

7-1-2018

## The Writing on the Wall: The Future of LGBT Employment Antidiscrimination Law in the Age of Trump

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### Recommended Citation

Elizabeth Kristen and David Nahmias, *The Writing on the Wall: The Future of LGBT Employment Antidiscrimination Law in the Age of Trump*, 39 BERKELEY J. EMP. & LAB. L. 89 (2018).

### Link to publisher version (DOI)

<https://doi.org/10.15779/Z38F47GT8X>

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# The Writing on the Wall: The Future of LGBT Employment Antidiscrimination Law in the Age of Trump

Elizabeth Kristen<sup>†</sup> & David Nahmias<sup>††</sup>

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## INTRODUCTION

Concluding recently that Title VII of the Civil Rights Act<sup>1</sup> does not protect employees from discrimination based on their sexual orientation, a

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DOI: <https://doi.org/10.15779/Z38F47GT8X>

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<sup>†††</sup>. This paper was initially prepared for the keynote address at *The Future of Discrimination Law: Frameworks, Theory, Practice & People* symposium at the University of California, Berkeley, School of Law on March 10, 2017, and contains updates to reflect subsequent developments prior to publication.

1. 42 U.S.C. §§ 2000e-2–2000e-17 (2012).

three-judge panel in the Seventh Circuit in *Hively v. Ivy Tech Community College* acknowledged that its holding might not endure for long, stating that “the writing is on the wall” with respect to ensuring protections from employment discrimination for Lesbian, Gay, Bisexual and Transgender (LGBT) people.<sup>2</sup> This was prescient indeed, as a few months later the appellate court sitting *en banc* decided to overrule the decision and become the first circuit to find that Title VII encompasses sexual orientation.<sup>3</sup> In the intervening months, the Eleventh Circuit in *Evans v. Georgia Regional Hospital* had concluded that federal law does not prohibit sexual orientation discrimination, while the Second Circuit, sitting *en banc*, concluded that it does in *Zarda v. Altitude Express, Inc.*<sup>4</sup> The circuits are now clearly split, and the issue likely will go to the Supreme Court in short order. The national landscape generally is in flux. Indeed as we attempt to finalize this article, updates on LGBT rights (and the erosion of those rights) are happening on a daily basis. As a recent opinion piece noted, whether LGBT people are protected from discrimination depends on your zip code.<sup>5</sup> Although approximately twenty-two states provide some employment protections for LGBT workers, the majority of these workers still lack the protection of employment antidiscrimination laws.

Under the Obama Administration, federal agencies expanded LGBT civil rights protections and thus provided some additional protections to vulnerable workers. In the Trump era, however, where the civil rights of marginalized communities are vulnerable and under attack, the writing on the wall for the future of employment protections for LGBT workers is smudged at best.

This article evaluates the future of antidiscrimination law for LGBT employees under a Trump Administration and recommends new strategies for the LGBT movement, based in part on our experiences advocating for LGBT workers. In Part I, we offer a short summary of the state of the law within the federal legislative and judicial branches. In Part II, we consider the role of the EEOC, the predominant administrative agency enforcing antidiscrimination workplace laws, and its future under Trump. In Part III,

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2. *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 830 F.3d 698, 718 (7th Cir. 2017) (*Hively I*).

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

4. *Evans v. Georgia Reg'l Hosp.*, 850 F.3d 1248, 1256–57 (11th Cir. 2017), *cert. denied*, 138 S. Ct. 557 (2017); *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018) (*en banc*) (overruling its prior precedent and holding that “Zarda is entitled to bring a Title VII claim for discrimination based on sexual orientation.”). The Second Circuit presaged its *Zarda* decision in *Christiansen v. Omnicom Grp., Inc.*, 852 F.3d 195, 201 (2d Cir. 2017), in which a three-judge panel reversed dismissal of Title VII harassment claim by an HIV positive gay man because his “gender stereotyping allegations . . . are cognizable” at the pleading stage).

5. See Frank Bruni, *The Worst (and Best) Places to be Gay in America*, N.Y. TIMES (Aug. 25, 2017), <https://www.nytimes.com/interactive/2017/08/25/opinion/sunday/worst-and-best-places-to-be-gay.html>.

we offer and critique three overarching strategies for antidiscrimination advocates: (A) focusing on state laws, (B) influencing corporate policies and the business community, and (C) mobilizing movements outside of the policy and litigation realms. In Part IV we conclude, galvanized to fight for LGBT rights even in this hostile environment. We have seen tremendous progress in the last 20 years for LGBT equality, and our community is simply unwilling to go back.<sup>6</sup>

## I.

### THE LEGISLATIVE AND THE JUDICIAL BRANCHES: PURVEYORS OF UNATTAINABLE AND INCONSISTENT MESSAGES.

Title VII of the Civil Rights Act makes it unlawful for employers to discriminate on the basis of “race, color, religion, sex, or national origin.”<sup>7</sup> It does not explicitly mention sexual orientation or gender identity.<sup>8</sup> Multiple attempts to amend the statute have failed. Versions of the Employment Non-Discrimination Act (ENDA), which explicitly outlaws employment discrimination based on sexual orientation (and more recently gender identity), have been introduced in every session of Congress since 1994.<sup>9</sup> In 2013, the Senate passed a version of ENDA for the first time, but it died in the House.<sup>10</sup> A new comprehensive bill, the Equality Act, would more broadly prohibit LGBT-related discrimination in employment, housing, credit, education, jury service, public accommodations, and federal programs.<sup>11</sup> But it too failed in the last Congress, and with Republican dominance in the House, Senate, and Presidency, dreams of passing the Equality Act appear quixotic and out of reach.

Absent Congressional action to amend Title VII, federal courts have been reluctant to interpret the statute as incorporating sexual orientation and gender identity. The *Hively* en banc decision in April 2017 is thus a watershed moment for LGBT-related jurisprudence. In that case, the court evaluated “what it means to discriminate on the basis of sex, and in

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6. It is undeniable that the law is evolving rapidly as current events transpire. By the time of this article’s publication, new legal, social and political developments have further affected the rights of the LGBT community in unexpected ways, and they will continue to do so (for example, the distressing outcome of *Masterpiece Cakeshop, LTD. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018), the Department of Justice’s creation of a Religious Liberty Task Force, and the elevation of conservative Judge Brett Kavanaugh to the U.S. Supreme Court to replace Justice Anthony Kennedy.). While acknowledging that many of the claims presented here have since evolved, the authors stand firm behind the overall propositions and believe the recommendations will remain relevant moving forward.

7. 42 U.S.C. § 2000e-2.

8. *See id.*

9. *See* Alex Reed, *Abandoning ENDA*, 51 HARV. J. ON LEGIS. 277, 278 (2014).

