NOTES

LOVING BEYOND THE BINARY: APPLYING ASSOCIATIONAL DISCRIMINATION TO GENDER IDENTITY UNDER TITLE VII

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ABSTRACT

The Second and Seventh Circuits, in their landmark decisions in Zarda v. Altitude Express, Inc.[1] *and* Hively v. Ivy Tech Community College of Indiana,[2] *declared that Title VII of the Civil Rights Act encompasses sexual orientation when determining discrimination "because of . . . sex." Both courts supported their reasoning in part through statutory interpretation and past precedent protecting individuals from associational discrimination (as in* Loving v. Virginia*).*[3] *In short, the Circuits found that, under Title VII, employers could not discriminate against their employees because they disapproved of their employees' intimate same-sex attractions or associations.*

This Note asserts that the concept of associational discrimination can, and should, be extended to gender identity in cases involving discrimination against transgender individuals and their cisgender partners. Much like the interracial couple in Loving *was persecuted for violating traditional norms of romantic association, discriminating against the partner of a transgender individual reflects aversion to loving, nontraditional relationships—even those that are technically heterosexual (e.g., a heterosexual cisgender man coupled with a heterosexual transgender woman). This Note examines the genesis and growth of the associational discrimination doctrine, as well as other "sex" discrimination theories that have been used to protect LGBTQ+ employees under Title VII. Though Title VII protection can be extended to transgender*

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[1] 883 F.3d 100 (2d Cir. 2018) (en banc) (deciding employee was entitled to bring Title VII claim for sexual orientation discrimination), *cert. granted*, 139 S. Ct. 1599 (2019) (mem.).

[2] 853 F.3d 339 (7th Cir. 2017) (en banc) (holding that sex discrimination for Title VII purposes includes claims for sexual orientation).

[3] 388 U.S. 1 (1967).

individuals through statutory interpretation of the word "sex," this Note ultimately contends that legislation amending Title VII to explicitly prohibit discrimination based on gender identity and sexual orientation will provide the most comprehensive protection for relationships that exist beyond the gender binary.

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INTRODUCTION

In October 2014, Allegra Schawe-Lane, a transgender[4] woman, and her husband, Dane Lane, a cisgender[5] man, began working in a northern Kentucky warehouse owned by online retail giant Amazon.[6] The couple had specifically applied to work at Amazon because of its reputation for being LGBTQ+ friendly; the company's corporate policy explicitly "prohibits discrimination based on sexual orientation and gender identity."[7] "I thought we would be safe and accepted," said Schawe-Lane.[8] However, the couple's experience with Amazon was "like a bad dream"[9]—one that is unfortunately all too common in the American workplace for transgender individuals and their partners.

Schawe-Lane claims that she was regularly misgendered[10] by her colleagues and supervisors, who called her derogatory terms including "tranny" and "shemale."[11] Moreover, she alleges that she was repeatedly harassed in heinous ways, from threats of physical and sexual violence to coworkers peeking into her bathroom stall to look at her genitalia.[12] When Schawe-Lane brought her complaints to management, she claimed that her supervisors deliberately referred to her "by male pronouns and titles" and that her claims "were never investigated by Amazon."[13]

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[4] Merriam-Webster dictionary defines transgender as "being a person whose gender identity differs from the sex the person had or was identified as having at birth." *Transgender*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/transgender [https://perma.cc/ZF7B-7RZ3] (last visited Sept. 21, 2019).

[5] Merriam-Webster dictionary defines cisgender as "being a person whose gender identity corresponds with the sex the person had or was identified as having at birth." *Cisgender*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/cisgender [https://perma.cc/7ZNE-CCJJ] (last visited Sept. 21, 2019). Put differently, "If a doctor announces, 'It's a girl!' in the delivery room based on the child's body and that baby grows up to identify as a woman, that person is cisgender." Katy Steinmetz, *This Is What Cisgender Means*, TIME (Dec. 23, 2014), http://time.com/3636430/cisgender-definition/.

[6] *Trans Woman Sues Amazon over Alleged Discrimination at Kentucky Warehouse*, THE GUARDIAN (Aug. 9, 2017, 1:47 PM), https://www.theguardian.com/us-news/2017/aug/09/transgender-woman-sues-amazon-kentucky-discrimination [https://perma.cc/5JMC-8TW5] [hereinafter *Trans Woman Sues Amazon*].

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] To misgender someone is to "[r]efer to (someone, especially a transgender person) using a word, especially a pronoun or form of address, that does not correctly reflect the gender with which they identify." *Misgender*, LEXICO, https://www.lexico.com/en/definition/misgender [https://perma.cc/3T9C-6U9Q] (last visited Sept. 21, 2019).

[11] Complaint and Jury Demand ¶ 71a, Schawe-Lane v. Amazon.com.KYDC LLC, No. 2:17-cv-00134 (E.D. Ky. Aug. 9, 2017), 2017 WL 3437565.

[12] *Id.* ¶¶ 74, 77, 81.

[13] *Id.* ¶¶ 73, 79.

Schawe-Lane's husband was also allegedly subjected to various forms of discrimination at Amazon. Lane claims that he was sexually harassed by two male coworkers, who inappropriately touched him, told him that his wife was a prostitute, and made repeated and unwanted sexual advances toward him.[14] On one occasion, while the couple was walking together, one of their coworkers shouted at them, "You should get fucking fired, *faggots*!"[15] Lane also alleges that his supervisors stopped allowing him to take his breaks at the same time as Schawe-Lane and that they were both subjected to heightened scrutiny and discipline for fictional work offenses.[16]

In a particularly severe and dangerous incident, the brake lines on the couple's car were severed (purportedly by a fellow Amazon employee) while in the warehouse's secured parking lot. Luckily, they discovered the problem before either was injured.[17] Fearing for their lives, both Lane and Schawe-Lane resigned from Amazon in early October 2015.[18]

The couple filed a civil complaint against Amazon in August 2017, claiming, inter alia, that the company discriminated against them "because of sex" in violation of Title VII of the Civil Rights Act of 1964.[19] Despite the fact that Lane is a masculine-presenting cisgender man in a heterosexual relationship with Schawe-Lane,[20] he nevertheless brought his own separate Title VII claim against Amazon for "institut[ing] a campaign of harassment and bullying against" him because of "his association with a person in a protected category"—his transgender wife.[21]

The couple eventually settled the lawsuit with Amazon without proceeding to trial,[22] so there is no way to know whether Lane's Title VII claim would have prevailed in court (although one could surmise that Amazon saw at least some merit in his claims, given its decision to settle).[23] However, Lane's claim raises an interesting legal question: Can a cisgender individual in a heterosexual relationship bring a sex discrimination claim against their employer under Title VII based on their intimate association with their transgender partner?

Before answering this question, it is imperative to first define and distinguish gender identity and sexual orientation. Gender identity and sexual orientation

[14] *Id.* ¶¶ 141, 146.

[15] *Id.* ¶ 77d.

[16] *Id.* ¶¶ 149, 158, 173, 176.

[17] *Id.* ¶¶ 102-04.

[18] *Id.* ¶¶ 129, 180.

[19] *Id.* ¶¶ 1-2.

[20] *Id.* ¶¶ 36-40.

[21] *Id.* ¶ 284.

[22] *See* Daniel Wiessner, *Amazon Settles Bias Claims with Transgender Employee, Husband*, REUTERS LEGAL, Jan. 2, 2019 (reporting on Amazon's settlement with Schawe-Lane and Lane).

[23] Amazon's decision to settle also could have been a strategic move to avoid further bad press.

are commonly misperceived to be the same, as evidenced by Lane and Schawe-Lane's coworker calling them a homophobic slur, when in fact they are in a heterosexual relationship. In actuality, sexual orientation and gender identity are distinct.[24]

Sexual orientation is an individual's "inherent or immutable enduring emotional, romantic or sexual attraction to other people."[25] As sexual orientation is not dependent on gender, a transgender person could be "gay, straight, bisexual, asexual, or a whole host of other sexual identities."[26] Schawe-Lane, for instance, is in a heterosexual relationship with her husband; her transgender identity is irrelevant to her sexual orientation.

Conversely, gender identity is the "innermost concept of self as male, female, a blend of both or neither—how individuals perceive themselves and what they call themselves."[27] Though "transgender" has often been used as an "umbrella term for people whose gender identity and/or expression is different from cultural and social expectations based on the sex they were assigned at birth,"[28] many other terms often more accurately reflect the identity of an individual who operates outside the gender binary, including "agender,"[29] "gender fluid,"[30] and "gender non-conforming."[31] However, for the sake of clarity, this Note will deal specifically with Title VII and the common law as it relates to transgender individuals and their partners.

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[24] *See* Cydney Adams, *The Difference Between Sexual Orientation and Gender Identity*, CBS NEWS (Mar. 24, 2017, 10:23 AM), https://www.cbsnews.com/news/the-difference-between-sexual-orientation-and-gender-identity/ [https://perma.cc/2PCU-T3LE] (explaining misconception that gender identity and sexual orientation are connected).

[25] *Id.* (quoting *Glossary of Terms*, HUM. RTS. CAMPAIGN, https://www.hrc.org/resources/glossary-of-terms [https://perma.cc/2J5T-CHCY] (last visited Sept. 21, 2019)).

[26] *Id.*

[27] Cydney Adams, *The Gender Identity Terms You Need to Know*, CBS NEWS (Mar. 24, 2017, 10:22 AM), https://www.cbsnews.com/news/transgender-gender-identity-terms-glossary/ [https://perma.cc/7CKP-D4YU] (providing glossary of gender identity terms as defined by GLAAD, the Human Rights Campaign, the National Center for Transgender Equality, and The Trevor Project, and noting that "[g]ender identity . . . is a separate issue entirely from sex, our biological makeup; or sexual orientation, who we are attracted to").

[28] *Id.*

[29] "A term for people whose gender identity and expression does not align with man, woman, or any other gender. A similar term used by some is gender-neutral." *Id.*

[30] "A person who does not identify with a single fixed gender, and expresses a fluid or unfixed gender identity. One's expression of identity is likely to shift and change depending on context." *Id.*

[31] "A broad term referring to people who do not behave in a way that conforms to the traditional expectations of their gender, or whose gender expression does not fit neatly into a category." *Id.*

Despite the major progress that the LGBTQ+ community has seen over the past decade in terms of legislation,[32] legal protection,[33] and social change,[34] transgender individuals "still face pervasive discrimination in many areas of life, including work, school, housing, and public accommodations."[35]

In 2017, the U.S. Commission on Civil Rights published a report on LGBTQ+ workplace discrimination and determined that "[a]lmost every transgender employee in the U.S. has experienced some form of harassment or mistreatment at their job."[36] Over seventy percent of transgender respondents reported that they "had to hide their gender identity, delay their transition, or quit their job due to fear of negative repercussions."[37] Moreover, "trans people's families continue to face barriers . . . to recognition of their family relationships in many situations."[38] A comprehensive 2011 survey of transgender people determined that "14% reported that due to their gender identity, their spouse or partner experienced job discrimination."[39] Cisgender spouses were twice as likely to face employment discrimination of their own if their transgender partners lost their jobs due to bias.[40]

Title VII only protects employees who are discriminated against on the basis of their "race, color, religion, sex or national origin."[41] While transgender employees have pursued successful discrimination actions against their

[32] *See, e.g.*, Lisa Creamer, *Mass. Votes 'Yes' on Question 3 to Keep Law Protecting Transgender People in Public Accommodations*, WBUR NEWS (Nov. 6, 2018, 11:34 PM), https://www.wbur.org/news/2018/11/06/question-3-transgender-ballot-yes-wins [https://perma.cc/C3LT-WNNQ].

[33] *See, e.g.*, Adam Liptak, *'Equal Dignity,'* N.Y. TIMES, June 27, 2015, at A1 ("In a long-sought victory for the gay rights movement, the Supreme Court ruled by a 5-to-4 vote on Friday that the Constitution guarantees a right to same-sex marriage.").

[34] *See, e.g.*, Aamer Madhani, *Poll: Approval of Same-Sex Marriage in U.S. Reaches New High*, USA TODAY (May 23, 2018, 5:04 PM), https://www.usatoday.com/story/news/nation/2018/05/23/same-sex-marriage-poll-americans/638587002/ [https://perma.cc/8DLT-KCK7] ("More than two-thirds of Americans say they support same-sex marriage . . . .").

[35] Elizabeth F. Schwartz, *The Many Faces of Transgender Discrimination*, TRIAL, Oct. 2016, at 40, 40.

[36] Christianna Silva, *Almost Every Transgender Employee Experiences Harassment or Mistreatment on the Job, Study Shows*, NEWSWEEK (Nov. 29, 2017, 6:44 PM), https://www.newsweek.com/transgender-employees-experience-harassment-job-726494 [https://perma.cc/6YTM-PHBU] (finding that ninety percent of transgender workers faced discrimination at work).

