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SEXUAL ORIENTATION DISCRIMINATION UNDER TITLE VII: THE PROMISING ROAD AHEAD

*Sydney Wright**

I. INTRODUCTION

What does it mean to discriminate against an individual on the basis of that individual’s sex? Title VII prohibits an employer from “discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, *sex*, or national origin.”¹ And since its adoption in 1964, litigants have, in one way or another, repeatedly posed this question for courts to determine.

While most courts historically have held that “sex” does not include sexual orientation²—meaning an action against an employer for discriminating against a homosexual employee is not legally cognizable under Title VII—in recent years following the Supreme Court’s decision in *Price Waterhouse v. Hopkins*,³ courts have reconsidered the logic behind such a determination.

Perhaps, sexual orientation discrimination is in fact discrimination on the basis of sex insofar as the crux of homosexuality is a sexual relationship between two people of the same *gender*. In other words,

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1. 42 U.S.C. § 2000e-2 (2012) (emphasis added).

2. See, e.g., *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757 (6th Cir. 2006); *Medina v. Income Support Div.*, 413 F.3d 1131 (10th Cir. 2005); *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061 (9th Cir. 2002); *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257 (3d Cir. 2001); *Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc.*, 224 F.3d 701 (7th Cir. 2000); *Simonton v. Runyon*, 232 F.3d 33 (2d Cir. 2000); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252 (1st Cir. 1999); *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138 (4th Cir. 1996) (abrogated on other grounds); *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69 (8th Cir. 1989).

3. 490 U.S. 228 (1989) (recognizing discrimination based on gender stereotyping or gender non-conformity as legally cognizable sex-based discrimination).

as one scholar frames the argument, “[t]he discharge of a male employee because he has a male lover is an action that would not be taken against a similarly situated female employee.”⁴

Nonetheless, the Eleventh Circuit recently held in *Evans v. Georgia Regional Hospital*⁵ that discrimination based on sexual orientation is not actionable under Title VII.⁶ In a strongly worded dissent, Circuit Judge Rosenbaum explained why the majority’s and concurrence’s decision rests on unsettled ground at best.⁷ This Comment will explore the majority, concurring, and dissenting opinions in *Evans* and discuss why the dissent’s view is more consistent with the evolution of the law and is likewise gaining momentum in other circuits.

Part II of this Comment will discuss the facts and procedural history of *Evans*. In Part III, we will take an in-depth look at the majority, concurring, and dissenting opinions in *Evans*, as they are fairly emblematic of the various emerging theoretical approaches to sexual orientation discrimination under Title VII. Part IV will discuss the historical framework of sex discrimination under Title VII, particularly the Supreme Court cases that have carved a path for recognizing sexual orientation discrimination as actionable under Title VII.

Finally, Part V will explain why it seems the dissent in *Evans* got it right, or at the very least why the dissent’s point of view is gaining momentum as other courts and the Equal Employment Opportunity Commission (EEOC) hold that sexual orientation discrimination is actionable under Title VII. Part VI will also briefly discuss how a Title VII sexual orientation discrimination case might fare in the Supreme Court.

II. STATEMENT OF THE CASE

A. Facts

From August 1, 2012 to October 11, 2013, Jameka Evans worked at Georgia Regional Hospital as a security officer.⁸ Evans is a lesbian woman who “identifie[s] with the male gender.”⁹ During her tenure at

4. Samuel A. Marcossou, *Harassment on the Basis of Sexual Orientation: A Claim of Sex Discrimination Under Title VII*, 81 GEO. L.J. 1, 3 (1992).

5. 850 F.3d 1248 (11th Cir. 2017).

6. *Id.*

7. *Id.* at 1261–73 (Rosenbaum, J., dissenting).

8. *Id.* at 1250–51 (majority opinion).

