

Religious Nonadherence Claims as a Means of Contesting LGB-Related Employment Bias

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INTRODUCTION

“[I]t is clear that there is ‘no justification in the statutory language . . . for a categorical rule excluding’ . . . claims [of sexual orientation discrimination] from the reach of Title VII.”¹

Whereas courts are increasingly likely to hold that sexual orientation discrimination is actionable under Title VII as a form of sex discrimination,² they are virtually uniform in holding that lesbian, gay, and bisexual (LGB) persons cannot contest instances of religiously motivated sexual orientation bias as a type of religious discrimination.³ Specifically, courts dismiss LGB persons’ religious nonadherence claims on the grounds they are “repackaged claim[s]” of sexual orientation discrimination and, therefore, beyond the scope of Title VII.⁴ Religious nonadherence discrimination refers to situations in which employers discriminate against employees because the employees do not share or follow their employers’ religious beliefs.⁵ By recasting LGB plaintiffs’ otherwise cognizable claims of religious nonadherence discrimination as claims of sexual orientation discrimination, courts have effectively created a sexual orientation exception to Title VII’s ban on religious discrimination.⁶

One commentator argues that courts should reinforce this de facto exception by subjecting LGB persons’ religious nonadherence claims to a heightened evidentiary standard. In her 2014 law review article, Andrea Sinclair proposes a modified five-part analysis for determining whether a plaintiff has established a prima facie case of religious nonadherence discrimination under Title VII.⁷ Sinclair contends that a new standard is needed “to balance the sometimes-conflicting values of religious expression

1. *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 131 (2d Cir. 2018) (en banc) (quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998)).

2. *See, e.g., Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 341 (7th Cir. 2017) (en banc).

3. *See, e.g., Horton v. Midwest Geriatric Mgmt., LLC*, No. 4:17CV2324JCH, 2017 WL 6536576, at *5 (E.D. Mo. Dec. 21, 2017). *Contra Terveer v. Billington*, 34 F. Supp. 3d 100, 116–18 (D.D.C. 2014).

4. *See, e.g., Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 293 (3d Cir. 2009).

5. *See generally Shapolia v. Los Alamos Nat’l Lab.*, 992 F.2d 1033, 1037–39 (10th Cir. 1993) (identifying the proof elements necessary to establish a prima facie case of religious nonadherence discrimination). Religious nonadherence claims have also been referred to as “reverse religious discrimination claim[s].” *Noyes v. Kelly Servs.*, 488 F.3d 1163, 1168 (9th Cir. 2007).

6. *See, e.g., Horton*, 2017 WL 6536576, at *5 (holding plaintiff failed to state a cognizable claim of religious nonadherence discrimination notwithstanding the fact plaintiff alleged defendant withdrew its offer of employment because “Plaintiff held religious beliefs regarding homosexual marriage and relationships that could not be reconciled with [the defendant’s] religious beliefs regarding homosexual marriage and relationships”) (quotation marks omitted).

7. Andrea J. Sinclair, Note, *Delimiting Title VII: Reverse Religious Discrimination and Proxy Claims in Employment Discrimination Litigation*, 67 VAND. L. REV. 239, 269 (2014).

and [employment] nondiscrimination.”⁸ Specifically, she notes the current approach stands to allow LGB persons to contest sexual orientation discrimination via “proxy” claims of religious nonadherence discrimination.⁹ To guard against this possibility, Sinclair would modify the existing standard by requiring LGB plaintiffs to “show that the alleged discrimination was motivated by the employee’s religious beliefs on homosexuality, not merely their homosexual conduct or lifestyle.”¹⁰ According to Sinclair, such a provision would “encourage[] democratic accountability by requiring legislatures, rather than courts, to prohibit sexual orientation discrimination if the electorate demands it.”¹¹

Sinclair’s concern that LGB persons will seek to contest instances of sexual orientation-based employment bias as a form of religious nonadherence discrimination mirrors the “bootstrapping” arguments that—until recently—proved so effective in undermining LGB persons’ gender-stereotyping claims.¹² Indeed, courts once routinely dismissed gender-stereotyping claims brought by LGB persons for fear the plaintiffs were seeking to transform otherwise permissible instances of sexual orientation bias into actionable cases of sex discrimination.¹³ Within the past few years, however, a growing number of courts have held that sexual orientation discrimination is necessarily predicated on gender stereotypes such that anti-LGB employment bias is actionable under Title VII as a form of sex discrimination.¹⁴ These courts recognize that “the line between sex discrimination and sexual orientation discrimination is ‘difficult to draw’ because that line does not exist, save as a lingering and faulty judicial

8. *Id.* at 268.

9. *Id.* at 241–42. Sinclair uses the term “proxy claims” to “refer exclusively to the use of a reverse religious discrimination claim . . . to seek redress for sexual orientation discrimination in jurisdictions where sexual orientation discrimination is not prohibited.” *Id.* at 242 n.12.

10. *Id.* at 270.

11. *Id.* at 272.

12. See *Dawson v. Bumble & Bumble*, 398 F.3d 211, 218 (2d Cir. 2005) (asserting that because “stereotypical notions about how men and women should behave will often necessarily blur into ideas about heterosexuality and homosexuality,” the Second Circuit has “recognized that a gender stereotyping claim should not be used to ‘bootstrap protection for sexual orientation into Title VII’” (citations omitted)), *overruled by* *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 132 (2d Cir. 2018) (en banc). See also Zachary A. Kramer, *Of Meat and Manhood*, 89 WASH. U. L. REV. 287, 291 (2011) [hereinafter Kramer, *Manhood*] (“The theory behind this bootstrapping logic is that . . . gender-stereotyping claims are not sincere sex discrimination claims, but rather a kind of litigation sleight of hand, a way for [LGB] employees to create statutory protection where no such protection exists.”); Zachary A. Kramer, *Heterosexuality and Title VII*, 103 NW. U. L. REV. 205, 208 (2009) [hereinafter Kramer, *Heterosexuality*] (“For lesbian and gay employees, sexual orientation is a burden because courts are primed to reject otherwise actionable discrimination claims on the theory that such claims are an attempt to bootstrap protection for sexual orientation into Title VII.”).

13. Kramer, *Heterosexuality*, *supra* note 12, at 207 n.17 (collecting cases).

14. Alex Reed, *Abandoning ENDA*, 51 HARV. J. ON LEGIS. 277, 292–93 (2014) (collecting cases).

construct.”¹⁵ Conversely, in asserting a new approach is needed to prevent LGB persons from contesting sexual orientation discrimination as a form of religious nonadherence bias, Sinclair is seemingly unaware that courts are already inclined to engraft a sexual orientation exception into Title VII’s ban on religious discrimination.¹⁶

This article rejects the premise that the current proof structure should be modified to ensure that LGB persons’ allegations of religious nonadherence discrimination are not permitted to function as proxy claims for sexual orientation bias. Courts should instead repudiate the de facto sexual orientation exception to Title VII’s ban on religious discrimination so that LGB individuals are afforded the same employment protections as heterosexual persons. Part I provides a brief overview of the existing proof structure courts use to evaluate religious nonadherence claims and contrasts it with the modified five-part analysis proposed by Sinclair. Part II reveals that while courts are increasingly likely to disavow the sexual orientation exception in the specific context of sex discrimination, they continue to apply the exception in the area of religious discrimination. Part III demonstrates that the arguments for repudiating the sexual orientation exception in the context of religious discrimination are equally, if not more, compelling than those used to rebut the exception in the area of sex discrimination such that courts must evaluate religious nonadherence claims on their merits irrespective of plaintiffs’ sexual orientation.

I. ESTABLISHING A PRIMA FACIE CASE OF NONADHERENCE DISCRIMINATION

In the absence of direct evidence of discrimination, a Title VII plaintiff must rely on the burden-shifting framework of *McDonnell Douglas Corporation v. Green*.¹⁷ *McDonnell Douglas* allows plaintiffs to establish a prima facie case of discrimination using circumstantial evidence pursuant to a court-prescribed proof structure.¹⁸ Once a plaintiff has established a prima facie case, the burden shifts to the employer to offer evidence showing that the employer took the challenged employment action for legitimate, non-discriminatory reasons.¹⁹ If the employer satisfies this requirement, the burden then shifts back to the plaintiff to prove that the employer’s proffered reasons are pretextual.²⁰

15. *Zarda*, 883 F.3d at 122 (quoting *Videckis v. Pepperdine Univ.*, 150 F. Supp. 3d 1151, 1159 (C.D. Cal. 2015)).

16. *See infra* Part II.

17. 411 U.S. 792 (1973).

18. Steven J. Kaminshine, *Disparate Treatment as a Theory of Discrimination: The Need for a Restatement, Not a Revolution*, 2 STAN. J. C.R. & C.L. 1, 8–11 (2005).

19. *Tex. Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 (1981).

20. *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 514 (1993).

The elements of a prima facie case vary depending on the relevant facts.²¹ Because *McDonnell Douglas* concerned a job applicant's claim of race discrimination, the Supreme Court tailored its proof structure accordingly.²² Thus, the Court required the plaintiff to show:

(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.²³

The Court, however, was careful to note that “[t]he facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations.”²⁴ Consequently, lower courts often recast *McDonnell Douglas*' elements in more general terms. For example, one district court has described the prima facie elements as “(1) membership in a protected class; (2) qualification for the position; (3) an adverse employment action; and (4) circumstances giving rise to an inference of discrimination on the basis of membership in the protected class.”²⁵

The proof structure necessary to establish a prima facie case of religious nonadherence discrimination was first addressed by the Tenth Circuit Court of Appeals. In *Shapolia v. Los Alamos National Laboratory*, the Tenth Circuit observed that the traditional proof elements of *McDonnell Douglas* were ill-suited for the purposes of a religious nonadherence claim.²⁶ The court reasoned that use of *McDonnell Douglas*' first factor—protected class membership—would be misleading because it suggests some identifiable characteristic of the plaintiff in order to give rise to Title VII protection.²⁷ The Tenth Circuit went on to explain that “[w]here discrimination is not targeted against a particular religion, but against those who do not share a particular religious belief, the use of the protected class

21. Robert S. Whitman, Note, *Clearing the Mixed-Motive Smokescreen: An Approach to Disparate Treatment Under Title VII*, 87 MICH. L. REV. 863, 886 n.122 (1989).