[37] *Id.*

[38] *Issues | Families*, NAT'L CTR. FOR TRANSGENDER EQUALITY, https://transequality.org/issues/families [https://perma.cc/XD8Q-5Q2Y] (last visited Sept. 21, 2019).

[39] Loree Cook-Daniels, *Family Matters: Fast New Facts About Transgender People and SOFFAs (Significant Others, Friends, Families and Allies)*, FORGE (Feb. 1, 2011), https://forge-forward.org/wp-content/docs/fast-facts-SOFFA.pdf [https://perma.cc/7STJ-NE56].

[40] *Id.*

[41] 42 U.S.C. § 2000e-2 (2012).

employers under Title VII,[42] no record exists of a cisgender partner of a transgender individual successfully pursuing a Title VII discrimination claim at trial.[43] However, Dane Lane's complaint, which alleges that he was discriminated against "because of his association" with his transgender wife,[44] provides a potential blueprint for legal success for cisgender partners by relying on the doctrine of associational discrimination.

This Note examines the origins of associational discrimination doctrine and its evolution from race to sexual orientation and advocates for a logical extension of the doctrine to encompass gender identity as well. Part I explores the foundations of associational discrimination doctrine, starting with *Loving v. Virginia* and its progeny and its more recent application to cases involving sexual orientation (especially with regard to same-sex marriage). In addition, Part I illustrates how the Second and Seventh Circuits, in *Zarda v. Altitude Express, Inc.* and *Hively v. Ivy Tech Community College of Indiana*, used associational discrimination to find that employment discrimination based on sexual orientation is sex-based discrimination. Part II details the sex-stereotyping claims that transgender individuals have brought against employers under Title VII and why a cisgender partner of a transgender individual would likely be unsuccessful in bringing such a claim. Subsequently, Part II argues for the extension of the associational discrimination reasoning of *Zarda* and *Hively* to apply to transgender individuals and their partners. Finally, Part III contends that while judicial application of associational discrimination doctrine to transgender individuals and their partners is a solid (albeit uncertain and jurisdiction-specific) start, Title VII must be amended to explicitly include gender identity and sexual orientation to provide more comprehensive and concrete statutory protection.

I. THE EVOLUTION OF ASSOCIATIONAL DISCRIMINATION

The term "associational discrimination" does not appear in the U.S. Constitution. However, the Fourteenth Amendment states that "[n]o State" may "deny to any person within its jurisdiction the equal protection of the laws."[45] The Equal Protection Clause has subsequently been interpreted, with various applicable levels of scrutiny, to protect people from "invidious discrimination"

[42] EEOC v. R.G. & G.R. Funeral Homes, Inc., 884 F.3d 560, 567 (6th Cir. 2018) (finding that employer discriminated against transgender individual "on the basis of her sex" under Title VII), *cert. granted in part*, 139 S. Ct. 1599 (2019) (mem.).

[43] *See* Elizabeth K. Ehret, Note, *Legal Loophole: How LGBTQ Nondiscrimination Laws Leave Out the Partners of Transgender People*, 67 RUTGERS U. L. REV. 469, 471 (2015) ("While there is no record in the courts of such discrimination, this is an issue that will foreseeably arise as transgender people increasingly live more openly as transgender.").

[44] Complaint and Jury Demand, *supra* note 11, ¶ 137.

[45] U.S. CONST. amend. XIV, § 1.

in the promulgation or application of laws, particularly laws that infringe upon fundamental rights.[46]

Over the years, the Supreme Court has determined which human rights are indeed "fundamental," extending the classification to only a handful of entitlements.[47] In *Skinner v. Oklahoma ex rel Williamson*,[48] the Court decided that marriage and procreation were "fundamental to the very existence and survival of the race."[49] However, legal scholars have recently argued that the established constitutional theory that statutes contravening fundamental rights under the umbrella of Due Process "liberty" are uniformly held to strict scrutiny review is nothing more than a "myth."[50] Nevertheless, *Skinner*'s discussion of marriage helped set the stage for the inevitable dawn of associational discrimination jurisprudence and the Supreme Court showdown over the forbidden marriage of Mildred and Richard Loving.

A. Loving *and the Dawn of Associational Discrimination Jurisprudence*

In June 1958, Mildred Jeter, a half-black, half-Native American woman, and Richard Loving, a white man, crossed state lines to get married in Washington, D.C. and then returned to their "marital abode" in Caroline County, Virginia.[51] At the time of their marriage, antimiscegenation laws—bans on interracial marriage—were "the foundation for the system of racial segregation in railroads, schools, parks, and cemeteries that prevailed into the 1960s."[52] A 1958 poll found that ninety-four percent of Americans opposed interracial marriage.[53]

Little more than a month after their marriage, the Lovings were awakened by the town sheriff and his deputies storming into their bedroom in the middle of the night to arrest them.[54] They were indicted for violating Virginia's

[46] *E.g.*, Yick Wo v. Hopkins, 118 U.S. 356, 367 (1886) (interpreting Equal Protection Clause of Fourteenth Amendment and scope of protection against discrimination).

[47] *See, e.g.*, Griffin v. Illinois, 351 U.S. 12, 20 (1956) (holding that right to criminal appeal is "fundamental to the protection of life and liberty"); *Yick Wo*, 118 U.S. at 370 (finding voting to be fundamental right because it is "preservative of all rights"). *But see* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 37 (1973) (finding arguments that education is fundamental right "unpersuasive").

[48] 316 U.S. 535 (1942).

[49] *Id.* at 541.

[50] *See, e.g.*, JAMES E. FLEMING & LINDA C. MCCLAIN, ORDERED LIBERTY: RIGHTS, RESPONSIBILITIES, AND VIRTUES 238-39 (2013) (exposing "myth of strict scrutiny for fundamental rights under the Due Process Clause").

[51] Loving v. Virginia, 388 U.S. 1, 2 (1967) (noting facts that established the Lovings' violation of Virginia's antimiscegenation law).

[52] Peggy Pascoe, *What Comes Naturally: The* Loving v. Virginia *Case in Historical Perspective*, BLACKPAST (July 25, 2010), https://www.blackpast.org/african-american-history/what-comes-naturally-loving-v-virginia-case-historical-perspective-0/ [https://perma.cc/6KM8-Y2J6].

[53] *Id.*

[54] *Id.*

antimiscegenation law.[55] The trial judge, ardent antimiscegenation supporter Leon Bazile, "[e]ffectively banished" the Lovings from Virginia for twenty-five years in exchange for suspending their one-year prison sentences.[56]

Thereafter, Mildred, Richard, and their three children relocated to D.C.[57] After four difficult years, Mildred wrote a letter to Attorney General Robert F. Kennedy about Congress's pending civil rights bill and its potential effect on her family's banishment.[58] Kennedy forwarded her letter to the American Civil Liberties Union, who decided to take up the Lovings' case.[59]

On November 6, 1963, the Lovings filed in Virginia state court a Motion to Vacate Judgment and Set Aside Sentence.[60] The Virginia Supreme Court affirmed the denial of their motion, finding "no sound judicial reason . . . to depart from" the state's settled law.[61]

In 1964, the Lovings brought suit in federal court to challenge the constitutionality of Virginia's antimiscegenation statute on the ground that the statute contravened the Fourteenth Amendment.[62] On appeal, a unanimous Supreme Court found that Virginia's ban on interracial marriage violated the Equal Protection Clause of the Fourteenth Amendment.[63] Chief Justice Warren, writing for the Court, rejected Virginia's argument that the law did not violate equal protection because it "similarly punished" both white and black citizens.[64] As "the Equal Protection Clause requires the consideration of whether the classifications drawn by any statute constitute an arbitrary and invidious discrimination," Chief Justice Warren wrote, Virginia's statute, which clearly "rest[ed] solely on distinctions drawn according to race," served no "legitimate overriding purpose" other than "to maintain White Supremacy."[65] Thus, the law (and any law prohibiting interracial marriage) ran afoul of the Equal Protection Clause.[66]

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[55] *Loving*, 388 U.S. at 3.

[56] Pascoe, *supra* note 52.

[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] Loving v. Commonwealth, 147 S.E.2d 78, 79 (Va. 1966) (noting that motion "alleg[ed] that they had complied with the terms of their suspended sentences but assert[ed] that the statute under which they were convicted was unconstitutional and that the sentences imposed upon them were invalid"), *rev'd*, 388 U.S. 1 (1967).

[61] *Id.* at 82.

[62] Loving v. Virginia, 388 U.S. 1, 3 (1967).

[63] *Id.* at 2.

[64] *Id.* at 9-10.

[65] *Id.* at 10-11.

[66] *Id.* at 12 ("There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.").

The Court also found that the statute violated the Fourteenth Amendment's Due Process Clause.[67] Citing *Skinner*, the Court noted, "Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival."[68] Accordingly, the Court found, "the freedom to marry or not marry[] a person of another race resides with the individual and cannot be infringed by the State."[69]

Loving created an immediate and indelible impact on American life, instantly eradicating antimiscegenation laws nationwide (although only a minority of states—sixteen—still had interracial marriage bans on the books).[70] However, its legacy extends far beyond its holding; *Loving* has since been employed to "define and affirm the fundamental right to marry."[71]

Eleven years later, in *Zablocki v. Redhail*,[72] the Court ensured that its ruling in *Loving* would be understood to expand beyond interracial marriage.[73] In reaffirming that "the right to marry is of fundamental importance to all individuals,"[74] the Court invalidated a Wisconsin law that precluded individuals who were noncompliant with their child support payments from getting married.[75] Invoking *Loving* and *Griswold v. Connecticut*,[76] Justice Thurgood Marshall noted that the Court had "routinely categorized the decision to marry as among the personal decisions protected by the right of privacy,"[77] "on the same level of importance as decisions relating to procreation, childbirth, child rearing, and family relationships."[78] Thus, individuals should be free to marry "without unjustified government interference."[79]

In *Turner v. Safley*,[80] the Court relied on *Loving* and *Zablocki* to invalidate a Missouri regulation that allowed inmates to get married only with the permission of the prison's superintendent.[81] The Court found that marriage, a "fundamental right," is an "expression[] of emotional support[,] . . . public commitment," and

[67] *Id.* ("These statutes also deprive the Lovings of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment.").

[68] *Id.* (quoting Skinner v. Oklahoma *ex rel* Williamson, 316 U.S. 535, 541 (1942)).

[69] *Id.* at 12.

[70] *See* John DeWitt Gregory & Joanna L. Grossman, *The Legacy of Loving*, 51 HOW. L.J. 15, 16 (2007). While the laws were legally invalidated, it took decades for all of the states to officially repeal their antimiscegenation laws; in 2000, Alabama was the last state to repeal its law. *See* Pascoe, *supra* note 52.

[71] Gregory & Grossman, *supra* note 70, at 19.

[72] 434 U.S. 374 (1978).

[73] *Id.* at 384.

[74] *Id.*

[75] *Id.* at 375-76.

[76] 381 U.S. 479 (1965).

[77] *Zablocki*, 434 U.S. at 384.

[78] *Id.* at 386.

[79] *Id.* at 385 (quoting Carey v. Population Servs. Int'l, 431 U.S. 678, 684-85 (1977)).

[80] 482 U.S. 78 (1987).

[81] *Id.* at 95.

"personal dedication."[82] *Turner* has since been read to support the principle that marriage "involves structuring one's life in partnership with another, producing an alloy of private intimacy, public witnessing, and government sanction that has been the defining compound of civil marriage laws since the middle of the twentieth century."[83]

Many judges and legal scholars have read *Loving* even more broadly to protect an individual's interest in intimate association.[84] The Court's plurality opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*[85]—which declined to explicitly overturn *Roe v. Wade*[86] but recognized a greater state interest in a woman's choice to have an abortion—appears to support this theory. In affirming the recognition of a woman's "liberty" interest in her own bodily autonomy,[87] the Court describes *Loving*, *Skinner*, *Griswold*, and *Eisenstadt v. Baird*[88] as a "framework" that is "'not a series of isolated points,' but [instead] mark[s] a 'rational continuum.'"[89] The *Casey* plurality draws its "rational continuum" language from a famous dissent by Justice Harlan in *Poe v. Ullman*,[90] which conceived of liberty as an "abstract concept . . . not a code of concrete, specific enumerated rights."[91] *Casey* notes that the "liberty" interest that encompasses the personal rights in these cases includes "the interest in independence in making certain kinds of important decisions."[92] By recognizing an individual's interest in privately making their own choices regarding their personal and bodily autonomy, the *Casey* plurality indicates that rather than protecting a discrete list of isolated fundamental rights, the Constitution enables the pursuit of "ordered liberty through taking rights, responsibilities, and virtues

[82] *Id.* at 95-96.