10. *See id.*; Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. (2013).

11. *See* Equality Act, S. 1858, 114th Cong. (2015); Equality Act, H.R. 3185, 114th Cong. (2015). *See also* Alex Reed, *RFRA v. ENDA*, 23 VIRG. J. SOC. POL’Y & L. 1, 36 (2016).

particular, whether actions taken on the basis of sexual orientation are a subset of actions taken on the basis of sex.”<sup>12</sup> The court reasoned that sexual orientation discrimination is grounded in gender stereotypes and prejudice toward an LGB employee’s associations with same-sex partners.<sup>13</sup> Because of the evolving Supreme Court jurisprudence on sex discrimination and the “common-sense reality that it is actually impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex,” the court became the first appellate tribunal to find that Title VII indeed prohibits sexual orientation-based discrimination at work.<sup>14</sup>

Notwithstanding the *Hively* and *Zarda* decisions, most circuits have reaffirmed their respective precedents that Title VII does not include sexual orientation, letting stand a circuit split.<sup>15</sup> Some LGBT employees have succeeded to an extent by adequately demonstrating that their discrimination amounted to impermissible sex stereotyping, but there are no uniform rules under which courts arrive at this interpretation.<sup>16</sup>

Numerous cases and law review articles have analyzed the various ways that courts have or have not justified their rulings in LGBT employment discrimination cases absent clear language in Title VII.<sup>17</sup> It

12. *Hively II*, 853 F.3d 339, 343 (7th Cir. 2017) (en banc).

13. *Id.* at 345–49.

14. *Id.* at 351. *Hively*’s reasoning directly inspired the *Zarda* court, which also included that sexual orientation discrimination is a “subset” of discrimination based on sex, sex stereotyping, and association. *Zarda v. Altitude Express*, 883 F.3d 100, 112, 119, 124 (2d Cir. 2018).

15. See, e.g., *Hively I*, 830 F.3d at 705–15 (7th Cir. 2017) (analyzing cases in the other circuits); *Evans v. Georgia Reg’l Hosp.*, 850 F.3d 1248, 1256–57 (11th Cir. 2017); *Zarda v. Altitude Express*, 855 F.3d 76, 82 (2d Cir. 2017). The Ninth Circuit has found that gay men subjected to homophobic harassment at their respective workplaces pled cognizable sex-based harassment claims under Title VII. *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1063–64 (9th Cir. 2002). Courts have been more receptive, however, to transgender individuals’ claims of gender identity discrimination arising from Title VII. See, e.g., *Tovar v. Essentia Health*, 857 F.3d 771, 775 (8th Cir. 2017) (“assum[ing] for purposes of this appeal that the prohibition on sex based discrimination under Title . . . encompasses protection for transgender individuals” although ultimately finding that the mother of a transgender youth lacks standing to pursue a Title VII claim); *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011); *Barnes v. City of Cincinnati*, 401 F.3d 729, 736–38 (6th Cir. 2005); *Smith v. City of Salem*, 378 F.3d 566, 570–75 (6th Cir. 2004).

16. The *en banc Hively II* and *Zarda* decisions rely squarely on sex stereotyping theory. For other examinations of sex stereotyping cases in the LGBT context, see, for example, *Roberts v. United Parcel Serv.*, 115 F. Supp. 3d 344, 362–63 (E.D.N.Y. 2015); Stephanie Rotondo, *Employment Discrimination Against LGBT Persons*, 16 GEO. J. GENDER & L. 103, 108–15 (2015).

17. See, e.g., *Hively I*, 830 F.3d at 704–13 (citing cases); *Videckis v. Pepperdine Univ.*, 150 F. Supp. 3d 1151, 1161 (C.D. Cal. 2015) (construing Title IX to encompass sexual orientation-based discrimination). Unfortunately, the *Videckis* plaintiffs lost their case at trial. Andrea Castillo & Matt Hamilton, *Jury Rules Against Plaintiffs in Pepperdine University Sexual Orientation Discrimination Case*, L.A. TIMES (August 12, 2017, 1:55 PM), <http://www.latimes.com/local/lanow/la-me-anti-gay-discrimination-20170812-story.html>); *Roberts*, 115 F. Supp. 3d 344, 362–66 (E.D.N.Y. 2015); Rotondo, *supra* note 16; Brian Soucek, *Perceived Homosexuals: Looking Gay Enough For Title VII*, 63 AM. U. L. REV. 715 (2014). Some cases have relied on *Oncala v. Sundowner Offshore Servs.*, 523 U.S. 75, 78 (1998), which ruled that same-sex harassment violated Title VII’s prohibition of discrimination “because of . . . sex.” See, e.g., *Rene*, 305 F.3d at 1066–68; *cf. Whitaker v. Kenosha Unif. Sch. Dis. No.*

suffices to say that the Trump Administration, and the Republican-led 115<sup>th</sup> Congress, have taken power during a period of piecemeal precedent when the federal courts continue to hear challenges to LGBT antidiscrimination law and often fail to rule for employees, many times leaving them outside the protections of the judiciary and, consequently, without a livelihood.

## II.

### THE EXECUTIVE BRANCH: THE EASING CAMPAIGN OF THE EEOC.

During the Obama Administration, LGBT employment advocates could largely find solace and protections in the Executive Branch. President Obama did more for LGBT employees than any previous president, issuing executive orders that protected transgender federal employees and LGBT federal contractors.<sup>18</sup> One essential way that his administration took action for LGBT employees was through its Equal Employment Opportunity Commission (EEOC).

Established as part of Title VII, the EEOC is the federal agency responsible for enforcing the nation's workplace antidiscrimination laws. An employee claiming a Title VII violation first must file a charge with the EEOC, which will then conduct an investigation and seek to resolve the matter. If a claimant is unsatisfied with the EEOC process, she may request a "right to sue" letter to file an action in federal court. The EEOC may also pursue litigation against employers on behalf of the aggrieved employee.<sup>19</sup> And, importantly, the EEOC adjudicates claims brought by federal workers.<sup>20</sup>

In 2012, the EEOC inaugurated a new era for LGBT employees with its 2013–2017 Strategic Enforcement Plan. Within its national priority of "Addressing Emerging and Developing Issues," the EEOC included "coverage of lesbian, gay, bisexual and transgender individuals under Title VII's sex discrimination provisions, as they may apply."<sup>21</sup> Shortly thereafter, the EEOC embarked on an active campaign on behalf of transgender employees.

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1 Bd. of Educ., 858 F.3d 1034, 1048–50 (7th Cir. 2017) (construing *Oncale* in the Title IX context to find that a school prohibiting a transgender student from using the restroom corresponding with his gender identity constitutes sex discrimination).