22. *McDonnell Douglas*, 411 U.S. at 802.

23. *Id.* See also Charles A. Sullivan, *Disparate Impact: Looking Past the Desert Palace Mirage*, 47 WM. & MARY L. REV. 911, 926 (2005) (observing that “the famous four prongs of the prima facie case [described in *McDonnell Douglas*] were tailored to the relatively unusual facts before the Court, namely an employer's refusal to rehire a qualified black former employee when the job in question remained vacant”).

24. *McDonnell Douglas*, 411 U.S. at 802 n.13. See also Charles A. Sullivan, *The Phoenix from the Ash: Proving Discrimination by Comparators*, 60 ALA. L. REV. 191, 202 (2009) (“[T]he original *McDonnell Douglas* formulation was so fact-specific that it has applied to almost no actual cases.”).

25. *Ricci v. DeStefano*, 554 F. Supp. 2d 142, 151–52 (D. Conn. 2006).

26. 992 F.2d 1033, 1037–38 (10th Cir. 1993).

27. *Id.* at 1038.

factor is inappropriate.”²⁸ Consequently, the court articulated a new proof structure by which persons discriminated against on the basis of their failure to conform to their employer’s religious beliefs may establish a prima facie case:

[T]he plaintiff must show (1) that he was subjected to some adverse employment action; (2) that, at the time the employment action was taken, the employee’s job performance was satisfactory; and (3) some additional evidence to support the inference that the employment actions were taken because of a discriminatory motive based upon the employee’s failure to hold or follow his or her employer’s religious beliefs.²⁹

Although the court acknowledged these requirements were to some extent mandated by intra-circuit precedent,³⁰ a number of courts outside the Tenth Circuit have adopted the proof elements announced in *Shapolia* either implicitly or explicitly,³¹ and several additional courts have recognized the viability of religious nonadherence claims without adopting the proof structure of *Shapolia* specifically.³²

Shapolia’s tripartite analysis has been criticized on the grounds that it stands to transform otherwise permissible instances of sexual orientation bias into actionable cases of religious nonadherence discrimination. Specifically, Andrea Sinclair faults the Tenth Circuit for not requiring plaintiffs to demonstrate membership in a protected class consistent with the first element of *McDonnell Douglas*.³³ Sinclair contends such a requirement is necessary to prevent LGB persons from establishing a prima facie case of religious nonadherence discrimination based solely on their non-heterosexual sexual orientation.³⁴ Sinclair’s proposed analysis endeavors to correct this perceived shortcoming by requiring nonadherence plaintiffs to show that they have specific religious beliefs that differ from

28. *Id.*

29. *Id.*

30. *Id.* at 1038 n.6.

31. *E.g.*, *Noyes v. Kelly Servs.*, 488 F.3d 1163, 1168–69 (9th Cir. 2007); *Sattar v. Motorola, Inc.*, 138 F.3d 1164, 1169–70 (7th Cir. 1998); *Magden v. Easterday Farms*, No. 2:16-CV-00068-JLQ, 2017 WL 1731705, at *6–7 (E.D. Wash. May 3, 2017); *Burrows v. Coll. of Cent. Fla.*, No. 5:14-cv-197-Oc-30PRL, 2014 WL 7224533, at *2–3 (M.D. Fla. Dec. 17, 2014); *Terveer v. Billington*, 34 F. Supp. 3d 100, 116–17 (D.D.C. 2014); *Scott v. Montgomery Cty. Sch. Bd.*, 963 F. Supp. 2d 544, 553–54 (W.D. Va. 2013); *Sarenpa v. Express Images Inc.*, No. CIV.04-1538(JRT/JSM), 2005 WL 3299455, at *3 (D. Minn. Sept. 8, 2005); *Henegar v. Sears, Roebuck & Co.*, 965 F. Supp. 833, 836–37 (N.D.W. Va. 1997); *Yancey v. Nat’l Ctr. on Insts. & Alts.*, 986 F. Supp. 945, 954 (D. Md. 1997), *aff’d*, 141 F.3d 1162 (4th Cir. 1998).

32. *E.g.*, *Campos v. City of Blue Springs, Missouri* 289 F.3d 546, 551 (8th Cir. 2002); *Tillery v. ATSI, Inc.*, 242 F. Supp. 2d 1051, 1061 (N.D. Ala. 2003), on reconsideration, No. CIV.A. CV01-S-2736NE, 2003 WL 25699080 (N.D. Ala. Apr. 14, 2003), *aff’d*, 97 F. App’x 906 (11th Cir. 2004); *Backus v. Mena Newspapers, Inc.*, 224 F. Supp. 2d 1228, 1233 (W.D. Ark. 2002); *Erdmann v. Tranquility Inc.*, 155 F. Supp. 2d 1152, 1161–62 (N.D. Cal. 2001).

33. Sinclair, *supra* note 7, at 266–67.

34. *Id.* at 270.

those held by their employers.³⁵ According to Sinclair, this approach would require LGB persons to “show that the alleged discrimination was motivated by the employee’s religious beliefs on homosexuality, not merely their homosexual conduct or lifestyle.”³⁶

As recognized by the Tenth Circuit, however, the protected class factor is inapposite in the context of religious nonadherence discrimination. The court explained that “use of the ‘protected class’ factor in [these cases] would be misleading because it suggests some identifiable characteristic of the plaintiff in order to give rise to Title VII protection.”³⁷ Conversely, in the religious nonadherence context “it is the religious beliefs of the employer, and the fact that [the plaintiff] does not share them that constitute the basis of the claim.”³⁸ The Tenth Circuit, thus, found that “where discrimination is not targeted against a particular religion, but against those who do not share a particular religious belief, the use of the protected class factor is inappropriate.”³⁹ Because the policy considerations raised by Sinclair do nothing to alter this observation or otherwise undercut the court’s rationale, requiring LGB plaintiffs to demonstrate membership in a protected class as part of their prima facie case would not only be inapt but also discriminatory to the extent LGB plaintiffs would be subject to a more demanding evidentiary standard than similarly situated heterosexuals.

Additionally, Sinclair criticizes the Tenth Circuit for including a background-circumstances requirement as the third element of a prima facie case.⁴⁰ In particular, she contends that *Shapolia*’s background-circumstances component threatens to undermine employers’ First Amendment religious freedoms: “By allowing an employer’s unexpressed private beliefs and non-work related statements and activities to serve as background circumstances, an employer’s personal religious associations may be unfairly used to find the employer liable for employment discrimination.”⁴¹ To remedy this ostensible defect, Sinclair would have nonadherence plaintiffs show that someone in a supervisory capacity

35. *Id.* Sinclair contends this would have the practical effect of satisfying the *McDonnell Douglas* protected class requirement without making the plaintiff show that he or she is a religious minority. *Id.*

36. *Id.*

37. *Shapolia v. Los Alamos Nat’l Lab.*, 992 F.2d 1033, 1038 (10th Cir. 1993).

38. *Id.*

39. *Id.*

40. Sinclair, *supra* note 7, at 266–67. Describing *Shapolia*’s third element as a background-circumstances requirement is consistent with Sinclair’s characterizing religious nonadherence claims as a form of “reverse discrimination.” See generally Charles A. Sullivan, *The World Turned Upside Down?: Disparate Impact Claims by White Males*, 98 NW. U. L. REV. 1505, 1526 (2004) (observing that a prima facie case of “reverse discrimination” generally requires a plaintiff to “establish ‘background circumstances’ that support an inference that the defendant employer is the ‘unusual employer who discriminates against the majority’”).

41. Sinclair, *supra* note 7, at 266–67.

affirmatively sought to impose their religious beliefs on the plaintiff.⁴² Sinclair suggests that “[b]y requiring evidence . . . the employer engaged in attempted [religious] conversion, religious coercion, or other similar behavior, courts can simultaneously remedy . . . religious [nonadherence] discrimination and protect employers’ First Amendment rights.”⁴³

Sinclair’s First Amendment concerns appear unwarranted, however. Specifically, she asserts that “it will be difficult for lower courts to administer . . . [*Shapolia*’s background-circumstances] element without encroaching on employers’ constitutional rights to religious association and expression.”⁴⁴ Yet, Sinclair does not cite any authority for this proposition or several analogous propositions.⁴⁵ If the background-circumstances element were truly problematic in terms of the First Amendment, presumably there would be caselaw acknowledging that tension as *Shapolia* was decided more than twenty-five years ago.⁴⁶ The fact that courts continue to apply *Shapolia*’s proof structure and have done so as recently as 2017⁴⁷ suggests they are capable of evaluating plaintiffs’ religious nonadherence claims without infringing upon defendants’ First Amendment rights. Consequently, there is no reason to believe courts will suddenly find *Shapolia*’s proof structure unworkable if LGB persons are permitted to contest religiously motivated sexual orientation bias as a form of religious nonadherence discrimination.

Scholarly criticism aside, *Shapolia*’s tripartite analysis remains the prevailing standard for determining whether a plaintiff has established a prima facie case of religious nonadherence discrimination under Title VII.⁴⁸ Nevertheless, a number of courts appear to share Sinclair’s concern that LGB plaintiffs will seek to portray every instance of sexual orientation-based employment bias as a case of religious nonadherence discrimination.⁴⁹ Courts’ efforts to police the line between “genuine” and

42. *Id.* at 271.

43. *Id.*

44. *Id.*

45. *Id.* at 266–71.

46. *Cf.* Chamber of Commerce of the U.S. v. Hugler, 231 F. Supp. 3d 152, 194 (N.D. Tex. 2017) (finding a standard “far from unworkable” where “courts seemingly have had little trouble applying” it “over the years”), *rev’d on other grounds*, 885 F.3d 360 (5th Cir. 2018).