[83] Tobias Barrington Wolff, *The Three Voices of* Obergefell, L.A. LAW., Dec. 2015, at 28, 30.

[84] *See, e.g.*, Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 349 (7th Cir. 2017) (en banc); Michael R. Engleman, Note, Bowers v. Hardwick*: The Right of Privacy—Only Within the Traditional Family?*, 26 J. FAM. L. 373, 388 (1987) ("While *Loving* protects freedom to marry, it seems clear that it is not the institution of marriage that is being protected, but rather the individual choice involved in the creation of such an intimate association.").

[85] 505 U.S. 833 (1992).

[86] 410 U.S. 113 (1973).

[87] *Casey*, 505 U.S. at 858 (plurality opinion) (acknowledging "recognition afforded by the Constitution to the woman's liberty").

[88] 405 U.S. 438, 440 (1972) (declaring that Massachusetts statute that allowed married couples to obtain contraceptives but prohibited single individuals from doing so violated Equal Protection Clause of Fourteenth Amendment).

[89] *Casey*, 505 U.S. at 858 (plurality opinion) (quoting Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting)).

[90] 367 U.S. 497, 543 (1961) (Harlan, J., dissenting).

[91] FLEMING & MCCLAIN, *supra* note 50, at 242.

[92] *Casey*, 505 U.S. at 859 (plurality opinion) (quoting Carey v. Population Servs. Int'l, 431 U.S. 678, 684 (1977)).

seriously."[93] In other words, this "rational continuum" of cases amounts to something greater than the sum of its individual parts.

This broader view of *Loving*'s legacy has had a particular and seismic effect on the substantive constitutional rights of LGBTQ+ Americans, especially on the issue of same-sex marriage.[94] At the conclusion of the decades-long fight for marriage equality, *Loving* served as a pivotal justification for the Supreme Court's decision to legalize same-sex marriage nationwide.[95] Legal scholars have posited that "[n]o U.S. Supreme Court case has proven more central to the constitutional battle over same-sex marriage than *Loving*."[96]

B. *Sexual Orientation and Marriage:* Lawrence*,* Windsor*,* Obergefell*, and Beyond*

As early as 1970,[97] proponents of same-sex marriage invoked *Loving* in legal disputes on the grounds that "bans on same-sex marriage were analogous to bans on interracial marriage," although these early efforts were unsuccessful.[98] Two decades later, in *Baehr v. Lewin*,[99] the Hawaii Supreme Court looked to *Loving* to declare a ban on same-sex marriage to constitute a "sex-based classification."[100] The *Baehr* court rejected the lower court's determination that because the same-sex marriage ban applied to both sexes equally, it could not constitute a sex-based classification.[101] Noting that the *Loving* Court similarly rebuffed an equal application theory, the *Baehr* majority stated, "[s]ubstitution of 'sex' for 'race' and article I, section 5 for the fourteenth amendment yields the precise case before us together with the conclusion that we have reached."[102]

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[93] FLEMING & MCCLAIN, *supra* note 50, at 272 (explaining concept of "reasoned judgment" regarding basic liberties).

[94] *See* Gregory & Grossman, *supra* note 70, at 27 ("Same-sex marriage advocates . . . invoked *Loving* in both a doctrinal sense and in a broader rhetorical one.").

[95] *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2598 (2015); *supra* text accompanying notes 125-129 (describing *Obergefell*'s reasoning).

[96] *See, e.g.*, Linda C. McClain, *Prejudice, Constitutional Moral Progress, and Being "on the Right Side of History": Reflections on* Loving v. Virginia *at Fifty*, 86 FORDHAM L. REV. 2701, 2702 (2018).

[97] *See, e.g.*, Baker v. Nelson, 191 N.W.2d 185, 187 (Minn. 1971) (noting petitioners' reliance on *Loving* but stating that "in commonsense and in a constitutional sense, there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex"), *cert. denied*, 409 U.S. 810 (1972).

[98] Gregory & Grossman, *supra* note 70, at 27 n.63 (noting two cases that "rejected the argument that bans on same-sex marriage were analogous to bans on interracial marriage").

[99] 852 P.2d 44 (Haw. 1993).

[100] Gregory & Grossman, *supra* note 70, at 28.

[101] *Baehr*, 852 P.2d at 67 (rejecting dissenting judge's equal application argument).

[102] *Id.* at 68. Hawaii did not legalize same-sex marriage at this juncture, however, "because while the case was pending on remand the constitution was amended to grant the legislature the power to ban same-sex marriage, which it subsequently exercised." Gregory & Grossman, *supra* note 70, at 28.

Lawrence v. Texas,[103] though not a same-sex marriage case (nor a case that explicitly relies on *Loving*), nevertheless provided important foundational support for the constitutional fight for marriage equality. In determining that criminal sodomy laws are unconstitutional under the Fourteenth Amendment's Due Process Clause, Justice Kennedy noted that *Casey* "confirmed that our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education."[104] "Persons in a homosexual relationship," Kennedy continued, "may seek autonomy" to make these choices, "just as heterosexual persons do."[105] *Lawrence*, therefore, explicitly held that "homosexual" individuals "are entitled to respect for their private lives."[106]

Like *Baehr*, *Goodridge v. Department of Public Health*[107]—the first case in the country that explicitly declared that a state's same-sex couples had the right to marry—also relied heavily on *Loving* in its reasoning, although its ultimate holding was based on fundamental rights under the Massachusetts Constitution.[108] The Massachusetts Supreme Judicial Court noted that *Loving* and *Zablocki* established marriage as a fundamental "civil right" in part because of marriage's "intensely personal significance."[109] As in *Casey*, the *Goodridge* court linked many of the landmark cases dealing with intimacy and personal autonomy (such as marriage, sexual intimacy, and family planning) as a foundation establishing "the most basic of every individual's liberty and due process rights."[110] The *Goodridge* court specifically acknowledged a parallel between its decision and the ruling in *Loving*—declaring that in both cases, "a statute deprives individuals of access to an institution of fundamental legal, personal, and social significance—the institution of marriage—because of a single trait: skin color in . . . *Loving*, sexual orientation here."[111] "[H]istory," the *Goodridge* court asseverated, "must yield to a more fully developed understanding of the invidious quality of the discrimination."[112]

Judges were not the only individuals who saw the parallels between *Loving* and same-sex marriage. As public opinion rapidly changed in the decade following *Goodridge*,[113] legal scholars advocated for the Supreme Court to

[103] 539 U.S. 558 (2003).

[104] *Id.* at 573-74.

[105] *Id.* at 574.

[106] *Id.* at 578.

[107] 798 N.E.2d 941 (Mass. 2003).

[108] *Id.* at 957.

[109] *Id.*

[110] *Id.* at 959.

[111] *Id.* at 958.

[112] *Id.*

[113] In 2004, less than a year after the *Goodridge* decision, a Gallup poll showed that fifty-five percent of the public was opposed to same-sex marriage, with forty-two percent in favor. Chris Cillizza, *How Unbelievably Quickly Public Opinion Changed on Gay Marriage, in 5*

extend its reasoning in *Loving* to same-sex couples and declare marriage equality nationwide.[114] Scholars challenged individuals who claimed that same-sex marriage was antithetical to traditional definitions of marriage by noting that the Lovings' interracial marriage was excluded for the same reason mere decades earlier.[115] On the fortieth anniversary of *Loving*, Mildred Loving released a statement advocating for same-sex marriage rights: "My generation was bitterly divided over something that should have been so clear and right. . . . I believe all Americans, no matter their race, no matter their sex, no matter their sexual orientation, should have that same freedom to marry. . . . That's what *Loving*, and loving, are all about."[116]

In 2013, the Supreme Court delivered the first of its two major same-sex marriage decisions.[117] While the majority of the Supreme Court in *United States v. Windsor*[118] ruled to invalidate Section 3 of the Defense of Marriage Act ("DOMA")—a 1996 law that denied federal recognition and federal benefits linked to same-sex couples validly married under state law—on equal protection and due process grounds, the Court did not rest its ruling on reasoning set forth in *Loving*.[119] However, the *Windsor* Court's assertion that *Loving* reflects the

Charts, WASH. POST (June 26, 2015), https://www.washingtonpost.com/news/the-fix/wp/2015/06/26/how-unbelievably-quickly-public-opinion-changed-on-gay-marriage-in-6-charts/?utm_term=.bf17180bf0cd. In 2013, the same poll showed that public opinion had dramatically flipped, with fifty-four percent in favor of same-sex marriage and forty-three percent opposed. *Id.* (noting that this "sort of reversal in public opinion—particularly on a social issue—is unique in modern American political history").

[114] *See, e.g.*, Adele M. Morrison, *Same-Sex* Loving*: Subverting White Supremacy Through Same-Sex Marriage*, 13 MICH. J. RACE & L. 177, 177 (2007) (arguing that "same-sex marriage is a civil rights issue that works against heterosupremacy and White supremacy and that *Loving v. Virginia* is indeed a case that can and should be extended to sanction same-sex marriage and support Lesbian and Gay couples"); Mark Strasser, Loving *Revisionism: On Restricting Marriage and Subverting the Constitution*, 51 HOW. L.J. 75, 90 (2007) (contending that state court rulings upholding bans on same-sex marriage "offer interpretations of *Loving*, equal protection jurisprudence, and due process jurisprudence which simply cannot account for the case law").

[115] *See, e.g.*, Angela Onwuachi-Willig, *The Definition of Marriage Bends Toward Justice*, N.Y. TIMES (Nov. 20, 2013, 2:14 PM), https://www.nytimes.com/roomfordebate/2012/04/24/are-family-values-outdated/the-definition-of-marriage-bends-toward-justice ("As we have learned from debates regarding previous bans on slave marriage and interracial marriage, to simply state that the legal definition of marriage has traditionally excluded particular groups does not make those exclusions right.").

[116] *Id.*

[117] Adam Liptak, *Justices Extend Benefits to Gay Couples; Allow Same-Sex Marriages in California*, N.Y. TIMES, June 27, 2013, at A1 ("The Supreme Court . . . ruled that married same-sex couples were entitled to federal benefits . . . .").

[118] 570 U.S. 744 (2013).

[119] *Id.* at 769-70 (holding that "DOMA seeks to injure the very class [same-sex couples] New York seeks to protect" and thus reflects "bare congressional desire to harm a politically unpopular group" (quoting U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534-35 (1973))).

maxim that "[s]tate laws defining and regulating marriage . . . must respect the constitutional rights of persons"[120] provided an important foundation for its landmark same-sex marriage decision exactly two years later. Indeed, legal scholars posited that *Windsor*'s "liberty-centered analysis . . . set the doctrinal stage for what will undoubtedly become known as the *Loving v. Virginia* of our time."[121] Moreover, several federal district court opinions striking down state "defense of marriage laws" found *Windsor*'s reliance on *Loving* to be highly significant.[122]

In *Obergefell v. Hodges*,[123] Justice Anthony Kennedy, writing for a 5-4 majority and building on his prior decisions in *Lawrence* and *Romer v. Evans*,[124] also drew repeatedly on *Loving* to declare a constitutional right for same-sex couples to marry nationwide.[125] Kennedy, emphasizing the "abiding connection between marriage and liberty," appeared to extend the holding of *Loving* beyond just the discriminatory nature of marriage bans and challenged the larger implications of dignity and autonomy inherent in such discrimination.[126] "There is dignity," Kennedy wrote, "in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices."[127] Once again, the Court bundled its prior cases dealing with privacy, marriage, and intimacy into a single package that "identified essential attributes . . . based in history, tradition, and other constitutional liberties inherent in this intimate bond."[128] Moreover, according to Kennedy, *Loving* illustrates that investigating the harms that result from discrimination can elucidate the importance of the rights being infringed.[129]

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[120] *Id.* at 766 (citing Loving v. Virginia, 388 U.S. 1 (1967)).

[121] *See, e.g.*, Daniel J. Crooks III, *Toward "Liberty": How the Marriage of Substantive Due Process and Equal Protection in* Lawrence *and* Windsor *Sets the Stage for the Inevitable* Loving *of Our Time*, 8 CHARLESTON L. REV. 223, 227-28 (2014).

[122] *See* LINDA C. MCCLAIN, WHO'S THE BIGOT? LEARNING FROM CONFLICTS OVER MARRIAGE AND CIVIL RIGHTS LAW (forthcoming 2019) (manuscript at 8) (on file with author) (noting that *Loving* played a key supporting role in court opinions finding defense of marriage laws unconstitutional).

[123] 135 S. Ct. 2584 (2015).