9. *Id.*

the hospital, Evans claimed that as a result of her non-conformity to her male boss's gender stereotypes, namely her sexual orientation and outwardly masculine appearance, "she was denied equal pay or work, harassed, and physically assaulted or battered."¹⁰

Evans alleged that her boss conspired to terminate her by "making her employment unbearable," insofar as he promoted a less qualified individual to be her direct supervisor, and he repeatedly closed a door on her "in a rude manner."¹¹ Additionally, she "experienced scheduling issues and a shift change" as well as harassment from her new supervisor and tampering with her equipment.¹² Finally, Evans claims that when she lodged a complaint against her employers to Human Resources, the Human Resources Manager asked her about her sexuality—indicating to Evans that her sexuality may have been the basis of the discriminatory treatment she received.¹³

B. Procedural History

Evans, as a pro se litigant, brought suit against her employer for the alleged discrimination based on her status as a lesbian woman and gender non-conformity, as well as a claim for retaliation in violation of Title VII.¹⁴ With respect to Evans's claims of discrimination based on her sexual orientation and gender non-conformity—the claims at the focus of this Comment—a magistrate judge found: Title VII "was not intended to cover discrimination against homosexuals."¹⁵ With regard to Evans's claim of discrimination based on gender non-conformity, the magistrate judge concluded that it was "just another way to claim discrimination based on sexual orientation," no matter how it was otherwise characterized.¹⁶

The magistrate judge recommended dismissing all of Evans's claims with prejudice.¹⁷ Evans timely objected to the magistrate judge's report and recommendation, with the support of an amicus curiae brief filed by the Lambda Legal Defense and Education Fund, Inc.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* at 1248.

15. *Id.* at 1252.

16. *Id.*

17. *Id.*

(“Lambda”).¹⁸ The District Court for the Southern District of Georgia adopted the magistrate judge’s report and recommendation without further comment, and appointed counsel from Lambda to represent Evans on appeal.¹⁹

The Court of Appeals for the Eleventh Circuit vacated the dismissal of Evans’s gender non-conformity claim and remanded “with instructions to grant Evans leave to amend such claim.”²⁰ The court affirmed, however, that sexual orientation discrimination is not actionable under Title VII, and consequently affirmed the dismissal of Evans’s claim of discrimination due to her status as a lesbian woman.²¹ Circuit Judge William Pryor concurred with the majority, while Circuit Judge Rosenbaum dissented.²² Furthermore, Evans filed a petition for writ of certiorari to the Supreme Court, which was denied.²³

III. REASONING OF THE COURT

A. *Majority Opinion*

The majority first addressed whether alleged discrimination based on gender non-conformity is actionable under Title VII, or “just another way to claim discrimination based on sexual orientation.”²⁴ It held that it is in fact actionable, pointing to the Eleventh Circuit’s holding in *Glenn v. Brumby*.²⁵ The court in *Glenn*, relying on *Price Waterhouse*, held that discrimination against a transgender individual on the basis of that individual’s failure to conform to a gender stereotype is sex-based discrimination actionable under Title VII.²⁶

The court found that Evans “did not provide enough factual matter to plausibly suggest that her decision to present herself in a masculine manner led to the alleged adverse employment actions.”²⁷ However, because pro se litigants should generally be allowed to amend

18. *Id.*; see also Proposed *Amicus Curiae* Brief of Lambda Legal Defense & Education Fund, Inc. in Support of Plaintiff’s Objections to Magistrate’s Report and Recommendation, *Evans v. Ga. Reg’l Hosp.*, 850 F.3d 1248 (11th Cir. 2017) (No. CV415-103).

19. *Evans*, 850 F.3d at 1253.

20. *Id.* at 1255.

21. *Id.* at 1257.

22. *Id.* at 1258 (Pryor, J., concurring), 1261 (Rosenbaum, J., dissenting).

23. *Evans v. Ga. Reg’l Hosp.*, 850 F.3d 1248 (11th Cir.), *cert. denied*, *Evans v. Ga. Reg’l Hosp.*, 138 S. Ct. 557 (2017) (mem.).

24. *Evans*, 850 F.3d at 1254.

25. *Id.* at 1254–55 (citing *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011)).

26. *Glenn*, 663 F.3d at 1316.