18. See Exec. Order 13672, 79 Fed. Reg. 42971 (July 21, 2014) (amending Exec. Order 11478 to protect transgender federal employees (LGB employees were already covered) and amending Exec. Order 11246 to protect LGBT federal contractors).

19. See EEOC, *How to File a Charge of Employment Discrimination*, <https://www.eeoc.gov/employees/howtofile.cfm> (last visited Oct. 24, 2017) (details on the EEOC process).

20. See EEOC, *Overview of Federal Sector EEO Complaint Process*, [https://www.eeoc.gov/federal/fed\\_employees/complaint\\_overview.cfm](https://www.eeoc.gov/federal/fed_employees/complaint_overview.cfm) (last visited Oct. 24, 2017).

21. EEOC, STRATEGIC ENFORCEMENT PLAN FY 2013–2016, (approved Dec. 17, 2012), <https://www.eeoc.gov/eeoc/plan/sep.cfm>.

For example, in *Macy v. Holder*, the Commission adopted the position that gender identity discrimination was a *prima facie* Title VII violation.<sup>22</sup> In *Macy*, the EEOC found for a transgender police detective who had applied for a job as a ballistics technician at the federal Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) by relying on sex stereotyping theories—arising from *Price Waterhouse* and its progeny—to hold that discrimination against transgender employees was illegal “because of sex.”<sup>23</sup> Then in July 2015, the Commission issued a watershed decision for LGBT employees in the workplace in *Baldwin v. Foxx*, declaring that Title VII encompasses sexual orientation.<sup>24</sup> The Commission concluded that “the question for purposes of Title VII coverage of a sexual orientation claim is the same as any other Title VII case involving allegations of sex discrimination,” which equates to unlawful “sex-based considerations.”<sup>25</sup>

According to the EEOC, “[s]exual orientation discrimination is sex discrimination because it necessarily entails treating an employee less favorably because of the employee’s sex.”<sup>26</sup> Consequently, the Commission found that a gay air traffic controller in *Baldwin* was unlawfully denied a permanent position on the basis of his sexual orientation because his employer “took his sex into account in its employment decision.”<sup>27</sup> Moreover, the EEOC ordered its offices nationwide to treat sexual orientation claims as complaints of sex discrimination under Title VII.<sup>28</sup>

*Macy* and *Baldwin* sparked a quiet yet aggressive front for the EEOC to protect LGBT workers.<sup>29</sup> The EEOC started to file its own complaints of sexual orientation-based discrimination grounded in the *Baldwin* decision. In March 2016, the EEOC filed two unrelated suits, one on behalf of a gay male and another for a lesbian employee, who endured multiple instances of

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22. *Macy v. Holder*, EEOC Appeal No. 0120120821, 2012 WL 1435995, at \*11 (Apr. 20, 2012). See also Emily K. Crawford, *America’s Finally Beginning to Talk About It—Transgender Individuals’ Rights in the Workplace*, 18 DUQ. BUS. L.J. 45, 61 (2016); EEOC, *Fact Sheet: Recent EEOC Litigation Regarding Title VII & LGBT-Related Discrimination*, [https://www.eeoc.gov/eeoc/litigation/selected/lgbt\\_facts.cfm](https://www.eeoc.gov/eeoc/litigation/selected/lgbt_facts.cfm) (last updated July 8, 2016) (listing cases).

23. *Macy v. Holder*, 2012 WL 1435995 at \*7. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 249–53 (1989), on which the EEOC relied, first articulated that Title VII also prohibited an employer from using a worker’s failure to conform to sex stereotypes to justify an adverse employment action. Courts have subsequently evaluated whether such sex stereotyping theory also prohibits sexual orientation and gender identity discrimination. See *supra* notes 15–17.

24. *Baldwin v. Foxx*, EEOC Appeal No. 0120133080, 2015 WL 4397641, at \*10 (Jul. 15, 2015).

25. *Id.* at \*4 (citing *Price Waterhouse*, 490 U.S. at 242).

26. *Id.* at \*5.

27. *Id.*

28. *Id.* at \*10.

29. See Joe Pinsker, *A Quiet Triumph for Gay Workers*, THE ATLANTIC (Jul. 22, 2015), <https://www.theatlantic.com/business/archive/2015/07/a-quietly-triumphant-ruling-in-favor-of-gay-workers-rights/399200/>.

harassment based on their sexual orientation.<sup>30</sup> In both cases, the Commission alleged sex-based Title VII discrimination under *Baldwin*. When filing these suits, the EEOC general counsel unequivocally supported this enhanced reading of Title VII, noting that “[w]hile some federal courts have begun to recognize this right under Title VII, it is critical that all courts do so.”<sup>31</sup>

Post-*Baldwin*, the EEOC started vigorously pursuing LGBT workers’ discrimination claims. In the first case that the EEOC litigated, the court denied the employer’s motion to dismiss, seeing “no meaningful difference between sexual orientation discrimination and discrimination ‘because of sex.’”<sup>32</sup> It agreed with the EEOC’s *Baldwin* analysis that unlawful sex stereotyping includes “making a determination that a person should conform to heterosexuality.”<sup>33</sup> In another case, the EEOC and the employer settled, with the employer agreeing to pay \$182,200 in damages to the female employee, donate an additional \$20,000 to the Human Rights Campaign’s Workplace Equality Program, and implement an internal training program on LGBT workplace issues.<sup>34</sup>

These lawsuits ushered in a new era for the EEOC that saw it file at least three more lawsuits in Arizona, North Dakota, and Washington, D.C., for discrimination against gay or lesbian employees—notably all in the last month of the Obama Administration.<sup>35</sup> The EEOC also executed other policies favoring LGBT employees outside of litigation, such as collaborating with other agencies to release a guide about LGBT discrimination protections for federal workers.<sup>36</sup>

Yet what a difference an election makes. The election of Donald Trump in 2016 not only shocked the world; it immediately cast doubt on the future of the significant advances for LGBT equality achieved under President Obama. Trump equivocated on LGBT issues during his campaign

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30. EEOC, *EEOC Files First Suits Challenging Sexual Orientation Discrimination as Sex Discrimination*, Mar. 1, 2016, 2016 WL 792023.

31. *Id.* Notwithstanding this entreaty from the general counsel, *Baldwin* did not fully move the needle among the judiciary. For instance, despite acknowledging *Baldwin* and giving it the deference due to administrative decisions, the *Hively I* panel nonetheless arrived at an opposing conclusion. *Hively I*, 830 F.3d 698, 703 (7th Cir. 2016). Conversely, the *en banc* court did not defer to the EEOC’s position but ultimately agreed with it. *Hively II*, 853 F.3d 339, 344 (7th Cir. 2017).

32. EEOC v. Scott Med. Health Ctr., P.C., 217 F. Supp. 3d 834, 839–40 (W.D. Pa. 2016).

33. *Id.* at 841.