47. Magden v. Easterday Farms, No. 2:16-CV-00068-JLQ, 2017 WL 1731705, at *6–7 (E.D. Wash. May 3, 2017).

48. *See* cases cited *supra* note 31.

49. *See, e.g.*, Prowel v. Wise Bus. Forms, Inc., 579 F.3d 285, 293 (3d Cir. 2009) (finding an LGB plaintiff’s religious nonadherence claim was merely “a repackaged claim for sexual orientation discrimination” on the grounds it was “based entirely upon his status as a gay man”). *See also* Burrows v. Coll. of Cent. Fla., No. 5:14-cv-197-Oc-30PRL, 2014 WL 7224533, at *4 (M.D. Fla. Dec. 17, 2014) (“To the extent Plaintiff’s claim for religious discrimination is based solely on Defendant’s alleged religious disapproval of her sexual orientation, Plaintiff has failed to allege a claim for religious discrimination.”).

“proxy” claims in this area have given rise to a de facto ban on LGB persons’ ability to bring religious nonadherence claims under Title VII.⁵⁰ The next part will examine the sexual orientation exception in greater detail and show that, whereas the exception continues to be viable in religious nonadherence cases, courts are increasingly likely to repudiate it in the realm of sex discrimination.

II. EXAMINING THE SEXUAL ORIENTATION EXCEPTION TO TITLE VII: SEX V. RELIGION

Zachary Kramer has extensively documented courts’ invocation of bootstrapping concerns to justify the dismissal of LGB persons’ gender-stereotyping claims.⁵¹ In particular, Professor Kramer has observed that “[o]nce a court identifies an employee as gay or lesbian, the court makes itself hyperaware of the employee’s homosexuality, thereby enabling the employee’s homosexuality to swallow all other aspects of the employee’s identity.”⁵² Thus, “court[s] cannot help but view . . . [LGB persons’] gender-stereotyping claims through the lens of their homosexuality” so that when confronted with such claims “court[s] automatically leap[] to the conclusion that the employees are trying [to] bootstrap protection for sexual orientation” into Title VII.⁵³

These same bootstrapping fears have led courts to create a de facto sexual orientation exception to Title VII’s ban on religious bias whereby courts dismiss LGB persons’ otherwise actionable claims of religious nonadherence discrimination as mere proxy claims for sexual orientation discrimination.⁵⁴ In the religious nonadherence context, the sexual orientation exception generally takes three distinct forms, one or all of which may be present in a given case. First, courts insist that religious objections to homosexuality cannot, by themselves, form the basis of a

50. See Brief of Plaintiff-Appellant Mark Horton at 30, *Horton v. Midwest Geriatric Mgmt., LLC*, No. 18-1104 (8th Cir. Mar. 7, 2018) [hereinafter *Horton Brief*] (“An examination of the cases that embraced the true elements of a nonadherence claim reveals a rather unapologetic creation of a ‘sexual orientation exception’ to the viability of such claims.”).

51. Zachary A. Kramer, *The New Sex Discrimination*, 63 DUKE L.J. 891, 926–35 (2014); Kramer, *Heterosexuality*, *supra* note 12, at 219–20; Zachary A. Kramer, *The Ultimate Gender Stereotype: Equalizing Gender-Conforming and Gender-Nonconforming Homosexuals Under Title VII*, 2004 U. ILL. L. REV. 465, 473 (2004).

52. Kramer, *Manhood*, *supra* note 12, at 304.

53. *Id.* at 305.

54. *E.g.*, *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 292–93 (3d Cir. 2009); *Pedreira v. Ky. Baptist Homes for Children, Inc.*, 579 F.3d 722, 728 (6th Cir. 2009); *Burrows v. Coll. of Cent. Fla.*, No. 5:14-cv-197-Oc-30PRL, 2014 WL 7224533, at *3–4 (M.D. Fla. Dec. 17, 2014); *Bennefield v. Mid-Valley Healthcare, Inc.*, No. 6:13-cv-00252-MC, 2014 WL 4187529, at *4–5 (D. Or. Aug. 21, 2014). *Contra Terveer v. Billington*, 34 F. Supp. 3d 100, 116–18 (D.D.C. 2014); *Erdmann v. Tranquility Inc.*, 155 F. Supp. 2d 1152, 1159–62 (N.D. Cal. 2001).

nonadherence claim.⁵⁵ Second, courts focus their analyses on the plaintiff's religious beliefs rather than the defendant's perception of those beliefs.⁵⁶ Third, courts predicate their holdings on the plaintiff's LGB status rather than the defendant's discriminatory conduct.⁵⁷

A. Focusing on the Claim's Form Rather Than Its Substance

Courts once routinely dismissed LGB persons' claims of gender-stereotyping discrimination on the grounds they were "pure and simple" claims of sexual orientation discrimination.⁵⁸ A common observation made by courts of this era was that "stereotypical notions about how men and women should behave will often necessarily blur into ideas about heterosexuality and homosexuality" such that "gender stereotyping claims can easily present [bootstrapping] problems for an adjudicator" if "utilized by an avowedly homosexual plaintiff."⁵⁹ To solve this problem, courts engrafted a sexual orientation exception into Title VII so that they would be able to dismiss LGB persons' gender-stereotyping claims without having to consider such claims on their merits.⁶⁰

Today, however, courts are increasingly likely to hold that sexual orientation discrimination is necessarily predicated on gender stereotypes so as to be actionable under Title VII as a form of sex discrimination.⁶¹ These courts recognize that "the line between sex discrimination and sexual

55. See, e.g., *Prowel*, 579 F.3d at 293 (holding LGB plaintiff's alleged failure to conform to his employer's "'religious' belief [that a man should not lay with another man] leads ineluctably to the conclusion that [plaintiff] was harassed not 'because of religion,' but because of his sexual orientation").

56. See, e.g., *Pedreira*, 579 F.3d at 728 (affirming dismissal of lesbian's religious nonadherence claim on the grounds she "has not alleged any particulars about her religion that would even allow an inference that she was discriminated against on account of her religion, or more particularly, her religious differences with" her employer).

57. See, e.g., *Burrows*, 2014 WL 7224533, at *3-4 (dismissing lesbian's religious nonadherence claim on the grounds "Title VII does not apply to discrimination claims based on sexual orientation" where plaintiff alleged she had been demoted and ultimately terminated because she did not share her employer's belief that LGBT persons "are sinners and live in a manner inconsistent with 'good Christian values'").

58. E.g., *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 264 (3d Cir. 2001).

59. *Dawson v. Bumble & Bumble*, 398 F.3d 211, 218 (2d Cir. 2005) (quoting *Howell v. N. Cent. Coll.*, 320 F. Supp. 2d 717, 723 (N.D. Ill. 2004)), *overruled by Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 132 (2d Cir. 2018) (en banc).

60. See *Kramer, Manhood*, *supra* note 12, at 304 ("The bootstrapping logic dodges the substance of the employee's claim by adopting a zero tolerance approach: if a claim makes any mention of homosexuality, then it is a sexual orientation claim and must fail.").

61. *Zarda*, 883 F.3d at 119-23; *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 346-47 (7th Cir. 2017) (en banc). See also Brief for Am. Civil Liberties Union et al. as Amici Curiae Supporting Plaintiff-Appellant at 18-19, *Horton v. Midwest Geriatric Mgmt., LLC*, No. 18-1104 (8th Cir. Mar. 14, 2018) (collecting cases).

orientation discrimination is ‘difficult to draw’ because that line does not exist save as a lingering and faulty judicial construct.”⁶²

Conversely, no such evolution has occurred with regard to LGB persons’ claims of religious nonadherence discrimination, and the sexual orientation exception remains entrenched. Indeed, as recently as December 2017, a court dismissed an LGB plaintiff’s claim of religious nonadherence discrimination after determining that the only way in which the plaintiff failed to conform to his employer’s religious beliefs was his sexual orientation.⁶³ This is consistent with the Third Circuit’s finding that where a religious nonadherence claim was predicated on an employer’s belief “that a man should not lay with another man,” the discrimination was based on the plaintiff’s homosexuality rather than his religion.⁶⁴ Similarly, where a lesbian was allegedly demoted and terminated because she did not share her employer’s belief that LGBT people “are sinners and live in a manner inconsistent with good Christian values,” a court dismissed her claim because it was “based solely” on her employer’s religiously-motivated objections to homosexuality.⁶⁵

B. Focusing on the Plaintiff’s Beliefs Rather Than the Defendant’s Perceptions

Courts have historically dismissed gender-stereotyping claims brought by LGB persons on the grounds the plaintiffs failed to exhibit any readily observable, objectively gender-nonconforming characteristics in the workplace.⁶⁶ These courts often note that in recognizing a gender stereotyping theory of sex discrimination, the Supreme Court “focused principally on characteristics that were readily demonstrable in the workplace, such as the plaintiff’s manner of walking and talking at work,”⁶⁷ whereas LGB persons’ claims purportedly seek to rely on gender-nonconforming characteristics exhibited outside of the workplace.⁶⁸

62. *Zarda*, 883 F.3d at 122 (quoting *Videckis v. Pepperdine Univ.*, 150 F. Supp. 3d 1151, 1159 (C.D. Cal. 2015)). See also *Hively*, 853 F.3d at 346 (“Our panel described the line between a gender nonconformity claim and one based on sexual orientation as gossamer-thin; we conclude that it does not exist at all.”).

63. *Horton v. Midwest Geriatric Mgmt., LLC*, No. 4:17CV2324 JCH, 2017 WL 6536576, at *5 (E.D. Mo. Dec. 21, 2017).

64. *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 293 (3d Cir. 2009).

65. *Burrows v. Coll. of Cent. Fla.*, No. 5:14-cv-197-Oc-30PRL, 2014 WL 7224533, at *3–4 (M.D. Fla. Dec. 17, 2014).

66. See Alex Reed, *Same-Sex Harassment After Boh Brothers*, 2016 UTAH L. REV. 441, 441 n.4 (2016) (collecting cases).

67. *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 763 (6th Cir. 2006).