27. *Evans*, 850 F.3d at 1254.

complaints, and an attempt to do so by Evans could not be deemed futile, the court remanded Evans’s gender non-conformity claim, with instructions to allow her to amend her complaint.²⁸

The court then addressed whether a plaintiff may sustain a claim of discrimination based on sexual orientation under Title VII.²⁹ The court relied on *Blum v. Gulf Oil Corp.*,³⁰ which held that “[d]ischarge for homosexuality is not prohibited by Title VII.”³¹ The court disagreed that the Supreme Court decisions in *Price Waterhouse v. Hopkins* and *Oncale v. Sundowner Offshore Services, Inc.*³² support claims for sexual orientation discrimination under Title VII.³³ The court reasoned that neither case’s holding “squarely address[ed] whether sexual orientation discrimination is prohibited by Title VII.”³⁴

Finally, the court bolstered its holding by citing cases from nearly all other circuits supporting the proposition that sexual orientation discrimination is not actionable under Title VII.³⁵ Not a single supporting case cited, however, was decided after 2006.³⁶ Furthermore, the court refused to address whether the decisions it cited from other circuits were inconsistent with *Price Waterhouse* or *Oncale* as Evans and the EEOC as amicus curiae argued. It instead maintained that *Blum* controlled its decision, and as such, it was bound to affirm the district court’s dismissal of Evans’s sexual orientation claim.³⁷

B. Judge Pryor’s Concurrence

The concurrence basically sets forth two main arguments. The first is that sexual orientation discrimination and discrimination based on gender nonconformity are “legally distinct” concepts, and as such,

28. *Id.* at 1254–55.

29. *Id.* at 1255.

30. 597 F.2d 936 (5th Cir. 1979).

31. *Evans*, 850 F.3d at 1255 (quoting *Blum*, 597 F.2d at 938); *see also* *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (“[W]e choose the decisions of the United States Court of Appeals for the Fifth Circuit, as that court existed on September 30, 1981, handed down by that court prior to the close of business on that date,” as binding precedent in the Eleventh Circuit.).

32. 523 U.S. 75, 82 (1998) (holding that sex discrimination consisting of same-sex sexual harassment is actionable under Title VII).

33. *Evans*, 850 F.3d at 1256.

34. *Id.*

35. *See id.*

36. *See id.*

37. *Id.* at 1257.

the former does not necessarily constitute the latter.³⁸ The second sets forth general disdain for the dissent's arguments and asserts that if sexual orientation discrimination ought to be covered by Title VII, it is up to the legislature to explicitly make it so.³⁹

1. Sexual Orientation Discrimination and Discrimination Based on Gender Nonconformity Are Legally Distinct

The concurrence asserts that although sexual orientation discrimination and discrimination based on gender nonconformity may overlap considerably, any notion that the former always constitutes the latter "relies on false stereotypes of gay individuals."⁴⁰ Judge Pryor disputes the idea that "all gay individuals necessarily engage in the same behavior."⁴¹ In apparent defense of gay individuals, Judge Pryor dives into a discussion of the spectrum of sexual identities which gay individuals "adopt," and accuses the dissent and the EEOC of "stereotyp[ing] all gay individuals in the same way that the Commission and dissent allege that the Hospital stereotyped Evans."⁴²

Ultimately, however, his argument amounts to a distinction between *status* and *behavior*. Judge Pryor asserts that an employee who has experienced discrimination based on sexual orientation can have a legally cognizable gender-nonconformity claim *only* if he or she can prove the discriminatory action was taken because of the employee's nonconforming *behavior*, and not solely because of his or her nonconforming *status* as a gay individual.⁴³ Judge Pryor maintains that the latter is merely an "invention" by the dissent without precedential support.⁴⁴

2. Even if the Dissent Were Right, It Is Up to the Legislature to Give Legal Effect to the Dissent's Arguments.

Judge Pryor further inflates this distinction between status and behavior by arguing that "a status-based [inquiry] does more than misread precedent; it also does violence to the relationship between the

38. *Id.* at 1258 (Pryor, J., concurring).

39. *Id.* at 1260–61.

40. *Id.* at 1258.

41. *Id.*

42. *Id.* at 1259.