34. EEOC v. Pallet Co., No. 16-cv-00595 (D. Md. filed Mar. 1, 2016). EEOC, *See IFCO Systems Will Pay \$202,200 in Landmark Settlement of One of EEOC’s First Sexual Orientation Cases*, Jun. 28, 2016, 2016 WL 3518330.

35. See EEOC v. Scottsdale Wine Café, LLC, No. 2:17-cv-00182 (D. Ariz. filed Jan. 20, 2017); EEOC v. Rocky Mountain Casing Crews, No. 1:16-cv-00428 (D.N.D. filed Dec. 22, 2016); EEOC v. Capital Restaurant Concepts, No. 1:16-cv-2477 (D.D.C. filed Dec. 20, 2016).

36. EEOC, *Agencies Release Guide on LGBT Discrimination Protections for Federal Workers* (Jun. 3, 2015), <https://www.eeoc.gov/eeoc/newsroom/release/6-3-15.cfm>.



while constructing an administration that is inimical to LGBT rights, from the virulently anti-gay Vice President Mike Pence on down.<sup>37</sup> One significant question is the extent to which Trump and his EEOC will defend LGBT workers against employment discrimination. So far, we suspect the answer is “little,” but the EEOC’s position in *Zarda* gives some home.

The first major indication of a shifting EEOC arose in the appeal of a Commission-led lawsuit on gender identity discrimination. In *R.G. & G.R. Harris Funeral Homes*, the district court ruled for the employer in a Title VII case the EEOC filed on behalf of a funeral director, who is transgender, who was fired for wearing clothing consistent with her gender identity.<sup>38</sup> The funeral home that employed her administered a gender-based dress code based on the employee’s sex assigned at birth.<sup>39</sup> After six years, the funeral director transitioned and sought to wear clothes according to the dress code for women, and the owner fired her almost immediately.<sup>40</sup> The funeral home, despite not being affiliated with any specific religion itself, defended its actions under the federal Religious Freedom Restoration Act (RFRA). The owner declared that his religious beliefs as a Christian led him to object to the funeral director’s status as a transgender female.<sup>41</sup> The court agreed with Harris, and found that RFRA exempted the employer from Title VII.<sup>42</sup>

The EEOC filed its appeal in October 2016, still under President Obama. Yet in January 2017, the employee herself, represented by the ACLU, sought to intervene in her case, concerned that the EEOC under Trump might drop its appeal. Indeed, the EEOC did not issue any remarks about the employee’s intervention and sought additional time for briefing due to “administration-related changes.”<sup>43</sup> Although the EEOC did eventually file its appeal, the Sixth Circuit granted the ACLU’s motion to intervene on a limited basis, and it ultimately ruled for the plaintiff and the EEOC, rejecting the RFRA claim.<sup>44</sup> This is a noteworthy victory for LGBT

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37. See Lucas Grindley, *Trump Backtracks on Campaign Promise, Won’t Overturn LGBT Protections*, THE ADVOCATE (Jan. 31, 2017, 2:14 AM), <http://www.advocate.com/politics/2017/1/30/trump-backtracks-campaign-promise-wont-overturn-lgbt-protections>.

38. EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 201 F. Supp. 3d 837, 842 (E.D. Mich. 2016), *rev’d*, 884 F.3d 560 (6th Cir. 2018).

39. *Id.*

40. *Id.* at 844.

41. *Id.* at 847.

42. *Id.* at 856.

43. Daniel Wiessner, *Funeral Home Says Fired Transgender Worker Can’t Intervene in EEOC Case*, REUTERS LEGAL (Feb. 8, 2017, 3:48 AM), <https://www.reuters.com/article/employment-funeralhome/funeral-home-says-fired-transgender-worker-cant-intervene-in-eeoc-case-idUSL1N1FT0GD>. The funeral home vigorously opposed the employee’s motion, continuing to misgender her in the process. *See id.*

44. Mark Joseph Stern, *EEOC Continues Fight Against Trans Discrimination Despite “Administration-Related Changes*, SLATE (Feb. 14, 2017, 11:12 AM),

rights and, for now, a glimmer of hope for the EEOC's advocacy, but the ruling will nonetheless undeniably fuel the ongoing controversy between LGBT rights and religious-based objections.

Whether the Commission continues to advocate vigorously for LGBT workplace protections factors into Trump's generally abysmal record on LGBT issues so far. Within hours of taking office, the Trump White House removed the Obama-era LGBT page from its official website.<sup>45</sup> Then, the Trump Administration decided to withdraw the implementation of Department of Education guidelines that interpreted Title IX as requiring schools to provide transgender students access to bathrooms and other facilities that correspond with their gender identity, after not appealing an injunction by a federal judge in Texas against the regulations.<sup>46</sup> These guidelines figured largely in the case of Gavin Grimm, a transgender male student denied access to men's facilities at his school. Following the administration's rescission of the Title IX guidance, the Supreme Court remanded the case for rehearing, and now the case may be moot due to Grimm's graduation.<sup>47</sup> Now, the Administration has taken aim squarely at

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[http://www.slate.com/blogs/xx\\_factor/2017/02/14/eecoc\\_continues\\_fight\\_against\\_trans\\_discrimination.html](http://www.slate.com/blogs/xx_factor/2017/02/14/eecoc_continues_fight_against_trans_discrimination.html). See also Order of Mar. 27, 2017 (Docket No. 28), EEOC v. R.G. & G.R. Harris Funeral, No. 16-2424 (6th Cir. filed Oct. 13, 2016); EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560 (6th Cir. 2018)

45. Colby Itkowitz, *LGBT Rights Page Disappears from White House Web Site*, WASH. POST (Jan. 20, 2017, 12:15 PM), [https://www.washingtonpost.com/local/2017/live-updates/politics/live-coverage-of-trumps-inauguration/lgbt-rights-page-disappears-from-white-house-website/?utm\\_term=.0eb3954c8fd9](https://www.washingtonpost.com/local/2017/live-updates/politics/live-coverage-of-trumps-inauguration/lgbt-rights-page-disappears-from-white-house-website/?utm_term=.0eb3954c8fd9).