68. See *id.* (“Vickers contends that in the eyes of his co-workers, his sexual practices, whether real or perceived, did not conform to the traditionally masculine role.”).

Within the past few years, however, courts have begun to hold that plaintiffs are not required “to prop up [their] employer’s subjective discriminatory animus by proving that it was rooted in some objective truth.”⁶⁹ Under this approach, whether a plaintiff exhibited any readily observable, objectively gender-nonconforming characteristics in the workplace is irrelevant.⁷⁰ Rather, the focus in such cases is on the defendant’s perception of the plaintiff and, more specifically, whether the defendant subjectively perceived the plaintiff as contravening gender norms.⁷¹ This approach is consistent with the Supreme Court’s observation that the critical inquiry in employment discrimination cases is whether the defendant possessed a “subjective intent to discriminate,”⁷² not whether the plaintiff belonged to a statutorily-protected class in some objective, empirical sense.⁷³

Courts adjudicating religious nonadherence claims, however, continue to demand that LGB plaintiffs “prop up . . . [their] employer’s subjective discriminatory animus by proving that it was rooted in some objective truth.”⁷⁴ To prevail, LGB plaintiffs “must show that their homosexuality is derived from their religious beliefs” and that they expressed those beliefs publicly in the workplace.⁷⁵ Meanwhile, the defendant’s religious views and the defendant’s perception of the plaintiff’s religious views are seemingly deemed irrelevant for the purposes of these courts’ analyses.⁷⁶

In *Pedreira v. Kentucky Baptist Homes for Children*, for example, the Sixth Circuit dismissed a Title VII claim brought by a lesbian who alleged the defendant fired her because she did not hold her employer’s religious belief that “homosexuality is sinful.”⁷⁷ The court acknowledged that the

69. *EEOC v. Boh Bros. Constr. Co.*, 731 F.3d 444, 456–57 (5th Cir. 2013) (en banc).

70. *Reed*, *supra* note 66, at 462.

71. *E.g.*, *Pinedo v. All. Inspection Mgmt., LLC*, No. EP-14-CV-195-KC, 2015 WL 3747426, at *10–11 (W.D. Tex. June 14, 2015) (noting that a jury could reasonably conclude that harasser’s homophobic epithets were rooted in plaintiff’s “fail[ure] to conform to [harasser’s] stereotyped expectations of masculinity”). *See also* *Reed*, *supra* note 66, at 461–62 (recognizing an analysis focusing on the defendant’s subjective perception of the plaintiff’s gender presentation is “consistent with the larger body of disparate-treatment jurisprudence”).

72. *Reed*, *supra* note 66, at 461 (citing *Raytheon Co. v. Hernandez*, 540 U.S. 44, 52–53 (2003)).

73. The “subjective perception” approach to gender stereotyping is consistent with the emerging body of case law on misperception discrimination, whereby plaintiffs are found to have cognizable Title VII claims even though the discrimination they endured was motivated by the defendant’s mistaken or inaccurate perception of the plaintiff as being a particular race, color, religion, sex, or national origin. *See generally* *Arsham v. Mayor of Balt.*, 85 F. Supp. 3d 841, 845–49 (D. Md. 2015) (collecting cases).

74. *Boh Bros.*, 731 F.3d at 457, n. 10.

75. *Sinclair*, *supra* note 7, at 261. *Cf.* *Horton* Brief, *supra* note 50, at 34 (acknowledging the district court dismissed plaintiff’s religious nonadherence claim “based on the absence of allegations [in the complaint] about [plaintiff’s] own religion”).

76. *See Pedreira v. Ky. Baptist Homes for Children, Inc.*, 579 F.3d 722, 728 (6th Cir. 2009) (disregarding defendant’s religious views); *Bennefield v. Mid-Valley Healthcare, Inc.*, No. 6:13-cv-00252-MC, 2014 WL 4187529, at *4–5 (D. Or. Aug. 21, 2014) (same).

77. 579 F.3d at 727–28 (6th Cir. 2009).

plaintiff's homosexuality was the catalyst for her termination, but faulted the plaintiff for "not alleg[ing] any particulars about *her* religion."⁷⁸ Moreover, the court found the plaintiff's complaint deficient to the extent that it "does not allege that her sexual orientation is premised on *her* religious beliefs or lack thereof" or "whether *she* accepts or rejects Baptist beliefs."⁷⁹ In requiring particularized allegations regarding the plaintiff's own religious beliefs rather than examining whether the defendant possessed a subjective intent to discriminate based on his perception of those beliefs, the Sixth Circuit misconstrued the applicable standard and dismissed an otherwise viable claim.⁸⁰

This error is not unique to the Sixth Circuit, however. In *Bennefield v. Mid-Valley Healthcare*, a lesbian brought a Title VII claim against her employer based, in part, on the fact that after she declined to answer a coworker's questions regarding her religious practices, the coworker told her, "You really need to find god" and "If you would just find god you wouldn't have this disgusting problem."⁸¹ The court held that these statements failed to provide evidence of religiously-motivated employment discrimination and noted that the plaintiff had not cited any authority for the proposition that an employer may be liable for religious discrimination "despite not knowing plaintiff's religion, or even knowing if plaintiff holds any religious beliefs at all."⁸² Consequently, the court characterized the plaintiff's religious nonadherence claim as "merely a repackaged claim for sexual orientation discrimination" and granted summary judgment for the employer.⁸³

Courts should not require LGB plaintiffs to make detailed disclosures about their religious beliefs, since courts do not require heterosexual plaintiffs to make such disclosures. In a case brought by a heterosexual woman, for example, the Seventh Circuit characterized the relevant inquiry as follows:

What matters in this context is not so much what [plaintiff's] own religious beliefs were, but [her male supervisor's] asserted perception that she did not share his own. She need not put a label on her own religious beliefs, therefore, or demonstrate that she communicated her religious status and needs as she would if she were complaining that the [employer] had failed to accommodate a particular religious practice. [Rather, she] need only

78. *Id.* at 728 (emphasis added).

79. *Id.* (emphasis added).

80. *Cf. EEOC v. Boh Bros. Constr. Co.*, 731 F.3d 444, 456 (5th Cir. 2013) (en banc) (observing that in disparate treatment cases, courts focus on the defendant's "subjective perception of the victim" so that "even an employer's wrong or ill-informed assumptions about its employee may form the basis of a discrimination claim" as liability is an "intent-based inquiry").

81. No. 6:13-cv-00252-MC, 2014 WL 4187529, at *4 (D. Or. Aug. 21, 2014).

82. *Id.* at *5.

83. *Id.* at *5–6.

show that her perceived religious shortcomings . . . played a motivating role in her discharge.⁸⁴

Similarly, other courts have permitted heterosexual persons' religious nonadherence claims to proceed notwithstanding the fact that the plaintiff was not himself religious⁸⁵ or had not made any allegations regarding her religious beliefs.⁸⁶ In *Shapolia v. Los Alamos National Laboratory*, moreover, the Tenth Circuit was prepared to find that the plaintiff had established a prima facie case of religious nonadherence discrimination even though it was unclear whether "any parties were aware of the plaintiff's religion at the time of the employment actions."⁸⁷ Consequently, LGB persons' religious beliefs, or lack thereof, are not dispositive of whether they have stated a cognizable religious nonadherence claim, just as LGB persons' conduct in the workplace is not dispositive of whether they have stated a viable gender-stereotyping claim. In each setting, the proper focus is on how the defendant subjectively perceived the plaintiff's gender or religious expression and whether the defendant discriminated against the plaintiff on that basis.

C. Focusing on the Plaintiff's Status Rather Than the Defendant's Conduct

In the past, courts often dismissed LGB persons' gender-stereotyping claims after determining they were predicated on the individuals' LGB status rather than any gender-nonconforming conduct.⁸⁸ In response to plaintiffs' contention that they were discriminated against based on their perceived gender-nonconforming sexual practices, courts held that gender-stereotyping claims were not broad enough to encompass individuals' romantic associations.⁸⁹ These courts reasoned that if such claims were cognizable, "any discrimination based on sexual orientation would be actionable under a sex stereotyping theory . . . as all homosexuals, by definition, fail to conform to traditional gender norms in their sexual practices."⁹⁰

Today, however, courts are increasingly likely to find LGB persons' gender-stereotyping claims actionable even when they are predicated on the

84. *Venters v. City of Delphi*, 123 F.3d 956, 972 (7th Cir. 1997) (citation omitted).

85. *Sarenpa v. Express Images Inc.*, No. Civ.04-1538(JRT/JSM), 2005 WL 3299455, at *1, *4 (D. Minn. Sept. 8, 2005).

86. *Henegar v. Sears, Roebuck & Co.*, 965 F. Supp. 833, 837 (N.D. W. Va. 1997).

87. 992 F.2d 1033, 1035 n.2 (10th Cir. 1993).

88. See Luke A. Boso, *Acting Gay, Acting Straight: Sexual Orientation Stereotyping*, 83 TENN. L. REV. 575, 591-92 (2016); Brian Soucek, *Perceived Homosexuals: Looking Gay Enough for Title VII*, 63 AM. U. L. REV. 715, 731 (2014).

89. *E.g.*, *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 763 (6th Cir. 2006).