43. *Id.*

44. *Id.*

doctrine [of gender nonconformity] and the enumerated classes of Title VII.”⁴⁵ He explains, “The doctrine of gender nonconformity is not an independent vehicle for relief; it is instead a proxy a plaintiff uses to help support [the] argument that an employer discriminated on the basis of the enumerated sex category”⁴⁶

He reiterates that the gender nonconformity doctrine is behavior-based, and as such, “[s]tatus-based protections must stem from a separate doctrine or directly from the text of Title VII.”⁴⁷ Judge Pryor concludes with a reminder for the dissent that the job of the court is to declare what the law is, not what it should be.⁴⁸ Therefore, Judge Pryor asserts, the dissent’s arguments are best raised “before Congress, not this Court.”⁴⁹

C. Judge Rosenbaum’s Dissent

Judge Rosenbaum’s dissent begins with a reiteration of the holding in *Price Waterhouse*: “Title VII precludes discrimination on the basis of every stereotype of what a woman supposedly should be”⁵⁰ He explains that *Price Waterhouse* “necessarily abrogated” the holding in *Blum* on which the majority relied.⁵¹ He asserts that “it is utter fiction” to find a woman discriminated against because she is lesbian “was not discriminated against for failing to comport with her employer’s stereotyped view of women.”⁵² Because such discrimination is explicitly proscribed by *Price Waterhouse*, Judge Rosenbaum would find sexual orientation discrimination actionable under Title VII.⁵³

Judge Rosenbaum continues to discuss the impact of *Price Waterhouse* on Title VII sex discrimination jurisprudence. He notes the Eleventh Circuit’s subsequent decision in *Glenn* in which the Court relied on *Price Waterhouse* to apply the “prescriptive-stereotyping theory to hold that discrimination against a transgender employee merely because the employee fails to conform to the employer’s view

45. *Id.* at 1260.

46. *Id.*

47. *Id.*

48. *Id.* at 1261.

49. *Id.*

50. *Id.* (Rosenbaum, J., concurring in part and dissenting in part).

51. *Id.*

52. *Id.*

53. *Id.*

of what a member of the employee's birth-assigned sex should be violates Title VII."⁵⁴

The dissent criticizes the majority and concurrence for departing from *Glenn*. He reasons,

By definition, a gay employee is sexually attracted to members of her own sex. So when an employer discriminates against an employee solely because she is a lesbian, the employer acts against the employee only because she is sexually attracted to women, instead of being attracted to only men, like the employer prescriptively believes women should be.⁵⁵

Judge Rosenbaum laments the concurrence's and the majority's re-characterization of sexual orientation in contradiction of their own reasoning in *Glenn*. He refers to the concurrence's behavior-status distinction as "artificial" and "arbitrary."⁵⁶ Judge Rosenbaum remarks, "In the concurrence's world, only the person who acts on her feelings enjoys the protection of Title VII. This makes no sense from a practical, textual, or doctrinal point of view."⁵⁷ He continues, "It cannot possibly be the case that a lesbian who is private about her sexuality . . . can be discriminated against by the employer because she does not comport with the employer's view of what a woman should be, while the outwardly lesbian plaintiff enjoys Title VII protection."⁵⁸

Judge Rosenbaum also disagrees with the notion that the Supreme Court has found a distinction between behavior and status in applying Title VII to proscriptive stereotyping sex discrimination. He reiterates, "The concurrence's distinction between 'behavior' and 'being' is a construct that is both illusory in its defiance of logic and artificial in its lack of a legal basis."⁵⁹

Judge Rosenbaum next addresses the concurrence's seemingly defensive discussion of the various lifestyles gay individuals may choose. Yet, he explains, "The concurrence's argument seems to fundamentally misunderstand what it means to be a lesbian. Lesbians are women who are sexually attracted to women. That's not a stereotype; it's a definition."⁶⁰

54. *Id.* at 1264.

55. *Id.* (citation omitted).

56. *Id.* at 1266.

57. *Id.* at 1267.

58. *Id.*

59. *Id.* at 1268.

60. *Id.* at 1269.

Judge Rosenbaum likewise disposes with the majority’s *Blum*-based reasoning because he believes it “directly conflict[s] with *Price Waterhouse*[].”⁶¹ He also criticizes the majority’s reliance on other circuits’ rulings—“the mere fact that our friends may jump off a bridge does not, in and of itself, make it a good idea for us to do so.”⁶²

Finally, Judge Rosenbaum cites several district court decisions that have reached the conclusion that sexual orientation discrimination is actionable under Title VII cases which the concurrence and majority failed to acknowledge.⁶³