46. Sandhya Somashekhar et al., *Trump Administration Poised to Change Transgender Student Bathroom Guidelines*, WASH. POST (Feb. 21, 2017), [https://www.washingtonpost.com/local/education/trump-administration-poised-to-change-transgender-student-bathroom-guidelines/2017/02/21/cd690204-f7bf-11e6-9845-576c69081518\\_story.html](https://www.washingtonpost.com/local/education/trump-administration-poised-to-change-transgender-student-bathroom-guidelines/2017/02/21/cd690204-f7bf-11e6-9845-576c69081518_story.html); Liam Stack, *Trump Drops Defense of Obama Guidelines on Transgender Students*, N.Y. TIMES (Feb. 11, 2017), [https://www.nytimes.com/2017/02/11/us/politics/trump-transgender-students-injunction.html?\\_r=0](https://www.nytimes.com/2017/02/11/us/politics/trump-transgender-students-injunction.html?_r=0). Another concerning development, albeit outside of the employment context, was Trump's appointment of Richard Servino, a virulent anti-LGBT former Heritage Foundation staffer, to head the Civil Rights Division of the Health and Human Services Department. Charles Ornstein, *Heritage Foundation Alum Critical of Transgender Rights to Lead HHS Civil Rights Office*, SALON (Mar. 27, 2017, 1:10 PM), [http://www.salon.com/2017/03/27/heritage-foundation-alum-critical-of-transgender-rights-to-lead-hhs-civil-rights-office\\_partner/](http://www.salon.com/2017/03/27/heritage-foundation-alum-critical-of-transgender-rights-to-lead-hhs-civil-rights-office_partner/). Servino once argued that "[r]eligious institutions face a variety of grave risks in the wake of legalized same-sex marriage." See Roger Servino, *Or for Poorer? How Same-Sex Marriage Threatens Religious Liberty*, 30 HARV. J. L. & PUB. POL'Y 939, 979 (2007). Trump nominated and the Senate confirmed notoriously homophobic Kansas Governor Sam Brownback as ambassador-at-large for "international religious freedom," another sign that the religious liberty agenda will take center stage in this administration. See Greg Price, *Who Is Sam Brownback? New Trump Nominee is Anti-LGBT*, NEWSWEEK (Jul. 31, 2017, 5:40 PM), <http://www.newsweek.com/trump-lgbt-brownback-religion-644540>.

47. Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm, 137 S. Ct. 1239 (2017), *remanding* 822 F.3d 709 (4th Cir. 2016) (remanding "in light of the guidance document issued by the Department of Education and Department of Justice on February 22, 2017"); see also Adam Liptak, *Supreme Court Won't Hear Major Case on Transgender Rights*, N.Y. TIMES (Mar. 6, 2017), <https://www.nytimes.com/2017/03/06/us/politics/supreme-court-transgender-rights-case.html>. See Grimm v. Gloucester Cty. Sch. Bd., 869 F.3d 286, 290-91 (4th Cir. 2017) (remanding to the district

LGBT workers, first when the Department of Justice filed an amicus brief in the *Zarda* case that rejected the notion that Title VII prohibits sexual orientation discrimination, and second, when the President signed an executive action precluding transgender individuals from enlisting in the armed forces.<sup>48</sup> Such affirmative, unsolicited attacks on the LGBT community unequivocally demonstrate the antagonism of the Trump Administration to our issues. While Trump's executive order on religious liberty was less aggressive against LGBT workers than we initially feared—for example by not repealing Obama-era protections for LGBT federal employees—the action still sanctions some level of discrimination on the basis of religious beliefs.<sup>49</sup>

Despite these dangerous setbacks, in the short-term the EEOC likely will not overtly change course in its defense of LGBT protections, as indicated by its lawsuits on the eve of the Trump Administration on behalf of LGBT workers.<sup>50</sup> In fact, the EEOC directly opposed the Justice Department by filing an amicus brief in the same *Zarda* case that argued in

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court to consider the mootness question) Ann E. Marimow, *Case of Transgender Teen Gavin Grimm Put Off by Appeals Court*, WASH. POST (Aug. 2, 2017), [https://www.washingtonpost.com/local/public-safety/case-of-virginia-transgender-teen-gavin-grimm-put-off-by-appeals-court/2017/08/02/4d49a254-77ad-11e7-8839-ec48ec4cae25\\_story.html](https://www.washingtonpost.com/local/public-safety/case-of-virginia-transgender-teen-gavin-grimm-put-off-by-appeals-court/2017/08/02/4d49a254-77ad-11e7-8839-ec48ec4cae25_story.html). The ACLU is now filing a new amended complaint seeking monetary damages and an injunction declaring unlawful the school's ban on transgender students using the facilities that correspond to their gender identity. Joshua Block, *Gavin Grimm's Lawsuit Enters a New Phase*, ACLU LGBT & HIV PROJECT (Aug. 11, 2017, 4:00 PM), <https://www.aclu.org/blog/lgbt-rights/transgender-rights/gavin-grimms-lawsuit-enters-new-phase>.

48. Brief for the United States as Amicus Curiae at 1-2, *Zarda v. Altitude Express*, 855 F.3d 76 (2d Cir. 2017) (No. 15-3775), 2017 WL 3277292 (submitting that "Title VII does not reach discrimination based on sexual orientation . . . as has been settled for decades"); Alan Feuer, *Justice Department Says Rights Law Doesn't Protect Gays*, N.Y. TIMES (Jul. 27, 2017), <https://www.nytimes.com/2017/07/27/nyregion/justice-department-gays-workplace.html>. See Presidential Memorandum for the Secretary of Defense and the Secretary of Homeland Security, 82 Fed. Reg. 41319 (Aug. 25, 2017), <https://www.whitehouse.gov/the-press-office/2017/08/25/presidential-memorandum-secretary-defense-and-secretary-homeland>; Michael R. Gordon & Emily Cochrane, *Trump Gives Mattis Wide Discretion Over Transgender Ban*, N.Y. TIMES (Aug. 25, 2017), <https://www.nytimes.com/2017/08/25/us/politics/trump-mattis-transgender-ban.html>.

49. See Exec. Order No. 13798, 82 Fed. Reg. 21675 (May 4, 2017); Derek Hawkins, *Critics Said Trump's 'Religious Liberty' Order Does Nothing. The Administration's Lawyers Seem to Agree*, WASH. POST (Aug. 25, 2017), <https://www.washingtonpost.com/news/morning-mix/wp/2017/08/25/critics-said-trumps-religious-liberty-order-does-nothing-the-administrations-lawyers-seem-to-agree/>; Rebecca Buckwalter-Poza & Sharita Gruberg, *How the Religious Liberty Executive Order Licenses Discrimination*, CTR. FOR AM. PROGRESS (Jul. 31, 2017, 9:01 AM), <https://www.americanprogress.org/issues/lgbt/news/2017/07/31/436871/religious-liberty-executive-order-licenses-discrimination/>; Emma Green, *Why Trump's Executive Order on Religious Liberty Left Many Conservatives Dissatisfied*, THE ATLANTIC (May 4, 2017), <https://www.theatlantic.com/politics/archive/2017/05/religious-freedom-executive-order/525354/>.

