and-harassment/>.

536. *Id.*

537. *Id.*

538. See Pizer et al., *supra* note 18, at 778 ("Is a federal law prohibiting employment discrimination on the basis of sexual orientation and gender identity still needed? Based on the current research and existing laws, the answer is clearly yes:").