IV. HISTORICAL FRAMEWORK

A. *Sexual Orientation Discrimination Under Title VII*

It is well established that Title VII prohibits an employer from discriminating against an employee because of his or her sex.⁶⁴ However, sex was actually added to Title VII at the “last minute” and, “[a]ccordingly, the legislative history contains little discussion about what constitutes sex discrimination, leaving the definition open to judicial interpretation.”⁶⁵

For years, district and appellate courts have dealt with sexual orientation claims under Title VII by frankly not dealing with them—that is, dismissing claims of sexual orientation as not actionable under Title VII.⁶⁶ As a result of this long-standing unanimity, the Supreme Court has never explicitly addressed the question. However, the Supreme Court has issued a few opinions broadening the scope of protection provided by Title VII’s “because of . . . sex” clause.⁶⁷ Below is a discussion of the relevant Supreme Court cases as they carve a path for recognizing sexual orientation discrimination as actionable under Title VII.

61. *Id.* at 1270 (first alteration in original).

62. *Id.* at 1271.

63. *Id.* at 1272–73.

64. 42 U.S.C. § 2000e-2 (1994).

65. Camille Patti, *Hively v. Ivy Tech Community College: Losing the Battle but Winning the War for Title VII Sexual Orientation Discrimination Protection*, 26 TUL. J.L. & SEXUALITY 133, 135 (2017).

66. *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000) (“The law is well-settled in this circuit and in all others to have reached the question that *Simonton* has no cause of action under Title VII because Title VII does not prohibit harassment or discrimination because of sexual orientation.”).

67. 42 U.S.C. § 2000e-2 (1994).

B. Supreme Court Decisions

In 1978, the Supreme Court held in *City of Los Angeles Department of Water & Power v. Manhart*⁶⁸ that generalizations about a class of individuals, even when true, do not justify discrimination against an individual to whom the generalization does not apply.⁶⁹ In other words, “[i]f height is required for a job, a tall woman may not be refused employment merely because, on the average, women are too short.”⁷⁰ This holding recognized what the dissent in *Evans* called “ascriptive stereotyping” as an avenue for setting forth a legally cognizable claim of sex discrimination in violation of Title VII.⁷¹

Just over ten years later in *Price Waterhouse*, the Supreme Court held that Title VII precluded not only sex discrimination based on an assumed gender stereotype regardless of whether the employee met the stereotype, but also discrimination based on failure to conform to a gender stereotype.⁷² The dissent in *Evans* referred to this form of stereotyping as “prescriptive.”⁷³ The Court in *Price Waterhouse* maintained that “[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.”⁷⁴

Additionally, in 1998, the Supreme Court held in *Oncale v. Sundowner Offshore Services, Inc.* that same-sex sexual harassment (when the alleged harasser and employee are of the same sex) is cognizable as sex discrimination under Title VII.⁷⁵ The dissent in *Evans* would have held that these rulings abrogated the Eleventh Circuit precedent relied on by the majority and concurrence. Regardless of whether or not the Supreme Court intended to lay the groundwork for recognizing sexual orientation discrimination claims under Title VII, courts have increasingly been using these cases to reach that exact conclusion.

68. 435 U.S. 702 (1978).

69. *Id.* at 708.

70. *Id.*

71. *Id.*; *Evans v. Ga. Reg'l Hosp.*, 850 F.3d 1248, 1263 (11th Cir. 2017) (Rosenbaum, J., concurring in part and dissenting in part).

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

73. *Evans*, 850 F.3d at 1262 (Rosenbaum, J., concurring in part and dissenting in part).

74. *Price Waterhouse*, 490 U.S. at 251 (alteration in original) (quoting *Manhart*, 435 U.S. at 707 n.13).

75. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 82 (1998).

V. ANALYSIS

A. *Evans is Moving in the Wrong Direction*

Judge Rosenbaum's in-depth explanation of the legal significance of the Supreme Court's holding in *Price Waterhouse* is illuminating. Most informative of the scope of the *Price Waterhouse* holding is the Supreme Court's finding that "[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."⁷⁶

The dissent's point of view in *Evans* is agreeable insofar as it seems to breathe life into the "entire spectrum" language in *Price Waterhouse*.⁷⁷ The Merriam-Webster Learner's Dictionary defines "stereotype" as "an often unfair and untrue belief that many people have about all people or things with a particular characteristic."⁷⁸ The "characteristic" at issue here is gender; and indeed, stereotypes linked to gender run deeper than "all women like shopping" and "all men like football." Societal notions of gender and sexual orientation are inextricably linked.