90. *Id.* at 764.

plaintiffs' homosexual status.⁹¹ The Second Circuit, for example, recently held 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 are attracted to men, the employer ‘has acted on the basis of gender’” in contravention of Title VII.⁹² Similarly, not long ago the Seventh Circuit determined “that a person who alleges . . . employment discrimination on the basis of . . . sexual orientation has put forth a case of sex discrimination for Title VII purposes.”⁹³

Nevertheless, courts continue to reject LGB persons' claims of religious nonadherence discrimination on the grounds they are predicated on the individuals' LGB status rather than any nonconforming religious beliefs.⁹⁴ The flaw with this rationale is that a plaintiff's sexual orientation, standing alone, is irrelevant for the purposes of a religious nonadherence claim, which turns on whether the plaintiff's perceived failure to conform to the defendant's religious beliefs motivated the defendant's discriminatory *conduct*. Indeed, after announcing what would become the prevailing proof structure for claims of religious nonadherence discrimination, the Tenth Circuit held that the complaint's lone allegation of discriminatory conduct failed to raise an inference that the plaintiff's termination was a result of his perceived nonadherence to the Mormon faith.⁹⁵ Likewise, in a religious nonadherence case brought by a heterosexual woman, the Seventh Circuit focused its analysis on the conduct of Jennifer Venters' supervisor, Larry Ives, rather than on her sexual orientation:

Granted, at no time did Ives ever admit when he fired Venters he did so because she did not meet his religious expectations. But if we credit the evidence that Venters has presented, Ives promised to do just that on a number of occasions preceding her discharge. As Venters recounts events, Ives described the police station as “God's house”; and to work in that

91. This trend is consistent with Supreme Court precedent declining to distinguish between LGB persons status and conduct in the constitutional context. See *Christian Legal Soc'y Chapter v. Martinez*, 130 S. Ct. 2971, 2990 (2010) (“Our decisions have declined to distinguish between status and conduct in this context.”) (citing *Lawrence v. Texas*, 539 U.S. 558, 575 (2003)). See also *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 127 (2d Cir. 2018) (en banc) (“[T]he Supreme Court has rejected arguments that would treat acts as separate from status in the context of sexual orientation.”).

92. *Zarda*, 883 F.3d at 120–21 (alterations in original) (quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989)).

93. *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 351–52 (7th Cir. 2017) (en banc).

94. E.g., *Horton v. Midwest Geriatric Mgmt., LLC*, No. 4:17CV2324JCH, 2017 WL 6536576, at *5 (E.D. Mo. Dec. 21, 2017) (“Plaintiff's ‘identification of this single ‘religious’ belief leads ineluctably to the conclusion that he was [discriminated against] not ‘because of religion,’ but because of his sexual orientation.”) (quoting, as amended, *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 293 (3d Cir. 2009)); *Burrows v. Coll. of Cent. Fla.*, No. 5:14-cv-197-Oc-30PRL, 2014 WL 7224533, at *4 (M.D. Fla. Dec. 17, 2014) (“To the extent Plaintiff's claim for religious discrimination is based solely on Defendant's alleged religious disapproval of [their] sexual orientation, Plaintiff has failed to allege a claim for religious discrimination.”).

95. *Shapolia v. Los Alamos Nat'l Lab.*, 992 F.2d 1033, 1039–40 (10th Cir. 1993).

house, one had to be spiritually whole, and that required her to be “saved.” If Venters proved herself unwilling to play by “God’s rules,” Ives warned her—if she did not choose “God’s way” over “Satan’s way”—she would lose her job. In a similar vein, after concluding that Venters was leading a life of sin, Ives proclaimed that he would not permit the “evil spirit that had taken [her] soul” to continue inhabiting the police department. One can readily infer from these remarks that Ives was not only willing (indeed, inclined) to evaluate employees in terms of his own religious beliefs and standards, but that in Venters’ case, he actually did so.⁹⁶

Courts adjudicating LGB persons’ religious nonadherence claims, therefore, must not allow the “employee’s homosexuality to swallow all other aspects of the employee’s identity.”⁹⁷ Rather, courts should concentrate their analyses on the defendant’s conduct and, more specifically, whether the defendant’s perception that the plaintiff did not share or follow the defendant’s religious beliefs motivated the challenged employment action. If so, the plaintiff has stated a viable nonadherence claim irrespective of his or her sexual orientation.

The preceding analysis has shown that courts are inclined to view LGB persons’ nonadherence claims “through the lens of their homosexuality” so that when confronted with such claims courts “automatically leap to the conclusion that the employees are trying to bootstrap protection for sexual orientation” into Title VII.⁹⁸ Thus, courts have effectively amended Title VII to include a sexual orientation exception not found in the statutory text. The next part will demonstrate that the arguments for repudiating this exception are equally – if not more – compelling than those used to rebut the exception in the area of sex discrimination.

III. REFUTING THE SEXUAL ORIENTATION EXCEPTION TO TITLE VII: SEX & RELIGION

Whereas courts are increasingly likely to repudiate the sexual orientation exception in cases of sex discrimination, the exception remains entrenched in the religious discrimination context. Those seeking to preserve the exception in the context of religion rely on many of the same arguments that were once used to justify the exception’s application to instances of sex discrimination: specifically, that the 88th Congress would not have understood the term “religion” to encompass “sexual orientation” and that Congress implicitly endorsed a sexual orientation-exclusive

96. *Venters v. City of Delphi*, 123 F.3d 956, 973 (7th Cir. 1997).

97. Kramer, *Manhood*, *supra* note 12, at 304.

98. Kramer, *Manhood*, *supra* note 12, at 305.

interpretation of Title VII via certain post-1964 legislative activity.⁹⁹ Both of these arguments have been decisively rejected as applied to sex discrimination, however, and they prove similarly unpersuasive in the context of religious discrimination.

A. Interpreting Title VII Consistent with the Concerns of the 88th Congress

Courts have historically relied on a narrow, biologically-based definition of “sex” to dismiss LGB persons’ sex discrimination claims.¹⁰⁰ These courts contend that, in 1964, the word “sex” was understood to refer to a person’s status as genetically male or female such that interpreting “sex” to include “sexual orientation” would be inconsistent with the intent of the 88th Congress.¹⁰¹ Furthermore, the fact that Congress added “sex” to Title VII as a result of sustained post-war lobbying by women’s rights groups ostensibly suggests that Congress intended to protect women rather than LGB persons.¹⁰² Conversely, as of 1964, the term “sexual orientation” did not appear in dictionaries,¹⁰³ and there had not yet been a coordinated, multi-year campaign to secure employment protections for LGB persons—likely because same-sex sexual activity remained illegal in most states and homosexuality was a designated mental disorder.¹⁰⁴ Consequently, courts argue that Title VII should not be interpreted as prohibiting sexual orientation discrimination because its drafters would not have anticipated that result.¹⁰⁵

The argument that courts should interpret Title VII consistently with the concerns precipitating its enactment has one major flaw—the Supreme Court directly refuted it in *Oncale v. Sundowner Offshore Services*.¹⁰⁶ Prior to *Oncale*, several lower courts had dismissed claims of male-on-male sexual harassment even while conceding that such claims would seem to be

99. *E.g.*, Brief for the Becket Fund for Religious Liberty as Amicus Curiae Supporting Defendant-Appellee at 20–29, *Horton v. Midwest Geriatric Mgmt., LLC*, No. 4:17CV2324JCH, 2017 WL 6536576 (8th Cir. June 13, 2018) (No. 18-1104) [hereinafter Becket Brief].

100. *E.g.*, *DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327, 329–30 (9th Cir. 1979), *abrogated by* *Nichols v. Azteca Rest. Enter., Inc.*, 256 F.3d 864, 875 (9th Cir. 2001).

101. *E.g.*, *Spearman v. Ford Motor Co.*, 231 F.3d 1080, 1084 (7th Cir. 2000), *overruled by* *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 350–51 (7th Cir. 2017) (en banc).

102. *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 138, 145 (2d Cir. 2018) (Lynch, J., dissenting).

103. *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 363 n.3 (7th Cir. 2017) (Sykes, J., dissenting).

104. *Zarda*, 883 F.3d at 140 (Lynch, J., dissenting).

105. *See id.* at 142 (“[T]here was no discussion of sexual orientation discrimination in the debates on Title VII Nor did those who opposed the sex provision in Title VII include the possibility that prohibiting sex discrimination would also prevent sexual orientation discrimination in their parade of supposed horrors.”).

106. 523 U.S. 75 (1998).

actionable under “[a] wooden application” of the statutory text.¹⁰⁷ These courts reasoned that same-sex harassment “was not the type of conduct Congress intended to sanction when it enacted Title VII” and instead sought “to adopt a reading of Title VII consistent with the underlying concerns of Congress.”¹⁰⁸ On appeal, the Supreme Court did not attempt to divine the 88th Congress’s motivations but instead relied on a literal reading of the statutory text to find male-on-male harassment actionable under Title VII:

We see no justification in the statutory language or our precedents for a categorical rule excluding same-sex harassment claims from the coverage of Title VII. As some courts have observed, male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.¹⁰⁹

Oncale featured prominently in the Second Circuit’s recent decision holding that sexual orientation discrimination is actionable as a form of sex discrimination.¹¹⁰ After acknowledging the dissent’s contention that Congress “included ‘sex’ in Title VII to ‘secure the rights of women to equal protection in employment’ and had no intention of prohibiting sexual orientation discrimination,”¹¹¹ the majority responded, “[w]e take no position on the substance of the dissent’s discussion of the legislative history . . . , but we respectfully disagree with its approach to interpreting Title VII as well as its conclusion that sexual orientation discrimination is not a ‘reasonably comparable evil’ to . . . male-on-male harassment.”¹¹² The majority noted that “[a]lthough legislative history most certainly has its uses, in ascertaining statutory meaning in a Title VII case, *Oncale* specifically rejects reliance on ‘the principal concerns of our legislators.’”¹¹³ Consequently, “the fact that [the 88th] Congress might not have contemplated that discrimination ‘because of . . . sex’ would encompass sexual orientation discrimination”¹¹⁴ was deemed irrelevant.¹¹⁵

107. *E.g.*, *Goluszek v. Smith*, 697 F. Supp. 1452, 1456 (N.D. Ill. 1988), *abrogated by Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 82 (1998).

108. *Id.*

109. *Oncale*, 523 U.S. at 79.

110. *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 115 (2d Cir. 2018) (en banc).

111. *Id.* (citation omitted).

112. *Id.* (citation omitted).

113. *Id.* (quoting *Oncale*, 523 U.S. at 79).

114. *Id.*

115. *See id.* (“[B]ecause sexual orientation discrimination is a function of sex, and is comparable to sexual harassment, gender stereotyping, and other evils long recognized as violating Title VII, the statute must prohibit it.”).