[124] 517 U.S. 620 (1996).

[125] *See, e.g.*, *Obergefell*, 135 S. Ct. at 2589.

[126] *Id.* at 2599 ("[T]he right to personal choice regarding marriage is inherent in the concept of individual autonomy.").

[127] *Id.*

[128] *Id.* at 2598-99 (referring to *Griswold*, *Loving*, *Eisenstadt*, *Zablocki*, *Turner*, and *Lawrence* as "instructive precedents").

[129] *See id.* at 2603 ("The reasons why marriage is a fundamental right became more clear and compelling from a full awareness and understanding of the hurt that resulted from laws barring interracial unions.").

Loving's holding that the right to marriage is fundamental has since been hailed as "[t]he heart of *Obergefell*."[130] Notably, *Obergefell* relies on *Loving*'s progeny, *Turner v. Safley*, to hold that "same-sex couples cannot be excluded from . . . intimate association," which has "informed the fundamental right to marry for decades."[131] Some legal scholars believe that *Obergefell* went even further than *Loving* in the significance it bestowed on liberty and that it "placed a far stronger emphasis on the intertwined nature of liberty and equality."[132] By acknowledging the interlocked nature of due process and equal protection, the argument articulates that *Obergefell* presents a new, comprehensive "antisubordination liberty" that provides protection to "historically subordinated groups."[133]

To echo the *Casey* plurality's words, *Loving*, *Lawrence*, and *Obergefell* are best understood not as a series of isolated points, but rather as a rational continuum of "judgmental responses" to a person's liberty interest in intimacy, regardless of whether that intimacy is exercised through marriage, sexual contact, or family planning.[134] This continuum, which started over fifty years ago with the Lovings' fight for legal recognition of their union and extended through the rapid emergence and ascendance of the LGBTQ+ rights movement, establishes the infrastructure for the "associational theory" of sex discrimination that has recently gained traction in Title VII jurisprudence. Though employment discrimination claims and freedom of intimate association may seem at first to be strange bedfellows, both the Second and Seventh Circuits relied heavily on *Loving* and its progeny to declare that "a person who is discriminated against because of the protected characteristic of one with whom she associates is actually being disadvantaged because of her own traits."[135] Indeed, the *Hively* court remarked that the line of cases establishing the "associational theory" of Title VII discrimination "began with *Loving*," and the *Zarda* court noted that "[c]onstitutional cases like *Loving* 'can provide helpful guidance in [the] statutory context' of Title VII."[136]

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[130] Wolff, *supra* note 83, at 30 (describing *Obergefell* as involving "pure application of precedent").

[131] *Id.* (describing elements of fundamental right to marry).

[132] Kenji Yoshino, *A New Birth of Freedom?:* Obergefell v. Hodges, 129 HARV. L. REV. 147, 148 (2015).

[133] *Id.* at 174 (describing "path forward for substantive due process" after *Obergefell*).

[134] FLEMING & MCCLAIN, *supra* note 50, at 243 (providing diagram of liberty cases in which Court has applied varied degrees of scrutiny).

[135] Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 347 (7th Cir. 2017) (en banc); *see* Zarda v. Altitude Express, Inc., 883 F.3d 100, 112 (2d Cir. 2018) (en banc) (finding that "sexual orientation discrimination—which is motivated by an employer's opposition to romantic association between particular sexes—is discrimination based on the employee's own sex"), *cert. granted*, 139 S. Ct. 1599 (2019) (mem.).

[136] *Zarda*, 883 F.3d at 126 (second alteration in original) (quoting Ricci v. DeStefano, 557 U.S. 557, 582 (2009)); *Hively*, 853 F.3d at 347.

C. *Sexual Orientation and Associational Discrimination Under Title VII*

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination because of "race, color, religion, sex, or national origin."[137] Though gender identity and sexual orientation are not explicitly named as protected categories, many legal scholars have advocated for their inclusion through a broad interpretation of "sex."[138] While the original intent of Title VII was "to ensure women were treated the same as men in employment," courts are divided on whether those protections extend to LGBTQ+ individuals.[139] In *Evans v. Georgia Regional Hospital*,[140] the Eleventh Circuit determined that an employee was foreclosed from bringing a Title VII claim of "workplace discrimination because of her sexual orientation."[141] Prior to 2017, "no federal circuit had found that sexual orientation, separate and distinct from sex-stereotyping,[142] was protected under Title VII."[143]

The Second and Seventh Circuits—in *Zarda* and *Hively*—reversed this trend by finding that sexual orientation was protected under Title VII, not on a sex-stereotyping theory, but independently due to what the courts dubbed "associational discrimination."[144] According to the associational theory, "when an employer fires a gay man based on the belief that men should not be attracted to other men, the employer discriminates based on the employee's own sex."[145]

Since 2000, Kimberly Hively, an "openly lesbian" educator, had worked at Ivy Tech Community College's South Bend campus as a part-time adjunct professor.[146] Her six applications for a full-time position at the college were all denied; moreover, "in July 2014 her part-time contract was not renewed."[147]

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[137] 42 U.S.C. § 2000e-2 (2012).

[138] *See, e.g.*, Laura Palk & Shelly Grunsted, *Born Free: Toward an Expansive Definition of Sex*, 25 MICH. J. GENDER & L. 1, 5-6 (2018).

[139] *Id.* at 23.

[140] 850 F.3d 1248 (11th Cir. 2017).

[141] *Id.* at 1255 (claiming to be bound by Fifth Circuit's decision in *Blum v. Gulf Oil Co.*, 597 F.2d 936, 938 (5th Cir. 1979), which stated that "[d]ischarge for homosexuality is not prohibited by Title VII").

[142] *See infra* Section II.A (describing cases involving sex-stereotyping).

[143] Palk & Grunsted, *supra* note 138, at 31. While many gay, lesbian, bisexual, and queer employees had brought successful Title VII actions under a sex-stereotyping theory, no circuit court had found that sexual orientation was protected because of associational discrimination until *Hively*. *Id.* at 31 (noting "need for statutory clarity on the issues of sexual orientation . . . discrimination"); *see infra* Section II.B (exploring Title VII sex-stereotyping doctrine).

[144] *See* Zarda v. Altitude Express, Inc., 883 F.3d 100, 112 (2d Cir. 2018) (en banc), *cert. granted*, 139 S. Ct. 1599 (2019) (mem.); Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 347 (7th Cir. 2017) (en banc) ("Hively also has argued that action based on sexual orientation is sex discrimination under the associational theory.").

[145] *Zarda*, 883 F.3d at 124.

[146] *Hively*, 853 F.3d at 341.

[147] *Id.*

Suspecting that these adverse employment actions had occurred because of her sexual orientation, Hively procured a right-to-sue letter from the Equal Employment Opportunity Commission ("EEOC") and brought suit against the college under Title VII for sex discrimination.[148] The district court judge and the Seventh Circuit panel, finding themselves constrained by precedent, dismissed Hively's claims.[149] However, "[i]n light of the importance of the issue, and recognizing the power of the full court to overrule earlier decisions and to bring [the] law into conformity with the Supreme Court's teachings," a majority of the Circuit voted to hear the appeal en banc.[150]

In overruling its prior cases to find that Hively had stated a claim for "sex" discrimination, the court found itself persuaded by both of Hively's legal arguments: first, that under the "tried-and-true comparative method," Hively would not have been subjected to the same employment action had she been dating a man; and second, a novel legal argument that Title VII "protect[s] her right to associate intimately with a person of the same sex."[151]

Regarding the associational discrimination argument, the *Hively* court declared: "It is now accepted that a person who is discriminated against because of the protected characteristic of one with whom she associates is actually being disadvantaged because of her own traits."[152] This conclusion, according to the Seventh Circuit, issues naturally from a trio of cases that found a right of action for racial discrimination.

The first, of course, is *Loving*, which established that "invidious racial discrimination" against interracial couples cannot stand simply because it harms both parties equally.[153] If "[c]hanging the race of one partner made a difference in determining the legality of the conduct," the action "rested on 'distinctions drawn according to race.'"[154] In rejecting the dissent's contention that its view of *Loving* as it related to Title VII is "anachronistic," the *Hively* court noted that many states still had antimiscegenation laws after Title VII was enacted that were enforced until *Loving* invalidated them three years later.[155]

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[148] *Id.*

[149] *Id.* (noting line of Seventh Circuit cases on which district court relied).

[150] *Id.* at 343.

[151] *Id.* at 345 ("[B]oth avenues end up in the same place: sex discrimination.").

[152] *Id.* at 347.

[153] Loving v. Virginia, 388 U.S. 1, 12 (1967) ("There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.").

[154] *Hively*, 853 F.3d at 348-49 (quoting *Loving*, 388 U.S. at 11); *id.* at 349 ("In the context of interracial relationships, we could just as easily hold constant a variable such as 'sexual or romantic attraction to persons of a different race' and ask whether an employer treated persons of different races who shared that propensity the same. That is precisely the rule that *Loving* rejected, and so too must we, in the context of sexual associations.").

[155] *Id.* at 348 (reasoning that antimiscegenation laws existing in 1967 were viewed as non-discriminatory prior to *Loving*).

Second, in *Parr v. Woodmen of the World Life Insurance Co.*,[156] the Eleventh Circuit ruled that a white man, who was not hired as an insurance salesman because his wife was black, had a right of action under Title VII for racial discrimination: "Where a plaintiff claims discrimination based upon an interracial marriage or association, he alleges, by definition, that he has been discriminated against because of *his* race."[157] The *Parr* court noted that it would be "folly" to find that the plaintiff could not sue under Title VII "based on an interracial marriage because, had the plaintiff been a member of the spouse's race, the plaintiff would still not have been hired."[158]

Finally, the Second Circuit reinforced *Parr*'s reasoning twenty years later in *Holcomb v. Iona College*,[159] which concerned a white assistant college basketball coach who claimed he was fired because he married a black woman.[160] The *Holcomb* court found that "where an employee is subjected to adverse action because an employer disapproves of interracial association, the employee suffers discrimination because of the employee's *own* race."[161]

The *Hively* court was unfazed that these cases all dealt with interracial associations and not with individuals of the same sex:

> The fact that *Loving*, *Parr*, and *Holcomb* deal with racial associations, as opposed to those based on color, national origin, religion, or sex, is of no moment. The text of the statute draws no distinction, for this purpose, among the different varieties of discrimination it addresses . . . . This means that to the extent that the statute prohibits discrimination on the basis of the race of someone with whom the plaintiff associates, it also prohibits discrimination on the basis of the national origin, or the color, or the religion, or (as relevant here) the sex of the associate. No matter which category is involved, the essence of the claim is that the *plaintiff* would not be suffering the adverse action had his or her sex, race, color, national origin, or religion been different.[162]

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[156] 791 F.2d 888 (11th Cir. 1986).

[157] *Id.* at 892. The *Parr* court took note of a Colorado Title VII decision, which found that the plaintiff in that case "was discriminated against on the basis of [her] race because [her] race was different from the race of the people [she] associated with." *Id.* at 891 (alterations in original) (quoting Reiter v. Ctr. Consol. Sch. Dist. No. 26-JT, 618 F. Supp. 1458, 1460 (D. Colo. 1985), *overruled on other grounds by* Drake v. City of Fort Collins, 927 F.2d 1156 (10th Cir. 1991)).

[158] *Id.* at 892.

[159] 521 F.3d 130 (2d Cir. 2008).

[160] *Id.* at 131-32.

[161] *Id.* at 139. The *Holcomb* court cited *Parr*, among other cases from various jurisdictions, to support its conclusion. *Id.*

[162] Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 349 (7th Cir. 2017) (en banc).

In *Zarda*, the Second Circuit faced a similar factual and precedential issue on the definition of "sex" discrimination under Title VII.[163] Donald Zarda,[164] who was gay, worked as a sky-diving instructor for Altitude Express, Inc. in the summer of 2010.[165] As he assisted clients in tandem skydives, he would sometimes inform female clients of his sexual orientation "to assuage any concern they might have about being strapped to a man."[166] Prior to one particular tandem skydive, Zarda informed a female client that he was gay in order to "preempt any discomfort."[167] After the completion of the dive, the client told her boyfriend that Zarda touched her inappropriately and "disclosed his sexual orientation to excuse his behavior."[168] Her boyfriend informed Zarda's boss of the allegation, who then fired Zarda, despite Zarda's adamant denial of any inappropriate contact.[169]

In September 2010, Zarda filed suit in federal court against Altitude Express, alleging, inter alia, sex discrimination under Title VII on the basis of his sexual orientation.[170] As in *Hively*, the district court and the Second Circuit panel both found that the case should be dismissed because of past binding precedent.[171] Thereafter, the Second Circuit ordered a rehearing en banc and finally, in 2018, decided to overturn its precedent, which had held that Title VII sex discrimination claims based on sexual orientation were "not cognizable under Title VII."[172]

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[163] Zarda v. Altitude Express, Inc., 883 F.3d 100, 107 (2d Cir. 2018) (en banc) ("[W]e have previously held that sexual orientation discrimination claims, including claims that being gay or lesbian constitutes nonconformity with a gender stereotype, are not cognizable under Title VII."), *cert. granted*, 139 S. Ct. 1599 (2019) (mem.).