The crux of Judge Rosenbaum's argument is this: many people share the belief that all men and women are (or should be) attracted to persons of the opposite sex; thus, when a person is attracted to another of the same sex, they are non-conforming to their respective gender stereotype of heterosexuality.⁷⁹ Therefore, a person who discriminates against a person because he or she is attracted to someone of the same sex is necessarily discriminating against someone because he or she has failed to conform to the discriminator's notions of who he or she *should* be attracted to based on his or her gender.

Whether or not this logic is completely sound, Judge Rosenbaum is not alone in this thinking. In fact, this logic seems to be gaining traction in the courts. On July 15, 2015, the EEOC issued an administrative decision holding that "sexual orientation is inherently a 'sex-

76. *Price Waterhouse*, 490 U.S. at 251 (alteration in original) (quoting *Manhart*, 435 U.S. at 707 n.13).

77. *Evans*, 850 F.3d at 1263 (Rosenbaum, J., concurring in part and dissenting in part).

78. MERRIAM-WEBSTER LEARNER'S DICTIONARY, <http://www.learnersdictionary.com/definition/stereotype> (last visited March 18, 2018).

79. *Evans*, 850 F.3d at 1261 (Rosenbaum, J., concurring in part and dissenting in part).

based consideration,⁷⁹ and an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII.⁸⁰

Taking this logic as persuasive authority, several district courts and two appellate courts have followed suit, holding that sexual orientation discrimination is inherently sex-based discrimination and therefore legally cognizable under Title VII.⁸¹ Although the Supreme Court denied certiorari in *Evans*,⁸² the EEOC decision in *Baldwin* and wave of district court decisions to follow may eventually lead to a Supreme Court case on point.⁸³

B. Predicting a Future Supreme Court Ruling on the Issue

If the Supreme Court indeed grants certiorari in a Title VII case involving sexual orientation discrimination in the future, one naturally might wonder how such a case may fare. Indeed, if the current Supreme Court bench hears such a case, gay rights advocates may have cause for hope.

The current makeup of the bench leaves Justice Kennedy as the swing vote.⁸⁴ With the addition of Justice Neil Gorsuch—who has been recognized as ideologically similar to the late Justice Scalia—Justice Kennedy once again finds himself the lone moderate on the

80. *Baldwin v. Foxx*, No. 0120133080, 2015 WL 4397641, at *6 (EEOC July 15, 2015).

81. *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 112 (2d Cir. 2018) (“[S]exual orientation discrimination is motivated, at least in part, by sex and is thus a subset of sex discrimination under Title VII.”); *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 341 (7th Cir. 2017) (“[D]iscrimination on the basis of sexual orientation is a form of sex discrimination.”); *Philpott v. New York*, 252 F. Supp. 3d 313, 317 (S.D.N.Y. 2017) (“Sexual orientation discrimination . . . is cognizable under Title VII.”); *U.S. Equal Emp’t Opportunity Comm. v. Scott Med. Health Ctr., P.C.*, 217 F. Supp. 3d 834, 839 (W.D. Pa. 2016) (“Title VII’s ‘because of sex’ provision prohibits discrimination on the basis of sexual orientation.”); *Videckis v. Pepperdine Univ.*, 150 F. Supp. 3d 1151, 1151 (C.D. Cal. 2015) (“[C]laims of sexual orientation discrimination are gender stereotype or sex discrimination claims covered by Title VII . . .”).

82. *Evans v. Ga. Reg’l Hosp.*, 850 F.3d 1248 (11th Cir.), *cert. denied*, *Evans v. Ga. Reg’l Hosp.*, 138 S. Ct. 557 (2017) (mem.).

83. *Patti*, *supra* note 65, at 145 (“Given the changes in the social understanding of both sex and sexuality that the justices recognized in *Obergefell*, the Supreme Court should take the opportunity created by *Hively* to formally hold that Title VII protects victims of sexual orientation discrimination.”); *see generally* Alex Swoyer, *Supreme Court Declines to Settle Gay Rights Employment Discrimination*, WASH. TIMES (Dec. 11, 2017), <https://www.washingtontimes.com/news/2017/dec/11/supreme-court-declines-settle-gay-rights-employment/> (“[O]ther cases will eventually force the justices to confront the thorny issue.”).