50. See Dominic Holden, *An Independent Federal Agency is Suing to Advance Gay Rights Without Waiting on Trump*, BUZZFEED NEWS (Jan. 24, 2017), <https://www.buzzfeed.com/dominicholden/an-independent-federal-agency-is-suing-on-behalf-of-gay-right>.

favor of finding sexual orientation protections in Title VII.<sup>51</sup> Yet Trump signaled a new employer-friendly direction for the EEOC by nominating Janet Dhillon, the general counselor of a large retailer and Republican donor, and Daniel Gade, a veteran and outspoken critic on disability issues, to the fill vacancies on the five-member Commission.<sup>52</sup> While their opinions on sexual orientation and gender identity issues are unknown, LGBT workers should likely prepare themselves for a less friendly EEOC, which will soon have a Republican majority. The current acting Commission chair, Victoria Lipnic, a Republican, initially said that the EEOC will continue to enforce existing antidiscrimination law, but likely will shift away from the systemic discrimination claims that Obama's EEOC filed. "Individual cases matter," she said at a panel, adding that "I'm not of the view that it should be all systemic all the time."<sup>53</sup> While the Commission may not revisit *Baldwin's* interpretation of Title VII, it likely will not affirmatively seek out LGBT discrimination cases either.<sup>54</sup>

The EEOC was designed as an independent agency with staggered terms, garnering it a greater degree of impartiality from the current administration. However, all signs indicate that, at best, the Commission will gradually retreat from its previous aggressive stance defending LGBT workers and shift its agenda to other priorities, like job growth.<sup>55</sup> At worst, the EEOC might begin affirmatively dismantling LGBT protections. Given the president's and his administration's actions so far, LGBT employees likely cannot count on the federal government, in particular the EEOC, to be vocal stewards of their interests.

We predict that the EEOC's vigorous championing of an inclusive workplace protecting sexual orientation and gender identity will diminish. In the face of waning federal advocacy, then, LGBT employees and their

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51. En Banc Brief of Equal Employment Opportunity Commission as Amicus Curiae Supporting Appellants and in Favor of Reversal at 1, *Zarda v. Altitude Express*, 855 F.3d 76 (2d Cir. 2017) (No. 15-3775), 2017 WL 2730281 (arguing that sexual orientation claims "fall squarely within Title VII's prohibition against discrimination on the basis of sex").

52. Erin Mulvaney & Mike Scarella, *Janet Dhillon, Ex-Big Law Turned Longtime GC, Lands Trump Nod for EEOC*, LAW.COM (Jun. 29, 2017), <http://www.law.com/sites/almstaff/2017/06/29/janet-dhillon-ex-big-law-turned-longtime-gc-lands-trump-nod-for-eeoc/>; Erin Mulvaney, *Trump's Latest EEOC Pick, Daniel Gade, Has Long Criticized Disability Pay for Vets*, NAT'L L.J. (Aug. 1, 2017), <http://www.nationallawjournal.com/id=1202794428492/Trumps-Latest-EEOC-Pick-Daniel-Gade-Has-Long-Criticized-Disability-Pay-for-Vets>.

53. Barbara Hoey, *New EEOC Chair Says There Will be No "Major Changes" But—the DOJ Seems to be Calling a Truce in the Transgender Battle—What Direction Are We Heading?*, JDSUPRA BUSINESS ADVISOR (Feb. 16, 2017), <http://www.jdsupra.com/legalnews/new-eeoc-chair-says-there-will-be-no-29185/>.

54. Kevin McGowan, *No Third Term Likely for Republican EEOC Commissioner*, BLOOMBERG NEWS (Dec. 13, 2016), <https://www.bna.com/no-third-term-n73014448471/>.

55. Acting Commissioner Lipnic said, "President Trump has made it very clear that he is interested in jobs, jobs, jobs," a priority that will likely drive EEOC policy. See Hoey, *supra* note 53.

allies must rely on other legal and non-legal means to protect themselves. It is to those strategies that we now turn in Part III.

### III.

#### TURNING OUR FOCUS: ALTERNATIVE STRATEGIES TO ADVANCE PROTECTIONS FOR LGBT WORKERS.

##### *A. State and Local Legislation*

Advocates have successfully expanded LGBT rights by passing state and local laws to protect LGBT employees from discrimination. Often modeled after Title VII, these laws empower state agencies to conduct investigations of complaints, hold administrative hearings, and issue judgments against discriminating employers. These laws also usually allow employees to pursue private lawsuits.<sup>56</sup> However, despite early success, the possibility to achieve additional state and local changes may be limited given the relative enmity toward LGBT rights in the remaining states and the advent of “religious freedom” and preemption laws.

Current LGBT employment discrimination laws are a patchwork of protections across the United States. According to the Human Rights Campaign, twenty states and the District of Columbia prohibit discrimination on the basis of sexual orientation and gender identity, and two states outlaw just sexual orientation discrimination. Seven more states ban discrimination against public sector employees on account of sexual orientation and gender identity, and five limit their non-discrimination laws to just lesbian, gay, and bisexual public employees. This leaves seventeen without any legislative protections for LGBT workers.<sup>57</sup>

This is significant as half of the American LGBT population lives in states that do not outlaw sexual orientation or gender identity discrimination in private sector employment.<sup>58</sup> As one might expect, every state without complete LGBT antidiscrimination protections voted for Trump in the 2016

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56. State laws are generally analogous to Title VII albeit often more expansive, such as with LGBT protections. *See, e.g.*, *Brooks v. City of San Mateo*, 229 F.3d 917, 923 (9th Cir. 2000) (“Title VII and [Cal.] FEHA operate under the same guiding principles.”).

57. *See State Employment Laws & Policies*, HUMAN RIGHTS CAMPAIGN (last updated Aug. 25, 2016), <http://www.hrc.org/state-maps/employment>.

58. *Non-Discrimination Law*, MOVEMENT ADVANCEMENT PROJECT, [http://www.lgbtmap.org/equality-maps/non\\_discrimination\\_laws](http://www.lgbtmap.org/equality-maps/non_discrimination_laws) (last visited Feb. 23, 2017) (The following states lack comprehensive antidiscrimination against sexual orientation and gender identity to date: Alabama, Alaska, Arizona, Arkansas, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, North Carolina, North Dakota, Pennsylvania, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Virginia, West Virginia, and Wyoming.).

election.<sup>59</sup> Some cities and counties in states without such laws protect LGBT workers through municipal ordinances, but coverage is mixed, rendering a hodgepodge of safeguards wherein a gay, lesbian, bisexual or transgender employee might be protected from discrimination in one town but not protected in a neighboring jurisdiction.<sup>60</sup>

For those states that explicitly protect transgender employees, they have relied on two different statutory schemes, the categorical or sex-based approaches. They have either crafted a new protected class of gender identity and gender expression, like California, or they have expanded the definition of sex or sexual orientation to cover transgender individuals, like Minnesota, the first state to enact transgender protections.<sup>61</sup> The latter mechanism reflects the logic that some federal courts and the EEOC have taken in contemplating discrimination against transgender employees as a form of sex-based discrimination. Both approaches can serve to protect LGBT employee rights, although explicit statutory amendments that codify sexual orientation and gender identity, like California's, are more likely to solidify state protections and foreclose any ambiguity or opportunities for court interpretation.