[164] Donald Zarda died from injuries sustained in a BASE-jumping accident in Switzerland in October 2014; his sister and his partner "continue[d] with the case against Altitude Express as co-executors of [his] estate." Vanessa Chesnut, *Plaintiff at Center of Landmark Gay-Rights Case Never Got to Witness His Victory*, NBC NEWS (Mar. 3, 2018, 12:30 PM), https://www.nbcnews.com/feature/nbc-out/donald-zarda-man-center-major-gay-rights-case-never-got-n852846 [https://perma.cc/5FL9-C7VQ].

[165] *Zarda*, 883 F.3d at 108.

[166] *Id.* (noting that tandem skydives involve being "strapped hip-to-hip and shoulder-to-shoulder").

[167] *Id.*

[168] *Id.*

[169] *Id.* at 108-09 ("Zarda denied inappropriately touching the client and insisted he was fired solely because of his reference to his sexual orientation.").

[170] *Id.* at 109.

[171] *Id.* at 109-10.

[172] *Id.* at 110 (quoting Zarda v. Altitude Express, Inc., 855 F.3d 76, 82 (2017), *aff'd in part, vacated in part en banc*, 883 F.3d 100, 107 (2d Cir. 2018), *cert. granted*, 139 S. Ct. 1599 (2019) (mem.)) (noting that precedent could only be overturned "by the entire Court sitting in banc").

The *Zarda* court rested its decision on statutory-interpretation,[173] sex-stereotyping,[174] and associational-discrimination[175] grounds. For the purposes of this Note, the associational discrimination rationale is most notable because the *Zarda* court is only the second federal court of appeals besides *Hively* to adopt associational discrimination as a valid theory of "sex" discrimination under Title VII.[176] The Second Circuit also relied on the associational reasoning in *Holcomb* as a foundation for its conclusion and—similarly to *Hively*—was not concerned that *Holcomb* dealt with race instead of sex. "This conclusion," the *Zarda* court declared, "is consistent with the text of Title VII, which 'on its face treats each of the enumerated categories exactly the same' such that 'principles . . . announce[d]' with respect to sex discrimination 'apply with equal force to discrimination based on race, religion, or national origin,' and vice versa."[177] The court further asserted that its adoption of associational discrimination doctrine for sex discrimination is "reinforced by the reasoning of *Loving v. Virginia* . . . that policies that distinguish according to protected characteristics cannot be saved by equal application."[178]

After the Second and Seventh Circuits' watershed decisions in *Zarda* and *Hively*, associational discrimination is now a credible and judicially supported theory of sexual orientation discrimination under Title VII. Of course, the Supreme Court will soon rule on the validity of this theory, and the circuits are split on whether this theory has merit.[179] For example, Fifth Circuit Judge Ho, in a concurrence to his own majority opinion in *Wittmer v. Phillips 66 Co.*,[180] noted that the "traditional interpretation" of the word "sex," as it existed in 1964, should be determinative in finding that Title VII protections do not extend to sexual orientation or gender identity.[181]

[173] *Id.* at 113.

[174] *Id.* at 122.

[175] *Id.* at 125.

[176] *But see id.* at 125 n.25 (noting that "numerous district courts throughout the country have recognized that employers violate Title VII when they discriminate against employees on the basis of association with people of another national origin or sex").

[177] *Id.* at 125 (quoting Price Waterhouse v. Hopkins, 490 U.S. 228, 243 n.9 (1989)).

[178] *Id.* at 126.

[179] *See* Adam Liptak, *Supreme Court to Decide Whether Landmark Civil Rights Law Applies to Gay and Transgender Workers*, N.Y. TIMES (Apr. 22, 2019), https://www.nytimes.com/2019/04/22/us/politics/supreme-court-gay-transgender-employees.html.

[180] 915 F.3d 328 (5th Cir. 2019).

[181] *Id.* at 334 (Ho, J., concurring) (presenting competing views of sex discrimination as prohibiting employers from "favoring men over women, or vice versa" and requring "employers to be entirely blind to a person's sex"). *Wittmer* held that the transgender plaintiff had failed to present sufficient evidence to support a prima facie case of sex discrimination. *Id.* at 332 (noting that "Wittmer did not present evidence that any non-transgender applicants were treated better").

II. GENDER IDENTITY AND THE LIMITS OF SEX-STEREOTYPING

A. *Gender Identity and Sex-Stereotyping Under Title VII*

To date, no court has had occasion to decide whether transgender individuals and their cisgender partners are covered by associational discrimination under Title VII. The vast majority of cases alleging transgender discrimination under Title VII do so under a theory of "sex-stereotyping": cases where a plaintiff is "penalized by an employer for *nonconformity* with a gender stereotype."[182]

In *Price Waterhouse v. Hopkins*,[183] the Supreme Court affirmed sex-stereotyping as a proper theory of sex discrimination under Title VII.[184] *Price Waterhouse* concerned Ann Hopkins, a female senior manager at the firm who was considered for partnership in 1982.[185] She was not offered partnership that year, and the partners refused to consider her proposal the following year.[186] There was evidence that the partners' negative opinion of her was due, in part, to Hopkins's rejection of traditional female gender traits of femininity and gentleness.[187] Partners referred to her as "macho" and "masculine," and she was told to "walk," "talk," and "dress more femininely" to be reconsidered for partnership.[188] After the partners' refusal to consider her, Hopkins brought suit in federal court under Title VII, "charging that the firm had discriminated against her on the basis of sex in its decisions regarding partnership."[189] On appeal, the Supreme Court found that Hopkins's sex-stereotyping claim was a legally permissible theory of sex discrimination under Title VII:

> [W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for "[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."[190]

In order to make out a prima facie claim of sex-stereotyping under the *Price Waterhouse* framework, the "plaintiff must show that the employer actually

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[182] Ilona M. Turner, Comment, *Sex Stereotyping Per Se: Transgender Employees and Title VII*, 95 CALIF. L. REV. 561, 573 (2007).

[183] 490 U.S. 228 (1989).

[184] *Id.* at 251 ("As to the existence of sex stereotyping in this case, we are not inclined to quarrel with the District Court's conclusion that a number of the partners' comments showed sex stereotyping at work.").

[185] *Id.* at 231.

[186] *Id.* ("She was neither offered nor denied admission to the partnership; instead, her candidacy was held for reconsideration the following year.").

[187] *Id.* at 235 ("There were clear signs, though, that some of the partners reacted negatively to Hopkins' personality because she was a woman.").

[188] *Id.*

[189] *Id.* at 232.

[190] *Id.* at 251 (second alteration in original) (quoting City of L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978)) (analyzing legal relevance of sex-stereotyping).

relied on [the employee's] gender in making its decision."[191] If the plaintiff does so, the burden shifts to the employer, who must furnish a "legitimate reason" for the adverse employment action and show that the reason, "standing alone, would have induced it to make the same decision."[192]

The Sixth Circuit, among other jurisdictions,[193] has applied this sex-stereotyping standard to discrimination claims brought by transgender employees, starting with its decision in *Smith v. City of Salem*.[194] Jimmie Smith, a lieutenant in the Fire Department of Salem, Ohio, initially presented as male to coworkers and supervisors for the first seven years of her employment.[195] However, Smith eventually began "expressing a more feminine appearance on a full-time basis" and informed her supervisor that she was transitioning[196] to

[191] *Id.*

[192] *Id.* at 252 ("As to the employer's proof, in most cases, the employer should be able to present some objective evidence as to its probable decision in the absence of an impermissible motive.").

[193] *See, e.g.*, EEOC v. A & E Tire, Inc., 325 F. Supp. 3d 1129, 1133 (D. Colo. 2018) ("Title VII protects all persons, including transgender persons, from discrimination based on gender nonconformity."); Fabian v. Hosp. of Cent. Conn., 172 F. Supp. 3d 509, 527 (D. Conn. 2016) ("Employment discrimination on the basis of transgender identity is employment discrimination 'because of sex' and constitutes a violation of Title VII of the Civil Rights Act."). At least two circuits have employed the Court's reasoning in *Price Waterhouse* to allow a right of action for transgender individuals on a sex-stereotyping theory under other laws, including Title IX and § 1983. *See* Whitaker *ex rel* Whitaker v. Kenosha Unified Sch. Dist., 858 F.3d 1034, 1039 (7th Cir. 2017) (finding that transgender high school student can bring Title IX action against school district for refusing to let him use men's bathroom on sex-stereotyping theory); Glenn v. Bumbry, 663 F.3d 1312, 1318 (11th Cir. 2011) (declaring, in holding that plaintiff can bring § 1983 claim, that "[a]ll persons, whether transgender or not, are protected from discrimination on the basis of gender stereotype").

[194] 378 F.3d 566 (6th Cir. 2004).

[195] *Id.* at 568.

[196] Transition, in gender identity terms, is described as "[a] person's process of developing and assuming a gender expression to match their gender identity. Transition can include: coming out to one's family, friends, and/or co-workers; changing one's name and/or sex on legal documents; hormone therapy; and possibly (though not always) some form of surgery." *LGBTQ+ Definitions*, TSER, http://www.transstudent.org/definitions/ [https://perma.cc/P5YQ-RLRS] (last visited Sept. 21, 2019). It is emblematic of the shift in public understanding of gender identity that the court in this case, in 2004, misgendered Smith using male pronouns, referred to her as "transsexual," and noted that she was diagnosed with "Gender Identity Disorder." *Smith*, 378 F.3d at 568. The American Psychiatric Board retired the term "Gender Identity Disorder" in 2012 and replaced it with "Gender Dysphoria," defined as "a marked incongruence between one's experienced/expressed gender and assigned gender." Dani Heffernan, *The APA Removes "Gender Identity Disorder" from Updated Mental Health Guide*, GLAAD (Dec. 3, 2012), https://www.glaad.org/blog/apa-removes-gender-identity-disorder-updated-mental-health-guide [https://perma.cc/Z4M6-MYAQ].

embrace her female gender identity.[197] Her superiors met and, in an attempt to induce Smith to resign, decided to arrange for the town's Civil Service Commission to require Smith to undergo "three separate psychological evaluations with physicians of the City's choosing."[198] When Smith heard of her employers' plan, she filed suit in federal district court, asserting that they had discriminated against her under Title VII on the basis of her sex.[199]

On appeal, the Sixth Circuit found that Smith had properly "stated a claim for relief pursuant to Title VII's prohibition of sex discrimination" using a sex-stereotyping theory.[200] The court held that *Price Waterhouse* does not "provide any reason to exclude Title VII coverage for non sex-stereotypical behavior simply because the person is" transgender.[201] "It follows," the court reasoned, "that employers who discriminate against men because they . . . wear dresses and makeup, or otherwise act femininely, are . . . engaging in sex discrimination, because the discrimination would not occur but for the victim's sex."[202] Of course, the court's understanding of transgender women as men "wear[ing] dresses and makeup" is an incorrect and outdated interpretation of gender identity,[203] but its conclusion that employers cannot escape sex-stereotyping liability simply because of the employee's transgender identity still holds precedential weight.

In *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*,[204] the Sixth Circuit recently extended its reasoning in *Smith* more broadly.[205] Aimee Stephens, who was "assigned male at birth," served as a funeral director for R.G. & G.R. Funeral Homes, Inc. while living and presenting as male, using her "then-legal name" from April 2008 until July 2013.[206] In July 2013, Stephens informed her employer that she was transitioning into "the person that [her] mind already is."[207] The next month, her boss fired her because of his belief that "the Bible teaches that a person's sex is an immutable God-given gift."[208]

The Sixth Circuit first reinforced *Smith*'s conclusion that "[u]nder any circumstances, '[s]ex stereotyping based on a person's gender non-conforming

[197] *Smith*, 378 F.3d at 568.

[198] *Id.* at 569.

[199] *Id.*

[200] *Id.* at 575.

[201] *Id.*

[202] *Id.* at 574.

[203] *See supra* Introduction (discussing gender identity and explaining why *Smith* court's analysis is outdated).

[204] 884 F.3d 560 (6th Cir. 2018), *cert. granted in part*, 139 S. Ct. 1599 (2019) (mem.).

[205] *Id.* at 600 ("Discrimination against employees, either because of their failure to conform to sex stereotypes or their transgender and transitioning status, is illegal under Title VII.").