84. Adam Liptak & Matt Flegenheimer, *Neil Gorsuch Confirmed by Senate as Supreme Court Justice*, N.Y. TIMES (April 7, 2017), <https://www.nytimes.com/2017/04/07/us/politics/neil-gorsuch-supreme-court.html> (“Justice Kennedy . . . continues to hold the crucial vote in many closely divided cases.”).

bench.⁸⁵ So, with a Title VII sexual orientation discrimination case potentially on the horizon for the Supreme Court, and with Justice Kennedy still sitting in the proverbial “hot seat,” could the stage be set for another *Romer v. Evans*⁸⁶ showdown?

In *Romer*, Justice Kennedy authored the majority opinion in which the Court struck down an amendment to the Colorado Constitution—which “preclude[d] all legislative, executive, or judicial action at any level of state or local government designed to protect . . . ‘homosexual, lesbian or bisexual [persons] . . .’”—as violating the equal protection clause.⁸⁷ Despite sexual orientation being a non-suspect classification subject to rational basis review, Justice Kennedy rejected the proffered purpose for the law as protecting landlords’ and employers’ religious objections to homosexuality.⁸⁸ Instead, Justice Kennedy wrote, “We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else. This Colorado cannot do. A State cannot so deem a class of persons a stranger to its laws.”⁸⁹

Justice Scalia, in an unsurprisingly pithy dissent, made his point clear: “This Court has no business imposing upon all Americans the resolution favored by the elite class from which the Members of this institution are selected, pronouncing that ‘animosity’ toward homosexuality is evil.”⁹⁰

Could this “landmark decision on the gay rights front”⁹¹ be an indication of how a Title VII sexual orientation discrimination case might play out? One can imagine Justice Gorsuch taking a position similar to Justice Scalia’s, given his Scalia-esque commitment “to following the original understanding of those who drafted and ratified the Constitution.”⁹² But the more difficult prediction comes in discerning whether Justice Kennedy’s majority opinion can really be taken as an indication of an ideological preference for broadening the scope of

85. Benjamin Bell, *How Neil Gorsuch Could Affect the Supreme Court*, ABC NEWS (April 10, 2017, 4:18 AM), <http://abcnews.go.com/Politics/neil-gorsuch-affect-supreme-court/story?id=46691852>.

86. 517 U.S. 620 (1996).

87. *Id.* at 620.

88. *Id.* at 635.

89. *Id.*

90. *Id.* at 636 (Scalia, J., dissenting) (citation omitted).

91. Tobin A. Sparling, *The Odd Couple: How Justices Kennedy and Scalia, Together, Advanced Gay Rights in Romer v. Evans*, 67 MERCER L. REV. 305, 307 (2016).

92. Liptak & Flegenheimer, *supra* note 84.

federal protection against discrimination on the basis of sexual orientation.

Although Justice Kennedy never explicitly framed his opinion as furthering a gay rights agenda,⁹³ his willingness to strike down the amendment to the Colorado statute despite the Court's previous ruling in *Bowers v. Hardwick*⁹⁴ and in the face of highly deferential rational basis review indicates otherwise. Ultimately, however, there is no way to guarantee *Romer* déjà vu, especially since a Supreme Court decision on the Title VII issue may hang on the minutiae of the substantive Title VII jurisprudence discussed above as opposed to the policy-based equal protection analysis employed in *Romer*.

VI. CONCLUSION

The majority and concurrence in *Evans* represent where courts have historically landed on the question of whether discrimination based on sexual orientation is actionable under Title VII. On the other hand, the dissent represents where courts seem to be headed on the same issue. With an emerging circuit split, the stage is set for the Supreme Court to end the debate. Although it is difficult to predict how such a case might turn out, it will no doubt be significant to both legal scholars and gay rights advocates alike.

93. Sparling, *supra* note 91, at 306–07.

94. 478 U.S. 186 (1986) (holding that a Georgia sodomy statute did not violate the fundamental rights of homosexuals).