States' experiences with antidiscrimination laws suggest that LGBT employees do take advantage of their rights to pursue discrimination claims. For example, since 2000, California's Fair Employment and Housing Act (FEHA) has explicitly protected employees against sexual orientation discrimination, and since 2012, against gender identity and gender expression discrimination.<sup>62</sup> The Department of Fair Employment and

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59. See *Presidential Election Results: Donald J. Trump Wins*, N.Y. TIMES (Feb. 10, 2017), <http://www.nytimes.com/elections/results/president>. To clarify, some states with complete antidiscrimination protections also voted for Trump (e.g. Utah and Iowa, and Wisconsin, which only prohibits sexual orientation discrimination), and some states without such protections voted for Hillary Clinton (e.g. Virginia). However, all states that did go for Trump were also states that do not protect all LGBT private sector employees from discrimination.

60. See *Local Non-Discrimination Ordinances*, MOVEMENT ADVANCEMENT PROJECT, [http://www.lgbtmap.org/equality-maps/non\\_discrimination\\_ordinances/policies](http://www.lgbtmap.org/equality-maps/non_discrimination_ordinances/policies) (last visited Feb. 23, 2017) (enumerating cities and countries with non-discrimination ordinances). The variation of this hodgepodge is ample across the country: compare Florida, where 60 percent of residents are covered by non-discrimination ordinances, with South Carolina, which protects only 1 percent of residents (those who live in Myrtle Beach). See *id.*

61. See Alexandra A. Klimko, Comment, *Transgender Employment Discrimination Equality in Wisconsin: The Demise of a Former LGBTIQ+ Rights Trailblazer*, 18 MARQ. BENEFITS & SOC. WELFARE L. REV. 163, 175–79 (2016).

62. Cal. Gov't Code § 12940(a) (2017). See Assemb. B. 1001, Reg. Sess. (Cal. 1999) (incorporating sexual orientation as a protected class); Assemb. B. 887, Reg. Sess. (Cal. 2011) (incorporating gender identity and gender expression as distinct protected classes). Note that from 2003 to 2011, California protected transgender employees under a broadened definition of sex discrimination. Klimko, *supra* note 61 at 176. Before 2000, the California Labor Code protected against for sexual orientation discrimination, see Cal. Lab. Code. § 1102.1 (repealed 1999), but as such it was subject to enforcement by the state Labor Commissioner and a shorter statute of limitations to bring claims, thereby relegating sexual orientation discrimination to a “second-class student.” That the Labor Code

Housing (DFEH) is charged with interpreting and enforcing the statute.<sup>63</sup> In 2015, California employees filed 1,036 claims of sexual orientation discrimination and 559 claims of gender identity or gender expression discrimination, or about 8 percent of the total complaints that the DFEH received.<sup>64</sup>

Note that while these are increases, they do not account for all of the discrimination against LGBT workers. Studies have consistently shown that many employees who have suffered discrimination and harassment at work fail to even identify these actions as such, feel ashamed to vocalize it, or both, so they do not make claims.<sup>65</sup>

Furthermore, simply filing a claim does not necessarily suggest how it will progress or whether the employee will achieve relief. In 2015, the DFEH filed civil complaints for sexual orientation discrimination in just one case, although it is possible that the administrative process resolved many of the other matters beforehand.<sup>66</sup> In addition, one pilot study of Massachusetts employees who filed sexual orientation-based claims in 1999 (ten years after the state promulgated employment protections for lesbian, gay and bisexual workers), found that a majority of claimants were dissatisfied or very dissatisfied with the outcomes of their claims.<sup>67</sup> Losing their claims and the subsequent workplace retaliation as a result of their coming out of the closet were major factors contributing to their dissatisfaction. The study also found that employees who had not shared

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encompassed sexual orientation at all was the effort of a group of gay and lesbian Berkeley Law and Hastings law students who sued the state public utility company for discriminating against them in employment. *See Gay Law Students Ass'n v. Pac. Tel. & Tel. Co.*, 24 Cal. 3d 458, 488 (1979). In 1979, during the first wave of the gay liberation movement, the California Supreme Court held that "coming out" constituted political activity protected under the Labor Code. *Id.*

63. Cal. Gov't Code § 12930. The DFEH recently promulgated new regulations that specifically enhance protections for transgender and non-binary workers; for instance, these new rules declare misgendering at work or failing to provide appropriate facilities as impermissible discrimination. *See* Cal. Code Regs. tit. 2 §§ 11030, 11031, 11034 (2017). These regulations went into effect July 1, 2017. SB 396, effective January 1, 2018, made additional changes to California law to protect workers from discrimination based on gender identity, gender express, and sexual orientation including requiring covered employers to post information about workplace rights and to include gender identity, gender expression, and sexual orientation protections in their required sexual harassment training.

64. DEP'T OF FAIR EMP. AND HOUS., 2015 ANN. REP. 7 (2016), <http://www.dfeh.ca.gov/files/2016/09/DFEH-2015AnnualReport.pdf> [hereinafter DFEH, 2015 *Annual Report*]. Note that it is possible that these figures may double-count cases in which a claimant alleges both sexual orientation and gender identity discrimination. This number was a significant increase from when California first began explicitly protecting transgender employees in 2012, when employees filed 681 cases of sexual orientation discrimination and 199 claims of gender identity or gender expression discrimination. DEP'T OF FAIR EMP. AND HOUS., REP. TO THE JOINT LEGIS. BUDGET COMM. 13 (2015), <http://www.dfeh.ca.gov/files/2016/09/DFEH-AnnualReport-2011-2014.pdf>.

65. *See, e.g.,* Beth A. Quinn, *The Paradox of Complaining: Law, Humor, and Harassment in the Everyday Work World*, 25 LAW & SOC. INQUIRY 1151, 1153–56 (2000).