[206] *Id.* at 567.

[207] *Id.* at 568.

[208] *Id.* at 569.

behavior is impermissible discrimination.'"[209] Next, the court further extended this rationale, holding that all "discrimination on the basis of transgender and transitioning status violates Title VII."[210] In establishing a per se sex discrimination rule for transgender and transitioning employees, the court found that the employee's sex (or gender) is always relevant where "an employee's attempt or desire to change his or her sex leads to an adverse employment decision."[211] "[I]t is analytically impossible," the court asserted, "to fire an employee based on that employee's status as a transgender person without being motivated, at least in part, by the employee's sex."[212]

The funeral home appealed the decision, and on April 22, 2019, the Supreme Court decided to hear the case.[213] In an amicus brief, thirteen state attorneys general and three governors had urged the Supreme Court to grant certiorari and find that Title VII does not apply to transgender individuals.[214] The Trump Administration, through the U.S. Department of Justice, also filed a brief advocating for a statutory definition of "sex" that does not apply to transgender individuals.[215]

The potential ramifications for transgender employees could be monumental.[216] Were the Court to accept the Sixth Circuit's reasoning,

[209] *Id.* at 572 (second alteration in original) (quoting Smith v. City of Salem, 378 F.3d 566, 575 (6th Cir. 2004)); *id.* ("Here, Rost's decision to fire Stephens because Stephens was 'no longer going to represent himself as a man' and 'wanted to dress as a woman' falls squarely within the ambit of sex-based discrimination . . . ." (citation omitted)).

[210] *Id.* at 574-75.

[211] *Id.* at 576.

[212] *Id.* at 575.

[213] Liptak, *supra* note 179 ("The Supreme Court announced on Monday that it would decide whether the Civil Rights Act of 1964 guarantees protections from workplace discrimination to gay and transgender people in three cases expected to provide the first indication of how the court's new conservative majority will approach L.G.B.T. rights.").

[214] Brief for States of Nebraska et al. as *Amici Curiae* in Support of Petitioner at 1, R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC, No. 18-107 (U.S. Aug. 23, 2018), 2018 WL 4105814, at *1 (arguing that "'sex' under the plain terms of Title VII does not mean anything other than biological status"); Brooke Sopelsa, *16 States Urge High Court to Reject Federal Protections for Transgender Workers*, NBC NEWS (Aug. 29, 2018, 11:58 AM), https://www.nbcnews.com/feature/nbc-out/16-states-urge-high-court-reject-federal-protections-transgender-workers-n904741 [https://perma.cc/WT2F-LSFW]. Currently, no states have filed briefs in support of Aimee Stephens.

[215] Brief for the Federal Respondent in Opposition at 17, R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC, No. 18-107 (U.S. Oct. 24, 2018), 2018 WL 5293597, at *17 ("When Title VII was enacted in 1964, 'sex' meant biological sex . . . . Title VII thus does not apply to discrimination against an individual based on his or her gender identity.").

[216] Emanuella Grinberg, *She Came Out as Transgender and Got Fired. Now Her Case Might Become a Test for LGBTQ Rights Before the US Supreme Court.*, CNN (Sept. 3, 2018, 6:26 PM), https://www.cnn.com/2018/08/29/politics/harris-funeral-homes-lawsuit/index.html [https://perma.cc/Z93Z-8XF4] ("Advocates say the question could have dramatic implications not only for transgender individuals but for anyone who fails to meet an

transgender individuals could enjoy protection from employment discrimination nationwide. However, advocates of transgender rights are "deeply concerned about the potential outcome," especially after Brett Kavanaugh's confirmation to the bench, cementing the Court's 5-4 conservative majority.[217] A Supreme Court decision finding that transgender individuals are not protected under Title VII "would be extremely harmful for transgender people in the workplace because the holding would specifically focus on gender identity."[218] As Aimee Stephens points out, "the issues at stake are matters of life and death for the transgender community."[219]

B. *Gender Identity and Associational Discrimination*

While the Supreme Court's decision in *R.G. & G.R. Harris Funeral Homes* will have a profound effect on transgender employees, like Allegra Schawe-Lane, who experience discrimination at work,[220] their cisgender partners, like Dane Lane, do not have a clear right of action under the current common law framework as it relates to Title VII.

Both the per se rule and sex-stereotyping theories advanced by *R.G. & G.R. Harris Funeral Homes* fail to provide any protection to cisgender partners of transgender individuals in employment discrimination actions. In making its per se determination that discrimination against transgender employees is sex discrimination, the Sixth Circuit found that the relevance of sex is indisputable when "an employee's attempt or desire to change his or her sex leads to an adverse employment action."[221] However, cisgender individuals do not "desire to change" their sex; their "gender identity corresponds with the sex [they] had or [were] identified as having at birth."[222] Accordingly, they are categorically precluded from any per se protection rule regarding transgender gender identity.

Moreover, many cisgender partners of transgender individuals would be unsuccessful in bringing a claim under a sex-stereotyping theory under Title VII. The Sixth Circuit has definitively held that sex-stereotyping "based on a person's gender non-conforming behavior is impermissible discrimination."[223] While many partners of transgender individuals may indeed dress or act in ways that subvert gender stereotypes, some partners do conform, in appearance and

employer's expectations for how a man or woman should appear or behave." (quoting Sasha Buchert, Lambda Legal Staff Attorney)).

[217] *Id.* ("What they know about [Kavanaugh's] record on the D.C. Circuit Court of Appeals suggests he won't be friendly to workers or to the LGBT community . . . ." (quoting Harper Jean Tobin, Director of Policy for the National Center for Transgender Equality)).

[218] *Id.*

[219] *Id.*

[220] *See supra* notes 6-22 and accompanying text (describing Allegra Schawe-Lane's case).

[221] EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 576 (6th Cir. 2018), *cert. granted in part*, 139 S. Ct. 1599 (2019) (mem.).

[222] *Cisgender*, *supra* note 5.

[223] *R.G. & G.R. Harris Funeral Homes*, 884 F.3d at 572.

presentation, to traditional gender norms and tropes. Dane Lane, for instance, described himself in his complaint as having a "masculine gender expression."[224] As such, it seems unlikely that a cisgender individual like Lane would be able to state a valid Title VII claim under a sex-stereotyping theory.

To ensure that partners of transgender individuals are protected under Title VII, associational discrimination doctrine must be extended to gender identity as well as sexual orientation. The reasoning espoused in *Hively* and *Zarda* provides a clear roadmap for cisgender partners who have faced employment discrimination. A cisgender partner of a transgender individual who is discriminated against because of their partner's gender identity "is actually being disadvantaged because of [their] own traits."[225]

Dane Lane's horrific experience at the Kentucky Amazon warehouse provides a searing backdrop for the necessity of this logical expansion.[226] The foundational race discrimination cases that *Hively* rely upon are clearly analogous to Lane's predicament. Like the white man in *Parr* who was passed over for a job because his wife was black,[227] Lane was harassed and threatened at work because his wife was transgender.[228] The couples in *Parr* and *Holcomb*, along with Lane and his wife, all represent a digression from the homogenous, traditional notion of what constitutes a family. Just as the employers' actions in *Parr* reflect an aversion to interracial marriage,[229] Amazon's treatment of Lane and Schawe-Lane reflects an aversion to a marriage that commingles divergent gender identities.[230] Furthermore, in accordance with Title VII's approach to interracial marriage, it would be "folly" for a court not to find a right of action under Title VII for the partner of a transgender individual.[231] "[H]ad the plaintiff been a member of" the partner's gender identity, the plaintiff would most likely still have been subjected to the same adverse employment action.[232] The heinous treatment that Lane's transgender wife also endured at Amazon underscores this point.[233]

Furthermore, *Hively* demonstrated that it is "of no moment" that these foundational cases dealt with race instead of gender identity; Title VII draws no

[224] Complaint and Jury Demand, *supra* note 11, ¶ 37.

[225] Hively v. Ivy Tech Comm. Coll. of Ind., 853 F.3d 339, 347 (7th Cir. 2017) (en banc).

[226] *See supra* Introduction (discussing Lane's treatment at Amazon).

[227] Parr v. Woodmen of the World Life Ins. Co., 791 F.2d 888, 892 (11th Cir. 1986) ("Parr alleged that he was discriminated against because of his interracial marriage. Title VII proscribes race-conscious discriminatory practices.").

[228] *Trans Woman Sues Amazon*, *supra* note 6.

[229] *Parr*, 791 F.2d at 892.

[230] *Trans Woman Sues Amazon*, *supra* note 6 ("The lawsuit . . . alleges that Dane Lane and Allegra Schawe-Lane were targeted with threats, slurs and sexual harassment . . . .").

[231] *Parr*, 791 F.2d at 892.

[232] *Id.*

[233] *Trans Woman Sues Amazon*, *supra* note 6.

"distinction" between enumerated classes with regard to "discrimination."[234] The Second and Seventh Circuits, in *Zarda* and *Hively* respectively, have already embraced a broader view of sex in determining that sex includes sexual orientation.[235] This same broad lens can just as simply be used to include gender identity as well.[236]

Just as Richard Loving's whiteness was not a barrier to an equal protection challenge to Virginia's antimiscegenation law, it is immaterial whether the cisgender partner's gender identity is one that is not usually afforded additional protections; "the essence of the claim is that the *plaintiff* would not be suffering the adverse action had his or her sex [here, gender identity] . . . been different."[237] Put simply, the crux of a gender identity associational discrimination claim is that an employer initiates an adverse employment action against an employee because the employer disapproves of the intimate association between differing gender identities. The fact that Dane Lane is cisgender does not change the fact that he was subjected to sex discrimination.

This conclusion rests comfortably on the privacy, intimacy, and marriage cases that provide the foundation for *Hively* and *Zarda*, starting with *Loving*.[238] Contemporary understandings of due process doctrine have positioned *Loving*—which eradicated bans on interracial marriage and reaffirmed marriage's stature as a fundamental right[239]—as the starting point of an ever-evolving "rational continuum." This continuum has become broader and more inclusive as the courts have acknowledged changes in the country's social fabric.[240] Further, it has been understood to protect individuals' liberty interests in privacy, bodily autonomy, and intimate association.[241]

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[234] Hively v. Ivy Tech Comm. Coll. of Ind., 853 F.3d 339, 349 (7th Cir. 2017) (en banc).

[235] *Id.* at 350 ("It would require considerable calisthenics to remove the 'sex' from 'sexual orientation.'"); *see also* Zarda v. Altitude Express, Inc., 883 F.3d 100, 112 (2nd Cir. 2018) (en banc) ("We now conclude that sexual orientation is motivated, at least in part, by sex and is thus a subset of sex discrimination."), *cert. granted*, 139 S. Ct. 1599 (2019) (mem.).

[236] EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 577 (6th Cir. 2018), *cert. granted in part*, 139 S. Ct. 1599 (2019) (mem.).

[237] *Hively*, 853 F.3d at 349.

[238] *See supra* Section I.B (analyzing pivotal cases defining protections within intersection of sexual orientation and marriage).

[239] Loving v. Virginia, 388 U.S. 1, 2 (1967) ("For reasons which seem to us to reflect the central meaning of those constitutional commands, we conclude that these statutes cannot stand consistently with the Fourteenth Amendment.").

[240] *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 858 (1992) (plurality opinion) ("The latter aspect of the decision fits comfortably within the framework of the Court's prior decisions, the holdings of which are 'not a series of isolated points,' but mark a 'rational continuum.'" (citations omitted) (quoting Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting))).

[241] *See supra* Section I.A (describing *Loving* and development of associational discrimination framework).

The Court's landmark same-sex marriage decisions, *Windsor* and *Obergefell*,[242] reflect a respect for individuals' right to choose their intimate associates, and the "dignity" inherent in their "autonomy to make such profound choices."[243] Individuals with differing gender identities deserve the same right and freedom as same-sex and interracial couples to intimately associate with one another, and should be covered by the same protections in every aspect of public and private life. Dane Lane and Allegra Schawe-Lane deserve the same dignity that the courts ultimately bestowed upon Richard and Mildred Loving[244] and Jim Obergefell and his late husband John Arthur.[245] In order to ensure that dignity, the reasoning in *Zarda* and *Hively*, that associational discrimination is an actionable claim under Title VII for sexual orientation, must be extended to gender identity.

There are limits, however, to extending this statutory protection via judicial interpretation alone. Judicial interpretation is a jurisdiction-specific[246] and potentially fraught[247] solution to an issue that likely requires congressional intervention—an adhesive bandage on a festering wound. The next Part will discuss why statutory amendment of Title VII is crucial to providing consistent nationwide protection for transgender individuals and their cisgender partners from employment discrimination.