The Seventh Circuit likewise invoked *Oncale* to hold that sexual orientation discrimination is sex discrimination under Title VII.¹¹⁶ After quoting *Oncale* at length, the Seventh Circuit observed, “[t]he [Supreme] Court could not have been clearer: the fact that the enacting Congress may not have anticipated a particular application of the law cannot stand in the way of the provisions of the law that are on the books.”¹¹⁷ The court noted that in seeking to give effect to the statutory text, the Supreme Court construed Title VII’s “sex” provision “to cover far more than the simple decision of an employer not to hire a woman for Job A, or a man for Job B,” citing the sexual harassment and gender stereotyping theories of sex discrimination as examples of the Court’s expansive interpretation of “sex.”¹¹⁸ The Seventh Circuit concluded by acknowledging “[i]t is quite possible that these interpretations may also have surprised some who served in the 88th Congress,” but “experience with the law has led the Supreme Court to recognize that each of these examples is a covered form of sex discrimination.”¹¹⁹

The Second and Seventh Circuits’ rationale for repudiating the sexual orientation exception in the area of sex discrimination provides an equally compelling justification for disavowing the exception in cases of religious discrimination. Just as courts found sexual orientation discrimination to be a reasonably comparable evil to sexual harassment and gender stereotyping, so, too, sexual orientation discrimination is a reasonably comparable evil to religious nonadherence bias. Indeed, courts have given Title VII’s prohibition against religious discrimination a similarly broad construction¹²⁰ such that the statute’s “religion” provision covers far more than an employer’s simple decision not to hire a Muslim for Job A or a Christian for Job B. This includes prohibiting religious harassment by an individual’s coworkers,¹²¹ requiring employers to accommodate the suspected religious

116. *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 344–45 (7th Cir. 2017) (en banc).

117. *Id.* at 345.

118. *Id.*

119. *Id.*

120. Courts’ tendency to construe the “sex” and “religion” provisions expansively is attributable, at least in part, to a dearth of legislative history which might otherwise serve to constrain courts’ interpretations of these terms. Compare Marie Elena Peluso, *Tempering Title VII’s Straight Arrow Approach: Recognizing and Protecting Gay Victims of Employment Discrimination*, 46 VAND. L. REV. 1533, 1537 (1993) (“The [sex] amendment’s hasty introduction and passage leave little history from which to divine the intended boundaries of the concept of ‘sex.’”), with Russell S. Post, *The Serpentine Wall and the Serpent’s Tongue: Rethinking the Religious Harassment Debate*, 83 VA. L. REV. 177, 181 (1997) (observing that “[t]he legislative history of religious discrimination under Title VII is . . . deeply ambiguous,” which “suggests that religion was included in Title VII as boilerplate language” rather than “as a function of any compelling policy rationale”).

121. See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993) (recognizing hostile work environment claims predicated on religiously-motivated harassment are cognizable under Title VII).

practices of employees,¹²² and affording relief to persons who are discriminated against because they do not share their employer's religious beliefs.¹²³ Interpreting the term to preclude religiously motivated discrimination against LGB persons would, therefore, be consistent with courts' expansive construction of the provision. Moreover, while there can be no doubt the legislators enacting Title VII would not have understood or anticipated that courts might interpret the statute's prohibition against religious discrimination to preclude sexual orientation discrimination, this fact is of no consequence given the Supreme Court's declaration that "it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."¹²⁴

B. Inferring the 88th Congress's Intent from Subsequent Legislative Developments

Courts engrafting a sexual orientation exception into Title VII's ban on sex discrimination have cited post-1964 legislative developments as evincing a congressional intent to permit sexual orientation bias in the workplace.¹²⁵ Three arguments, in particular, have been used to justify a sexual orientation-exclusive interpretation of Title VII. First, it is argued that statutes enacted within the past few years suggest that when Congress wants to prohibit sexual orientation discrimination, it knows how to do so and does so explicitly.¹²⁶ Second, it is argued that the Civil Rights Act of 1991's¹²⁷ failure to repudiate a trio of circuit court decisions finding sexual orientation discrimination permissible under Title VII constituted an implicit ratification of those decisions by Congress.¹²⁸ Third, it is argued that the failure of certain legislation¹²⁹ to become law demonstrates Congress's opposition to prohibiting sexual orientation discrimination, whether under Title VII or a separate, stand-alone statute.¹³⁰ While these arguments have been soundly refuted in cases of sex discrimination, they prove even less persuasive in the religious discrimination realm.

122. See *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2033 (2015) ("An employer may not make an applicant's religious practice, confirmed or otherwise, a factor in employment decisions.").

123. *Venters v. City of Delphi*, 123 F.3d 956, 972 (7th Cir. 1997).

124. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998).

125. E.g., *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000), *overruled by Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 132 (2d Cir. 2018) (en banc).

126. See *infra* Section III.B.1.

127. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 29 and 42 U.S.C.).

128. See *infra* Section III.B.2.

129. See generally Alex Reed, *A Pro-Trans Argument for a Transexclusive Employment Non-Discrimination Act*, 50 AM. BUS. L.J. 835, 837-49 (2013) (providing a legislative history of the Employment Non-Discrimination Act).

130. See *infra* Section III.B.3.

1. The Violence Against Women Reauthorization Act and Other Statutes Referencing Sexual Orientation

The first argument contends that, by omitting “sexual orientation” from Title VII’s enumerated categories, the 88th Congress made a considered decision not to prohibit sexual orientation discrimination in the workplace.¹³¹ Proponents of this argument in the sex discrimination context rely on several pieces of subsequently enacted legislation for support, observing that “in each of these statutes, Congress listed ‘sexual orientation’ discrimination *in addition to* ‘sex’ or ‘gender’ discrimination, rather than deeming ‘sexual orientation’ discrimination to be *include[d]*’ *within* ‘sex’ discrimination.”¹³² Thus, the fact that later Congresses chose to enumerate “sex” and “sexual orientation” separately in certain legislation, e.g., the Violence Against Women Reauthorization Act, ostensibly counsels against interpreting Title VII’s “sex” provision to prohibit discrimination on the basis of “sexual orientation.”¹³³ Proponents of this argument contend that a contrary interpretation would render the express references to “sexual orientation” in more recent statutes “needless surplusage.”¹³⁴

Because the drafting decisions of the 105th, 111th, and 113th Congresses are irrelevant for the purposes of interpreting a statute enacted by the 88th Congress, two circuit courts have rejected the “surplusage” argument in cases alleging sex discrimination. The Seventh Circuit observed that Congress is free to use “a belt and suspenders” approach to achieve its objectives such that “sex” and “sexual orientation” need not be mutually exclusive.¹³⁵ The Second Circuit, meanwhile, provided a more nuanced critique of the surplusage argument, emphasizing the futility of attempting to infer the intent of an earlier Congress from the actions of a later Congress:

131. See Brief for the United States as Amicus Curiae at 14, *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018) (No. 15-3775) [hereinafter U.S. Brief] (“When adopting Title VII’s ban on sex discrimination in 1964 . . . Congress was well aware of the distinct practice of sexual orientation discrimination and chose not to ban it also.”).

132. *Id.* at 13 (alteration in original).

133. See *id.* (“This demonstrates both that Congress considers ‘sexual orientation’ discrimination to be distinct from, rather than a subset of, ‘sex’ or ‘gender’ discrimination, and also that Congress knows how to cover ‘sexual orientation’ discrimination separately from ‘sex’ or ‘gender’ discrimination when it so chooses.”).

In addition to the Violence Against Women Reauthorization Act, Pub. L. No. 113-4, § 3(b)(4), 127 Stat. 54, 61 (2013), Congress listed “sexual orientation” independently of “sex” in the following pieces of legislation: Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 5306(a)(3), 124 Stat. 119, 626 (2010); Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, Pub. L. No. 111-84, §§ 4704(a)(1)(C), § 4704(a), 123 Stat. 2835, 2837, 2839 (2009); Higher Education Amendments of 1998, Pub. L. No. 105-244, § 486(e)(1)(A), 112 Stat. 1581, 1743 (1998).

134. *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 363 (7th Cir. 2017) (Sykes, J., dissenting).

135. *Id.* at 344 (majority opinion).

While it is true that Congress has sometimes used the terms “sex” and “sexual orientation” separately, this observation is entitled to minimal weight in the context of Title VII.

The presumptions that terms are used consistently and that differences in terminology denote differences in meaning have the greatest force when the terms are used in “the same act.” By contrast, when drafting separate statutes, Congress is far less likely to use terms consistently, and these presumptions are entitled to less force where, as here, the government points to terms used in different statutes passed by different Congresses in different decades. *See* Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 3(b)(4), 127 Stat. 54, 61 (2013); Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 5306(a)(3), 124 Stat. 119, 626 (2010); Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, Pub. L. No. 111-84, §§ 4704(a)(1)(C), § 4704(a), 123 Stat. 2835, 2837, 2839 (2009); Higher Education Amendments of 1998, Pub. L. No. 105-244, § 486(e)(1)(A), 112 Stat. 1581, 1743 (1998).

Moreover, insofar as the government argues that mention of “sexual orientation” elsewhere in the U.S. Code is evidence that “because of . . . sex” should not be interpreted to include “sexual orientation,” our race discrimination jurisprudence demonstrates that this is not dispositive. We have held that Title VII’s prohibition on race discrimination encompasses discrimination on the basis of ethnicity, notwithstanding the fact that other federal statutes now enumerate race and ethnicity separately. The same can be said of sex and sexual orientation because discrimination based on the former encompasses the latter.¹³⁶

The rationale for rejecting the surplusage argument in cases alleging sex discrimination is similarly applicable in the context of religious discrimination. Thus, the fact that each of the aforementioned statutes¹³⁷ enumerates “religion” separately from “sexual orientation” should not be interpreted to preclude religious nonadherence claims predicated on a person’s sexual orientation. Rather, these statutes’ reference to both “religion” and “sexual orientation” may reflect Congress’s determination that a belt-and-suspenders approach represents the most effective means of combatting sexual orientation discrimination. Moreover, just as courts have interpreted Title VII’s prohibition on race discrimination to encompass discrimination on the basis of ethnicity¹³⁸—notwithstanding the fact that

136. *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 130–31 (2d Cir. 2018) (en banc) (citations omitted).

137. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 3(b)(4), 127 Stat. 54, 61 (2013); Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 5306(a)(3), 124 Stat. 119, 626 (2010); Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, Pub. L. No. 111-84, §§ 4704(a)(1)(C), § 4707(a), 123 Stat. 2835, 2837, 2839 (2009); Higher Education Amendments of 1998, Pub. L. No. 105-244, § 486(e)(1)(A), 112 Stat. 1581, 1743 (1998).

138. *E.g.*, *Vill. of Freeport v. Barrella*, 814 F.3d 594, 607 (2d Cir. 2016).

more recent statutes list “race” and “ethnicity” separately¹³⁹—so, too, Title VII’s prohibition on religious discrimination may be construed to encompass discrimination on the basis of sexual orientation despite these terms’ separate enumeration in several recently enacted laws.

Other statutes aside, Congress’s subsequent amendments to Title VII indicate broadly construing “sex” and “religion” to include “sexual orientation” is consistent with congressional intent. As originally enacted, Title VII did not include definitions for “race,” “color,” “religion,” “sex,” or “national origin.”¹⁴⁰ Today, however, the statute includes definitions for two of the five prohibited bases of discrimination: sex and religion.¹⁴¹ In relevant part, “[t]he terms ‘because of sex’ or ‘on the basis of sex’ [are defined to] *include, but are not limited to*, because of or on the basis of pregnancy, childbirth, or related medical conditions.”¹⁴² Title VII defines “religion,” meanwhile, to “include[] *all aspects of* religious observance and practice, as well as belief.”¹⁴³ The use of the phrases “include, but are not limited to” and “all aspects of” in these definitions suggest that Congress wanted courts to interpret “sex” and “religion” expansively.¹⁴⁴ Thus, in those instances where employers discriminate against LGB persons for failing to conform to their religious beliefs or values, finding sexual orientation discrimination actionable as a form of religious discrimination would be consistent with the broad definition of “religion” articulated in subsequent amendments to Title VII.

2. *The Civil Rights Act of 1991*

The second argument for imputing a sexual orientation exception into Title VII is that Congress implicitly ratified a trio of court decisions permitting sexual orientation-based employment bias¹⁴⁵ when it passed the

139. *E.g.*, Higher Education Amendments of 1998, Pub. L. No. 105-244, § 486(e)(1)(A), 112 Stat. 1581, 1743 (1998).

140. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified at 42 U.S.C. § 2000e (1964)).

141. 42 U.S.C. § 2000e (2018).

142. *Id.* § 2000e(k) (emphasis added).

143. *Id.* § 2000e(j) (emphasis added).

144. *See* *Sierra Club v. Va. Elec. & Power Co.*, 247 F. Supp. 3d 753, 763 (E.D. Va. 2017) (“Congress intended the definition . . . to be interpreted broadly, as indicated by the statute’s ‘including but not limited to’ language.”).

145. U.S. Brief, *supra* note 131, at 10 (citing *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989), *DeSantis v. Pacific Tel. & Tel. Co., Inc.*, 608 F.2d 327, 329–30 (9th Cir. 1979), and *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979)).

The fourth case cited in support of this proposition is inapposite as it concerned allegations of gender identity discrimination directed against a transgender person rather than allegations of sexual orientation discrimination against an LGB individual. *See id.* (citing *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984)).

Civil Rights Act of 1991.¹⁴⁶ This argument is predicated on *Texas Department of Housing & Community Affairs v. Inclusive Communities Project*,¹⁴⁷ wherein the Supreme Court found that disparate impact claims are cognizable under the Fair Housing Act (FHA).¹⁴⁸ In *Inclusive Communities*, “the [Supreme] Court [deemed] it relevant that Congress had amended the FHA after nine Courts of Appeals had held that the FHA allowed for disparate-impact claims, and did not alter the text of the Act in a way that would make it clear that disparate-impact claims were not contemplated by the FHA,” leading the Court to find that Congress had effectively ratified the circuit courts’ interpretation.¹⁴⁹ Similarly, proponents of the “ratification” argument in the context of Title VII note that, as of 1991, the three Courts of Appeals to have addressed the issue were unanimous in holding that sexual orientation discrimination is permissible under Title VII and argue that Congress’s failure to repudiate those decisions amounted to a tacit ratification of their holdings.¹⁵⁰

Upon closer examination, however, the 1991 amendments present a significantly weaker case for legislative ratification than existed in *Inclusive Communities*. Indeed, the Second Circuit recently refuted the argument’s central premise, finding “no indication . . . Congress was aware of the circuit precedents” permitting sexual orientation discrimination at the time of the 1991 amendments.¹⁵¹ Conversely, in *Inclusive Communities*, the Supreme Court determined that as of 1988 “Congress was aware” that “all nine Courts of Appeals to have addressed the question had concluded the Fair Housing Act encompassed disparate-impact claims,” leading the Court to conclude that Congress “made a considered judgment to retain the relevant statutory text” in the FHA.¹⁵² Furthermore, whereas the Second Circuit found the substance of the FHA amendments to provide additional evidence “of Congress’ understanding that disparate-impact liability exists under the FHA,”¹⁵³ the Second Circuit held there is “no reason to believe” that the substantive provisions of the 1991 amendments “were in any way premised on or made assumptions about whether sexual orientation was protected by Title VII.”¹⁵⁴ The Second Circuit concluded by noting that the

146. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of Titles 29 and 42 of the United States Code).

147. 135 S. Ct. 2507 (2015).

148. *Id.* at 2525.

149. *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 154 (2d Cir. 2018) (Lynch, J., dissenting) (citing *Inclusive Communities*, 135 S. Ct. at 2519).

150. U.S. Brief, *supra* note 131, at 10. Although the brief cites a fourth case—*Ulane v. Eastern Airlines, Inc.*—the plaintiff in *Ulane* was transgender rather than homosexual or bisexual such that the case did not address sexual orientation discrimination. 742 F.2d 1081, 1084–87 (7th Cir. 1984).

151. *Zarda*, 883 F.3d at 129.

152. *Inclusive Communities*, 135 S. Ct. at 2519.

153. *Id.* at 2520.

154. *Zarda*, 883 F.3d at 129.

legislative ratification argument “is particularly suspect [as applied to Title VII] given that the text of the 1991 amendment emphasized that it was ‘respond[ing] to Supreme Court decisions by *expanding* the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination.’”¹⁵⁵ These disparities reveal *Inclusive Communities* to be inapposite so as to render the legislative ratification argument moot.

Paradoxically, an equally plausible interpretation of the amendments’ legislative history is that Congress did not ratify the sexual orientation exception but instead repudiated it.¹⁵⁶ Critical to this interpretation is an understanding of the historical context in which Congress enacted the 1991 amendments. The first significant development occurred in 1989 when the Supreme Court issued its ruling in *Price Waterhouse v. Hopkins*, wherein the Court held that gender-stereotyping claims are actionable under Title VII as a form of sex discrimination.¹⁵⁷ One year later, Congress passed the Americans with Disabilities Act of 1990 (ADA), which expressly barred disability discrimination claims predicated on a person’s LGB status by defining “disability” to exclude homosexuality and bisexuality.¹⁵⁸ The following year, Congress passed the Civil Rights Act of 1991, which repealed portions of the *Price Waterhouse* decision but did not abrogate or otherwise limit the viability of gender-stereotyping claims.¹⁵⁹ Unlike the ADA, moreover, the 1991 amendments did not seek to preclude claims of race, color, national origin, sex, or religious discrimination to the extent they were predicated on a person’s LGB status.¹⁶⁰ Thus, Congress’s decision to retain the gender-stereotyping theory combined with its refusal to add a blanket carve-out for claims predicated on an individual’s homosexuality or bisexuality could be interpreted as reflecting Congress’s tacit endorsement of employment protections for LGB persons.

The absence of an ADA-style carve-out for claims based on an individual’s LGB status was not the only omission in the 1991 amendments to implicate religion, however. Whereas both Title VII¹⁶¹ and the ADA¹⁶²

155. *Id.*

156. Corrected and Required Short Appendix of Plaintiff-Appellant, Kimberly Hively at 46–50, *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339 (7th Cir. 2017) (No. 15-1720) [hereinafter *Hively Brief*].

157. 490 U.S. 228, 250–52 (1989).

158. *Hively Brief*, *supra* note 156, at 47–48. *See also* Americans with Disabilities Act of 1990, 42 U.S.C. § 12211(a) (2018) (“For purposes of the definition of ‘disability’ . . . homosexuality and bisexuality are not impairments and as such are not disabilities under this chapter.”).

159. *Hively Brief*, *supra* note 156, at 48. *See also* Zachary R. Herz, *Price’s Progress: Sex Stereotyping and Its Potential for Antidiscrimination Law*, 124 *YALE L.J.* 396, 418–19 (2014) (discussing the Act’s changes to the Supreme Court’s mixed-motive framework).

160. *See Hively Brief*, *supra* note 156, at 48 (“Congress in 1991 did not amend Title VII to exclude coverage of sexual orientation discrimination, as it had a year earlier in passing the ADA.”).

161. 42 U.S.C. § 2000e-1(a) (2018).

permit religious entities to engage in religiously-motivated employment discrimination against persons outside their faith, the ADA includes an additional provision allowing such entities to discriminate against co-religionists.¹⁶³ Specifically, the ADA’s “religious tenets” provision allows religious entities to “require that all applicants and employees conform to the [entity’s] religious tenets.”¹⁶⁴ Pursuant to this provision, religious entities may decline to hire persons who profess to be adherents of the employer’s faith but whom the employer regards as being insufficiently devout or straying from official dogma.¹⁶⁵ One could construe Congress’s omission of an analogous provision in the 1991 amendments as suggesting an expansive interpretation of Title VII’s ban on religious discrimination—one that conceivably allows LGB persons to state cognizable nonadherence claims against both secular and religious employers alike, provided in the latter instance they identify as members of their employer’s faith.