III. THE NECESSITY OF LEGISLATION

A. *Why Title VII Must Be Amended to Explicitly Protect Gender Identity*

While the logical extension of associational discrimination to employment actions involving gender identity can be achieved through statutory interpretation of the word "sex" in Title VII, there are several reasons it is imperative to amend Title VII to explicitly include "sexual orientation"[248] and "gender identity" as protected classes.

First, the common law acceptance of associational discrimination as a theory of sex discrimination is sharply jurisdiction-specific. Presently, only two circuit courts of appeal, the Second and Seventh Circuits, have accepted such claims.[249] Two other circuits have held the opposite—that sex discrimination based on

[242] *See supra* Section I.B (discussing same-sex marriage jurisprudence).

[243] Obergefell v. Hodges, 135 S. Ct. 2584, 2599 (2015).

[244] *Loving*, 388 U.S. at 2.

[245] *Obergefell*, 135 S. Ct. at 2594.

[246] *See supra* note 179 and accompanying text.

[247] *See supra* notes 216-219 and accompanying text.

[248] *See supra* note 235 and accompanying text.

[249] Zarda v. Altitude Express, Inc., 883 F.3d 100, 112 (2d Cir. 2018) (en banc), *cert. granted*, 139 S. Ct. 1599 (2019) (mem.); Hively v. Ivy Tech Comm. Coll. of Ind., 853 F.3d 339, 347 (7th Cir. 2017) (en banc).

intimate association is not actionable under Title VII.[250] Still other circuits have not ruled one way or another. Therefore, a cisgender partner of a transgender individual using associational discrimination as a litigation theory in a Title VII action would be subject to serious uncertainty or outright dismissal in some circuits, while potentially gaining traction in others. Legislative amendment of Title VII to include both sexual orientation and gender identity would legitimize the theory of associational discrimination nationwide as well as the transgender community as a protected class.

Second, the associational discrimination theory for transgender individuals and their partners is not only threatened by a jurisdictional split, but it is also potentially threatened by a superseding opinion by the Supreme Court. The Court has agreed to review both *R.G. & G.R. Harris Funeral Homes* and *Zarda* in its 2019-2020 term.[251] The impact of either case getting overturned would be devastating to a cisgender partner's associational discrimination argument.[252] If the Court were to side with Altitude Express and find that sexual orientation is not a cognizable form of sex discrimination under Title VII, it would eradicate the associational discrimination theory for sex discrimination entirely—it would only apply to interracial associations.[253] Alternatively, if the Court overrules *R.G. & G.R. Harris Funeral Homes* and finds that gender identity is not protected by Title VII, cisgender partners would similarly have no recourse, because the individuals they intimately associate with would no longer be considered a protected class.[254] The only way to alter the Supreme Court's ruling would be a statutory override—adding "sexual orientation" and "gender identity" to Title VII by congressional legislation, thereby altering the statutory

[250] *See* Wittmer v. Phillips 66 Co., 915 F.3d 328, 330 (5th Cir. 2019) ([W]e [have] expressly held that Title VII does not prohibit discrimination on the basis of sexual orientation."); Evans v. Georgia Reg'l Hosp., 850 F.3d 1248, 1255 (11th Cir. 2017) ("Evans next argues that she has stated a claim under Title VII by alleging that she endured workplace discrimination because of her sexual orientation. She has not.").

[251] Liptak, *supra* note 179 ("The Supreme Court announced on Monday that it would decide whether the Civil Rights Act of 1964 guarantees protections from workplace discrimination to gay and transgender people in three cases . . . ."). The Court consolidated *Zarda* with an Eleventh Circuit case, Bostock v. Clayton Cty. Bd. of Comm'rs, 723 Fed. App'x 964 (11th Cir. 2018) (per curiam), *cert. granted sub. nom.* Bostock v. Clayton County, Georgia, 139 S. Ct. 1599 (2019) (mem.), "that came to the opposite conclusion." *Id.*

[252] *See* Grinberg, *supra* note 216 ("If the court takes up the case, it could have broader implications for the definition of sex-based discrimination. And it could impact case law that precludes firing anyone—gay, straight or cisgender—for not adhering to sex-based stereotypes.").

[253] *Zarda*, 883 F.3d at 124 ("[A]ssociational discrimination extends beyond race to all of Title VII's protected classes.").

[254] EEOC v. R.G. & G.R. Funeral Homes, Inc., 884 F.3d 560, 575 (6th Cir. 2018) ("According to the Funeral Home, transgender status refers to 'a person's self-assigned "gender-identity" rather than a person's sex, and therefore such a status is not protected under Title VII."), *cert. granted in part*, 139 S. Ct. 1599 (2019) (mem.).

text. Preemptive adoption of these protected classes to Title VII via legislation would prevent such an outcome.

Finally, explicit statutory recognition of these protected classes would greatly strengthen the reasoning for extending associational discrimination protections to a transgender individual's cisgender partner.

Under the current statutory framework, one must make a series of narrative connections to conclude that cisgender partners of transgender individuals should receive Title VII protection against associational discrimination: (1) that equal application cannot redeem an invidiously discriminatory action,[255] (2) that "sex" under Title VII in fact encompasses both sexual orientation[256] and gender identity,[257] (3) that precedent providing protections for racial association extends logically to gender identity,[258] and (4) that heterosexual cisgender partners of transgender individuals deserve protection despite not being part of a protected class themselves.[259]

Amending Title VII would remove these convoluted challenges. With "gender identity" as its own co-extensive protected class alongside "race," protections afforded racial associations in *Loving*, *Parr*, and *Holcomb* would clearly apply to gender identity for the same reasons the Seventh Circuit identified for sexual orientation in *Zarda*: "To the extent that the statute prohibits discrimination on the basis of the race of someone with whom the plaintiff associates, it also prohibits discrimination on the basis of the national origin, or the color, or the religion, or (as relevant here) the sex of the associate."[260] *Zarda*'s reasoning would be further supported by the addition of "sexual orientation" to Title VII as well.[261]

There have been previous efforts to amend Title VII to accomplish these goals. The Equality Act, which would explicitly identify "sexual orientation" and "gender identity" as protected characteristics, has been introduced to Congress as a bipartisan bill numerous times to "amend existing civil rights law—including the Civil Rights Act of 1964, the Fair Housing Act, the Equal Credit Opportunity Act, the Jury Selection Services Act, and several laws regarding employment with the federal government."[262] A 2019 survey from the nonpartisan Public Religion Research Institute ("PRRI") found that sixty-nine

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[255] Loving v. Virginia, 388 U.S. 1, 9-10 (1967) (refuting state's arguments).

[256] *Zarda*, 883 F.3d at 112 ("We now conclude that sexual orientation discrimination is motivated, at least in part, by sex and is thus a subset of sex discrimination.").

[257] *R.G. & G.R. Harris Funeral Homes*, 884 F.3d at 577 ("Title VII protects transgender persons . . . .").

[258] *See supra* Section II.B (comparing racial precedents and gender identity).

[259] *See supra* Section II.B (drawing parallels between Richard Loving and Dane Lane).

[260] Hively v. Ivy Tech Comm. Coll. of Ind., 853 F.3d 339, 349 (7th Cir. 2017) (en banc) (cataloging when discrimination is prohibited).

[261] *Zarda*, 883 F.3d at 112.

[262] *The Equality Act*, HUM. RTS. CAMPAIGN, https://www.hrc.org/resources/the-equality-act [https://perma.cc/USV5-4UBG] (last visited Sept. 21, 2019).

percent of Americans favor the passage of such a law.[263] PRRI also found that the Equality Act "enjoys broad support across the political spectrum."[264] The Act is favored by seventy-nine percent of Democrats, seventy percent of independents, and fifty-six percent of Republicans.[265] Moreover, the Act is heavily supported by American businesses; it has been endorsed by "more than 160 major companies with operations in all 50 states, headquarters spanning 27 states, and a collective revenue of $3.8 trillion."[266]

Openly gay Congressman David Cicilline, who introduced the Equality Act to the House of Representatives in 2015, said of the Act:

> In most states, you can get married on Saturday, post your wedding photos to Facebook on Sunday, and then get fired on Monday just because of who you are. This is completely wrong. Fairness and equality are core American values. No American citizen should ever have to live their lives in fear of discrimination.[267]

As discussed below, the effort to pass the Equality Act continues.

B. *Counterarguments*

Of course, there are several potential counterarguments that seek to rebuff the need for statutory amendment. The first argument questions the necessity of the amendment, and the second reflects skepticism toward the legislation's likelihood of success.

1. Availability of Sex-Stereotyping Theory

The first counterargument contends that amending Title VII to include gender identity and sexual orientation is unnecessary because cisgender partners can simply bring a claim based upon the sex-stereotyping theory of sex discrimination. This argument is based on *Zarda*, which concluded that when "'an employer . . . acts on the basis of a belief that [men] cannot be [attracted to men], or that [they] must not be,' but takes no such action against women who

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[263] Daniel Greenberg et al., *Americans Show Broad Support for LGBT Nondiscrimination Protections*, PRRI (Mar. 3, 2019), https://www.prri.org/research/americans-support-protections-lgbt-people/ [https://perma.cc/JU7K-6RPN] ("Nearly seven in ten (69%) Americans favor laws that would protect LGBT people from discrimination in the job market, public accommodations, and housing.").

[264] *Id.*

[265] *Id.*

[266] *The Equality Act*, *supra* note 262.

[267] Press Release, Congressman David N. Cicilline, Cicilline Introduces Equality Act to Prohibit Discrimination Against LGBT Community (July 23, 2015), https://cicilline.house.gov/press-release/cicilline-introduces-equality-act-prohibit-discrimination-against-lgbt-community [https://perma.cc/DBU6-5KPL] ("'This bill is about justice. It is about freedom,' [then-Minority] Leader [Nancy] Pelosi said. 'The Equality Act is about ensuring that every American—no matter who they love, no matter who they are—can enjoy the full blessings of American democracy.'").

are attracted to men, the employer 'has acted on the basis of gender.'"[268] Some may argue that sex-stereotyping precedent for sexual orientation already provides a right of action for cisgender partners of transgender individuals. Using the conclusion in *Zarda* that employers who undertake adverse employment actions against employees because they are attracted to members of the same sex are engaging in sex-stereotyping, one could make the argument that a similar action against those who are attracted to transgender individuals is also sex-stereotyping.[269]

Under this proposed framework, if an employer acts on the basis of a belief that cisgender individuals cannot be attracted to transgender individuals or that they must not be, but takes no such action against cisgender individuals who are attracted to cisgender individuals, "the employer 'has acted on the basis of gender.'"[270] In the case of Dane Lane, he would claim that because Amazon and his coworkers mistreated him due to their belief that he should not be attracted to transgender people, and because they did not mistreat employees who were attracted to cisgender people, they discriminated against him on the basis of his sex.[271]

While that argument appears solid in theory, it crumbles under closer scrutiny. A sex-stereotyping theory based on *Zarda* would effectively—and impermissibly—conflate sexual orientation and gender identity.[272] In *Zarda*, the court based its analysis of sex-stereotyping on the concept that "same-sex orientation 'represents the ultimate case of failure to conform' to gender stereotypes."[273] However, gender identity has nothing to do with attraction to another person; rather, it is an individual's "innermost concept of self."[274] In the case of a heterosexual relationship between a transgender individual and a

[268] Zarda v. Altitude Express, Inc., 883 F.3d 100, 120-21 (2d Cir. 2018) (en banc) (alterations in original) (quoting Price Waterhouse v. Hopkins, 490 U.S. 228, 250 (1989)), *cert. granted*, 139 S. Ct. 1599 (2019) (mem.); *id.* ("This conclusion is [also] consistent with *Hively*'s holding that same-sex orientation 'represents the ultimate case of failure to conform' to gender stereotypes and aligns with numerous district courts' observation that 'stereotypes about homosexuality are directly related to our stereotypes about the proper roles of men and women . . . .'" (quoting Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 346 (7th Cir. 2017) (en banc))).

[269] *See Zarda*, 883 F.3d at 121 (identifying underlying "gender stereotype at work here" as stereotype "that 'real' men should date women, and not other men" (quoting Centola v. Potter, 183 F. Supp. 2d 403, 410 (D. Mass. 2002))).

[270] *Cf. id.*; *Price Waterhouse*, 490 U.S. at 250 ("In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.").

[271] *See supra* Introduction (discussing Lane's Title VII complaint).

[272] *See supra* Introduction (distinguishing sexual orientation and gender identity).

[273] *See Zarda*, 883 F.3d at 121 (quoting *Hively*, 853 F.3d at 346).

[274] *See* Adams, *supra* note 27 (quoting *Glossary of Terms*, *supra* note 25 (defining gender identity as "[o]ne's innermost concept of self as male, female, a blend of both or neither—how individuals perceive themselves and what they call themselves")).

cisgender individual, the relationship is not one of attraction to the same sex,[275] as in *Zarda*.[276] As such, Dane Lane, who is in a heterosexual relationship with his wife, would be unable to bring a sex discrimination claim on a sex-stereotyping theory.

2. Difficulty of Passing Legislation

The second argument posits that, in our polarized political climate,[277] the likelihood of passing legislation adding protections for LGBTQ+ individuals is extremely slim. This contention is certainly a serious one.

Transgender protections are still hot-button issues in American society.[278] Measures such as the so-called "bathroom bills"—which prohibit transgender individuals, including students, from using the restroom that matches their gender identity—have ignited fiery political battles on both state and national levels, from Indiana[279] to North Carolina.[280]

Most importantly, despite campaign promises to be an ally to LGBTQ+ individuals,[281] President Trump and his Administration have proven to be particularly hostile to the transgender community. One of President Trump's very first executive orders after assuming office in 2017 "was to unilaterally withdraw the Obama [A]dministration's guidance on protections for trans

[275] *See id.* (explaining that "[s]omeone can be transgender, but also be gay, straight, bisexual, asexual, or a whole host of other sexual identities that exist"); *supra* Introduction (distinguishing gender identity and sexual orientation).

[276] *Zarda*, 883 F.3d at 119.

[277] PEW RESEARCH CTR., POLITICAL POLARIZATION IN THE AMERICAN PUBLIC 6 (2014), http://www.people-press.org/2014/06/12/political-polarization-in-the-american-public/ [https://perma.cc/D4NC-JNHW] ("Republicans and Democrats are more divided along ideological lines—and partisan antipathy is deeper and more extensive—than at any point in the last two decades.").

[278] *See, e.g.*, Yael Bame, *21% of Americans Believe That Being Transgender Is a Mental Illness*, YOUGOV (May 17, 2017, 1:34 PM), https://today.yougov.com/topics/relationships/articles-reports/2017/05/17/21-americans-believe-identifying-transgender-menta [https://perma.cc/J4LC-CFY2] (finding that thirty-nine percent of Americans believe being transgender is a choice and twenty-seven percent do not want to be friends with transgender individuals).

[279] *Indiana Bill Targets Bathroom Use by Transgender People*, CHI. TRIB. (Dec. 24, 2015, 4:29 PM), https://www.chicagotribune.com/news/local/breaking/ct-indiana-bill-bathroom-transgender-20151224-story.html.

[280] Jonathan Drew, *North Carolina's Transgender Rights Battle Isn't Over*, USA TODAY (June 25, 2018, 10:20 PM), https://www.usatoday.com/story/news/nation/2018/06/25/north-carolina-bathroom-bill-transgender/729791002/ [https://perma.cc/B5L2-8X9K].

[281] Jeremy Diamond, *Donald Trump to LGBT Community: I'm a 'Real Friend,'* CNN (June 13, 2016, 7:05 PM), https://www.cnn.com/2016/06/13/politics/donald-trump-lgbt-community/index.html [https://perma.cc/R6BJ-K69J] ("[Trump] sought to draw a contrast with presumptive Democratic nominee Hillary Clinton, portraying himself as the 'real friend' of the gay community.").

students under Title IX."[282] Later that same year, President Trump announced on Twitter that he was reversing an Obama Administration policy and reinstating a ban on transgender individuals serving in the military.[283] Several news outlets reported in October 2018 that the Administration was "considering narrowly defining gender as a biological, immutable condition determined by genitalia at birth."[284] Considering that his Department of Justice filed a brief in the *R.G. & G.R. Harris Funeral Homes* case advocating for the exclusion of transgender individuals from Title VII protections,[285] it is extremely unlikely that President Trump will sign any bill amending Title VII to provide protections for transgender individuals.

Still, there are signs of hope on the horizon. The Trump Administration and the Republican Senate majority that would likely oppose any legislation providing transgender protections are guaranteed power only until January 2021. In the run-up to the 2018 midterm elections, Democrats in the House of Representatives promised that they would pass the Equality Act.[286] On January 3, 2019, after the Democrats won a resounding victory in the midterms to reclaim the House majority,[287] the 116th Congress was sworn in as "the queerest

[282] Michelle Chen, *Transgender Rights Are Under Siege in Trump's America*, THE NATION (Dec. 19, 2018), https://www.thenation.com/article/transgender-rights-trump-supreme-court/ [https://perma.cc/7ALA-XEJA].

[283] *See* Jeremy Diamond, *Trump to Reinstate U.S. Military Ban on Transgender People*, CNN (July 26, 2017, 9:23 PM), https://www.cnn.com/2017/07/26/politics/trump-military-transgender/index.html [https://perma.cc/L934-K7RL] ("'After consultation with my Generals and military experts, please be advised that the United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. Military,' Trump said in a series of tweets Wednesday morning."); Ariane de Vogue & Joan Biskupic, *Trump Administration Asks Supreme Court to Take Up Military Transgender Ban*, CNN (Nov. 24, 2018, 10:52 AM), https://www.cnn.com/2018/11/23/politics/military-transgender-ban-supreme-court/index.html [https://perma.cc/GH56-KRT2] ("In yet another aggressive attempt to bypass federal appeals courts, the Trump Administration asked the Supreme Court on Friday to hear a challenge to President Donald Trump's policy that bars most transgender individuals from military service.").

[284] Erica L. Green, Katie Benner & Robert Pear, *Trump May Limit How Government Defines One's Sex*, N.Y. TIMES, Oct. 22, 2018, at A1.

[285] Brief for the Federal Respondent in Opposition, *supra* note 215, at 17 ("Title VII thus does not apply to discrimination against an individual based on his or her gender identity.").

[286] Tim Fitzsimons, *Democrats Double Down on Equality Act Ahead of Midterm Elections*, NBC NEWS (Oct. 24, 2018, 12:20 PM), https://www.nbcnews.com/feature/nbc-out/democrats-double-down-equality-act-ahead-midterm-elections-n923846 [https://perma.cc/P7XD-ML2N] ("Nancy Pelosi, D-Calif., promised that passage of the Equality Act would be a top priority for a Democratic House majority.").

[287] Sabrina Siddiqui, *The Democratic Blue Wave Was Real*, THE GUARDIAN (Nov. 17, 2018), https://www.theguardian.com/us-news/2018/nov/16/the-democratic-blue-wave-was-real [https://perma.cc/NSW6-CGEQ].

and most diverse" session in history.[288] The majority of candidates vying for the 2020 Democratic presidential nomination have voiced their support for the Equality Act.[289] Indeed, in April 2019, Pete Buttigieg—the mayor of South Bend, Indiana—became the first openly gay man to seek the Democratic nomination for president.[290] On May 17, 2019, the House of Representatives passed the Equality Act by a 236-173 vote.[291] In June 2019, to commemorate the start of Pride Month, singer Taylor Swift started a petition to urge the Senate to follow the House's lead and pass the Act.[292] As of this writing, 559,189 individuals have signed the petition, including several sitting U.S. senators.[293]

Nevertheless, the political calculus remains—there will almost certainly be no amendment of Title VII to protect transgender individuals until President Trump leaves office.[294] In any event, regardless of the outcome of the upcoming presidential election, advocates of the Equality Act should push for its passage

[288] Rose Dommu, Opinion, *The 116th Congress Is Now the Queerest and Most Diverse in History*, OUT (Jan. 3, 2019, 11:05 AM), https://www.out.com/news-opinion/2019/1/03/116th-congress-now-queerest-and-most-diverse-history [https://perma.cc/P32R-TKTJ] ("This Thursday, an unprecedented number of queer women will be sworn into the 116th Congress, joining a historic number of women of color, making this class of Congress the most diverse in herstory.").

[289] *See, e.g.*, Kamala Harris (@KamalaHarris), TWITTER (Jan. 31, 2019, 11:50 AM), https://twitter.com/kamalaharris/status/1091061061560750087?lang=en [https://perma.cc/ZE9T-ZRZP] ("Passing the Equality Act won't only end discrimination against sexual orientation and gender identity, it's a pivotal part in ending homophobia and transphobia and moving our culture forward to be more inclusive and respectful."); Trudy Ring, *Grading Elizabeth Warren's LGBTQ Record*, ADVOCATE (Feb. 9, 2019, 3:15 PM), https://www.advocate.com/politics/2019/1/03/elizabeth-warren-persists-supporting-lgbtq-rights [https://perma.cc/5CQT-G378] (noting Senator Elizabeth Warren's cosponsorship of Equality Act).

[290] Nikki Schwab, *Pete Buttigieg Becomes First Openly Gay Democrat to Run for President*, N.Y. POST (Jan. 23, 2019, 2:09 PM), https://nypost.com/2019/01/23/pete-buttigieg-becomes-first-openly-gay-democrat-to-run-for-president/ [https://perma.cc/6YSZ-LD7Z]. *But see* Ryan C. Brooks, *Pete Buttigieg Is Not the First Openly Gay, Major Party Presidential Candidate*, BUZZFEED NEWS (Mar. 27, 2019, 4:26 PM), https://www.buzzfeednews.com/article/ryancbrooks/fred-karger-mayor-pete-buttigieg-gay-2020 [https://perma.cc/6SS2-E5BM] (noting that Fred Karger's unsuccessful candidacy for Republican nomination in 2012 U.S. Presidential election made him the first openly gay, major-party presidential candidate).

[291] Catie Edmonson, *Civil Rights Bill Advances But Is Unlikely to Get Far*, N.Y. TIMES, May 18, 2019, at A15.

[292] Taylor Swift, *Support the Equality Act*, CHANGE.ORG, https://www.change.org/p/support-the-equality-act [https://perma.cc/H693-QCMQ] (last visited Sept. 21, 2019).

[293] *Id.* (containing signatures and messages of support from Senators Cory Booker, Kirsten Gillibrand, Tim Kaine, Amy Klobuchar, Ed Markey, and Elizabeth Warren).

[294] *See* Edmonson, *supra* note 291 ("The response from the Republican-controlled Senate and White House, however, is likely to be a resounding no.").

as a moral imperative that transcends party lines and religious affiliations.[295] In the meantime, however, cisgender partners of transgender individuals facing workplace discrimination must advocate in their Title VII claims for judicial expansion of the associational discrimination doctrine detailed in *Zarda* and *Hively*.[296] Though the associational discrimination litigation strategy, without additional statutory protection, is an imperfect vehicle,[297] it will likely find success in certain jurisdictions and in some scenarios may persuade employers to settle, rather than face a costly and damaging trial.[298]

CONCLUSION

Under the current statutory framework, cisgender partners and spouses of transgender individuals are exposed to employment discrimination without a clear right of action under Title VII. Legislation to amend Title VII to explicitly include "gender identity," such as the Equality Act, is a crucial step in providing employment protections not only for transgender individuals, but also for their loved ones as well. However, as the wheels of social progress in Congress currently remain stalled, cisgender partners of transgender individuals seeking recourse against their employers for discriminatory behavior should push for a judicial expansion of associational discrimination doctrine to encompass gender identity as well.

The legacy of *Loving* demonstrates that everyone should be free to associate with the person they love—regardless of that person's race, sexual orientation, or gender identity—with autonomy, privacy, and dignity. While the harrowing experiences of Allegra Schawe-Lane and Dane Lane may seem like an unusually serious scenario, their ordeal is emblematic of everyday struggles for transgender Americans and their partners.[299] Title VII was enacted to ensure that individuals would be safe from discrimination in the workplace, and as such its reach should be viewed broadly to encompass those who are particularly susceptible to employment animus.[300] This includes cisgender partners of transgender individuals who are subject to workplace harassment. Ensuring that these vulnerable individuals are protected from discrimination for who they love is ultimately "what *Loving*, and loving, are all about."[301]

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[295] *See* Greenberg et al., *supra* note 263 (documenting broad majoritarian support for nondiscrimination protections for LGBTQ+ people).

[296] *See supra* Section II.B (applying associational discrimination to gender identity).

[297] *See supra* Section III.A (describing limits of associational discrimination strategy).

[298] *See* Wiessner, *supra* note 22 (detailing Amazon's settlement of bias claims with transgender employee).

[299] *See supra* Introduction (presenting transgender discrimination statistics).

[300] *See supra* Section I.C (discussing broad interpretation of "sex").

[301] Onwuachi-Willig, *supra* note 115 ("My generation was bitterly divided over something that should have been so clear and right. . . . I believe all Americans, no matter their race, no matter their sex, no matter their sexual orientation, should have that same freedom to marry. . . . That's what *Loving*, and loving, are all about." (quoting Mildred Loving)).