3. *The Employment Non-Discrimination Act*

The third argument contends that Congress’s failure to pass legislation prohibiting sexual orientation-based employment bias provides “strong evidence” of a congressional intent to permit anti-LGB discrimination under Title VII.¹⁶⁶ Proponents of this argument assert that if Congress intended for claims of sexual orientation discrimination to be actionable under Title VII, there would be no reason for the continuous introduction of bills seeking to ban sexual orientation discrimination in the workplace.¹⁶⁷ Consequently, the fact that more than sixty such bills have been introduced over the past forty years ostensibly reflects Congress’s understanding that, as currently written, Title VII does not prohibit sexual orientation discrimination.¹⁶⁸ That none of these bills have become law, moreover, purportedly demonstrates Congress’s desire to maintain the status quo,

162. *Id.* § 12113(d)(1).

163. *Id.* § 12113(d)(2).

164. *Id.*

165. *Cf.* Debbie N. Kaminer, *Religious Accommodation in the Workplace: Why Federal Courts Fail to Provide Meaningful Protection of Religious Employees*, 20 TEX. REV. L. & POL. 107, 150 (2015) (“[M]any religious individuals do not follow all of the tenets of their religion.”); Marc A. Fajer, *A Better Analogy: “Jews,” “Homosexuals,” and the Inclusion of Sexual Orientation as a Forbidden Characteristic in Antidiscrimination Laws*, 12 STAN. L. & POL’Y REV. 37, 42 (2001) (“[M]any Americans self-identify as Jewish while believing few or none of the traditional tenets of the religion.”).

166. En Banc Brief of Christian Legal Soc’y & Nat’l Ass’n of Evangelicals as Amici Curiae in Support of Defendants-Appellees and Affirmance at 13–14, *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018) (No. 15-3775) (quoting *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000)).

167. *See* Defendant-Appellee Ivy Tech Cmty. Coll. of Ind.’s Answer to the Petition for Rehearing and Rehearing En Banc at 10, *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339 (7th Cir. 2017) (No. 15-1720) (“Neither Hively nor the lawmakers can avoid the fact that they are pursuing new legislation to address a matter that is *not* currently addressed by . . . [Title VII].”).

168. Petition for Writ of Certiorari at 20 n.6, *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018), No. 17-1623 (May 29, 2018) (collecting bills).

pursuant to which sexual orientation discrimination is generally permissible under Title VII.¹⁶⁹

Because one can draw multiple competing inferences from Congress's failure to pass legislation prohibiting sexual orientation discrimination, two circuit courts have rejected the "ENDA"¹⁷⁰ argument in the sex discrimination context.¹⁷¹ For its part, the Seventh Circuit declined to assign any significance to Congress's repeated inaction on ENDA, concluding "it is simply too difficult to draw a reliable inference from these truncated legislative initiatives to rest our opinion on them."¹⁷² The Second Circuit, meanwhile, quoted extensively from Supreme Court precedent highlighting the dangers of divining congressional intent from the actions/inactions of a later Congress:

This theory . . . is in direct tension with the Supreme Court's admonition that "subsequent legislative history is a hazardous basis for inferring the intent of an earlier Congress," particularly when "it concerns, as it does here, a proposal that does not become law." This is because "[i]t is impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional approval of [a particular] statutory interpretation." After all, "[t]here are many reasons Congress might not act on a decision . . . , and most of them have nothing at all to do with Congress' desire to preserve the decision." For example, Congress may be unaware of or indifferent to the status quo, or it may be unable "to agree upon how to alter the status quo." These concerns ring true here. We do not know why Congress did not act and we are thus unable to choose among the various inferences that could be drawn from Congress's inaction Accordingly, we decline to assign congressional silence a meaning it will not bear.¹⁷³

169. U.S. Brief, *supra* note 131, at 12 (asserting "Congress has continued to confirm that Title VII does not bar sexual orientation discrimination" post-1991 as reflected by its "declin[ing] to enact proposed legislation that would prohibit discrimination in employment based on sexual orientation").

170. "ENDA" stands for Employment Non-Discrimination Act, the title assigned to bills seeking to prohibit sexual orientation-based employment discrimination between 1994 and 2014. *See generally* Reed, *supra* note 129, at 835–49 (examining Congress's efforts to prohibit sexual orientation-based employment bias between 1974 and 2011). *See also* Alex Reed, *RFRA v. ENDA: Religious Freedom and Employment Discrimination*, 23 VA. J. SOC. POL'Y & L. 1, 4–7 (2016) (providing a legislative history of the Employment Non-Discrimination Act of 2013); Chai R. Feldblum, *The Federal Gay Rights Bill: From Bella to ENDA*, in *CREATING CHANGE: SEXUALITY, PUBLIC POLICY, AND CIVIL RIGHTS*, 147–51 (discussing the social and political movements accompanying ENDA and its predecessors).

171. *Contra* *Simonton v. Runyon*, 232 F.3d 33 (2d Cir. 2000), *overruled by Zarda*, 883 F.3d at 132. In *Simonton*, the panel observed that "although congressional inaction subsequent to the enactment of a statute is not always a helpful guide, Congress's refusal to expand the reach of Title VII is strong evidence of congressional intent in the face of consistent judicial decisions refusing to interpret 'sex' to include sexual orientation." *Id.* at 35.

172. *Hively*, 853 F.3d at 344.

173. *Zarda*, 883 F.3d at 130 (citations omitted) (second, third, fourth, and fifth alterations in original).

The ENDA argument is particularly flawed in the religious discrimination context. Whereas under Title VII religious entities may discriminate on the basis of religion but must otherwise refrain from discriminating on the basis of race, color, sex, or national origin,¹⁷⁴ ENDA would have allowed these employers to discriminate on the basis of sexual orientation as well.¹⁷⁵ Indeed, it was the unprecedented breadth of ENDA's religious exemption—and the prospect that secular, for-profit businesses would be able to invoke the exemption in the wake of *Burwell v. Hobby Lobby Stores*¹⁷⁶—that ultimately led several major civil rights organizations to withdraw their support for the legislation.¹⁷⁷ The loss of these groups' endorsement effectively doomed the bill's prospects for passage as reflected by the fact ENDA has not received a floor vote in either chamber of Congress since 2013.¹⁷⁸ Consequently, an equally plausible interpretation to draw from the bill's failure would be that Congress has declined to enact ENDA because it stands to allow otherwise secular employers to discriminate against LGB persons by alleging that homosexuality is incompatible with the employer's religious beliefs. Courts, therefore, should be hesitant to engraft a sexual orientation exception into Title VII's ban on religious discrimination given that Congress's motivations for rejecting ENDA are subject to several competing interpretations, including that Congress wished to preserve religious nonadherence claims as a means by which LGB persons may contest sexual orientation-based employment bias under Title VII.¹⁷⁹

CONCLUSION

Although courts are increasingly likely to repudiate the sexual orientation exception to Title VII in cases of sex discrimination, the exception remains entrenched in the religious discrimination genre. Those

174. Alex Reed, *Redressing LGBT Employment Discrimination Via Executive Order*, 29 NOTRE DAME J.L. ETHICS & PUB. POL'Y 133, 147 (2015).

175. Reed, *supra* note 170, at 15–16.

176. See 134 S. Ct. 2751, 2767–75 (2014) (holding that certain secular, for-profit businesses are entitled to the protections of the Religious Freedom Restoration Act of 1993).

177. Reed, *supra* note 170, at 14–16.

178. H.R. 2282, 115th Cong. (2017); S. 1006, 115th Cong. (2017); H.R. 3185, 114th Cong. (2015); S. 1858, 114th Cong. (2015).

Since 2015, bills seeking to prohibit sexual orientation-based employment discrimination have been titled the “Equality Act.” *Id.* See generally Chris Johnson, *In Uphill Fight, Democrats Make Case for Equality Act*, WASH. BLADE, May 2, 2017, <http://www.washingtonblade.com/2017/05/02/congressional-dems-make-case-for-the-equality-act-in-uphill-fight/> (providing a legislative history of the Equality Act).

179. See *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) (“Congressional inaction lacks ‘persuasive significance’ because ‘several equally tenable inferences’ may be drawn from such inaction, ‘including the inference that the existing legislation already incorporated the offered change.’” (quoting *United States v. Wise*, 370 U.S. 405, 411 (1962))).

seeking to preserve the exception in the context of religion rely on many of the same arguments that were once used to justify the exception's application to instances of sex discrimination: specifically, that the 88th Congress would not have understood the term "religion" to encompass "sexual orientation" and that Congress implicitly endorsed a sexual orientation-exclusive interpretation of Title VII via certain post-1964 legislative activity. Just as these arguments have been decisively rejected as applied to sex discrimination, however, they prove similarly unpersuasive in the religious nonadherence context. Consequently, the sexual orientation exception to Title VII's ban on religious discrimination should be abrogated as "there is 'no justification in the statutory language . . . for a categorical rule excluding' . . . claims [of sexual orientation discrimination] from the reach of Title VII."¹⁸⁰

The policy concerns raised by Andrea Sinclair do nothing to change this fact. Sinclair's proposal that plaintiffs be required to demonstrate membership in a protected class as part of their prima facie case was rejected by the Tenth Circuit on the grounds it is inapposite in the religious nonadherence context. Similarly, concern for employers' First Amendment rights is not unique to LGB persons' religious nonadherence claims but instead applies to this class of claims generally. For more than twenty-five years, however, courts confronted with such claims have proven capable of balancing the statutory rights of the plaintiff with the constitutional rights of the defendant, and Sinclair has offered no evidence to suggest that courts would suddenly find *Shapolia's* proof structure unworkable if LGB persons are permitted to invoke its protections.

180. *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 131 (2d Cir. 2018) (en banc) (quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998)).