66. DFEH, 2015 *Annual Report*, *supra* note 64, at 16.

67. Toni Lester, *Queering the Office: Can Sexual Orientation Employment Discrimination Laws Transform Work Place Norms for LGBT Employees?*, 73 UMKC L. REV. 643, 665 (2005).

their LGBT identity publically were more likely to be outed to their coworkers or family members as a result of their filing claims, which may have deterred LGBT victims of discrimination from filing claims.<sup>68</sup> Statewide antidiscrimination employment laws that also elaborate administrative claims procedures are thus imperfect fixes to protect LGBT workers. Yet, they nonetheless may serve a signaling purpose, placing employers on notice that allowing discriminatory behavior toward LGBT employees not only is wrong, but also unlawful. Notably, the employees in the Massachusetts study said they would still file their claims again despite experiencing discrimination, suggesting that the process can still represent a valuable experience to employees.<sup>69</sup>

In the shadows of a federal statutory regime ranging from neutral to hostile to LGBT antidiscrimination agendas, advocates for more inclusive workplaces should focus their attention on the thirty states that lack complete sexual orientation and gender identity protections. A state-by-state strategy might focus on the major swing states, in particular on reshaping party control of their state legislatures. For instance, activists should continue to target New Hampshire and Virginia, both of which voted for Hillary Clinton, and Michigan, Wisconsin, and Pennsylvania, which narrowly handed Trump the election; all of these states maintain incomplete LGBT antidiscrimination protections.<sup>70</sup> Yet presidential election votes often differ from party control on a legislative and gubernatorial level, and indeed, Republicans currently control all of these state legislatures.<sup>71</sup> Disappointingly, in one “purple state” setback, last year the New Hampshire legislature recently defeated House Bill 478, which would have added gender identity to the state’s antidiscrimination statute.<sup>72</sup> Yet the narrowness of these statewide votes suggests that with the appropriate state-level political organizing and intent, LGBT activists could harness progressive energy to start tilting the state legislative playing field and support candidates committed to passing antidiscrimination laws.

Unfortunately, LGBT advocates also are contending with affirmative right-wing legislative action that could undercut or altogether block

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68. *Id.* at 664.

69. *Id.*

70. New Hampshire and Wisconsin protect only employees from sexual orientation, not gender identity, based discrimination, Pennsylvania and Michigan only protect LGBT public employees. *See* Human Rights Campaign, *supra* note 57.

71. *See 2016 Pre- and Post-Election State Legislative Control*, NAT’L CONF. OF STATE LEG. (last updated Nov. 9, 2016), <http://www.ncsl.org/research/elections-and-campaigns/2016-pre-and-post-election-state-legislative-control.aspx>.

72. Mark Joseph Stern, *The Bathroom Predator Myth Just Defeated Transgender Rights in New Hampshire*, SLATE.COM (Mar. 9, 2017, 1:33 PM), [http://www.slate.com/blogs/outward/2017/03/09/bathroom\\_predator\\_myth\\_defeats\\_transgender\\_rights\\_in\\_new\\_hampshire.html](http://www.slate.com/blogs/outward/2017/03/09/bathroom_predator_myth_defeats_transgender_rights_in_new_hampshire.html).



antidiscrimination laws. First are the so-called religious freedom laws, which exempt private employers who, because of their “sincerely held” religious beliefs, seek to discriminate against LGBT employees notwithstanding laws that explicitly prohibit discrimination. Religious exemptions have already stymied attempts to strengthen antidiscrimination laws on the federal level. Such an exemption ultimately led LGBT groups and their allies to withdraw support for ENDA in 2013, which in part doomed the legislation.<sup>73</sup> Especially worrisome is the possibility that the president may issue a new executive order that would broadly grant religious-based exemptions to companies and organizations that seek to discriminate.<sup>74</sup>

On a state level, opponents of expanded LGBT rights were galvanized after the Supreme Court decided *Hobby Lobby v. Burwell*, which allowed for-profit businesses to claim a religious liberty exemption under RFRA.<sup>75</sup> Twenty-one states now have constitutional or statutory religious exemption laws, and four out of every ten LGBT Americans live in those states.<sup>76</sup> Three states (Arkansas, Indiana, and Mississippi) adopted these laws after the Supreme Court decided *Hobby Lobby*,<sup>77</sup> and the Virginia legislature approved a “religious freedom” bill that the Democratic governor ultimately vetoed.<sup>78</sup> The Indiana law, signed by then-governor Mike Pence, triggered a nationwide firestorm of criticism, including threats by the NCAA to reconsider hosting future athletic events in the state. The state eventually amended the law with a caveat that prohibited use of the exception to discriminate on the basis of sexual orientation (but not gender identity).<sup>79</sup> But overall, companies operating in a state that has enacted LGBT antidiscrimination laws could still defend their alleged discriminatory conduct by relying on a state RFRA. Even absent such a law, the company might still be able to invoke the First Amendment’s freedom of speech and

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73. See Reed, *supra* note 11, 14–18.

74. See Sarah Posner, *Leaked Draft of Religious Freedom Order Reveals Sweeping Plans to Legalize Discrimination*, THE NATION (Feb. 1, 2017), <https://www.thenation.com/article/leaked-draft-of-trumps-religious-freedom-order-reveals-sweeping-plans-to-legalize-discrimination/>.

75. *Hobby Lobby v. Burwell*, 134 S. Ct. 2751 (2014). See Ira Lupu, *Moving Targets: Obergefell, Hobby Lobby, and the Future of LGBT Rights*, 7 ALA. C.R. & C.L.L. REV. 1, 47–74 (2015). The *Harris Funeral Home* decision at the district court rested in part on *Hobby Lobby*. See *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 201 F. Supp. 3d 837, 854 (E.D. Mich. 2016), *rev’d*, 884 F.3d 560 (6th Cir. 2018).

76. *State Religious Exemption Laws*, MOVEMENT ADVANCEMENT PROJECT, [http://www.lgbtmap.org/equality-maps/religious\\_exemption\\_laws](http://www.lgbtmap.org/equality-maps/religious_exemption_laws) (last visited Feb. 23, 2017).

77. Kyle C. Velte, *All Fall Down: A Comprehensive Approach to Defeating the Religious Right’s Challenges to Antidiscrimination Statutes*, 49 CONN. L. REV. 1, 20–21 n.94 (2016).

78. Michael K. Lavers, *McAuliffe Vetoes Religious Freedom Bill*, WASH. BLADE (Mar. 23, 2017, 2:35 PM), <http://www.washingtonblade.com/2017/03/23/mcauliffe-vetoes-religious-freedom-bill-2/>.

79. Wesley Lowery, *Gov. Pence Signs Revised Indiana Religious Freedom Bill*, WASH. POST (Apr. 2, 2015), <https://www.washingtonpost.com/news/post-nation/wp/2015/04/02/gov-pence-signs-revised-indiana-religious-freedom-bill-into-law/>.

religion protections to defend its discriminatory practices.<sup>80</sup> While religious freedom exemptions may themselves face judicial scrutiny—such as a possible violation of equal protection<sup>81</sup>—it is clear that these laws will continue to be used to obstruct full access to equal employment opportunities.

Also of major concern are state preemption laws, which are quickly proliferating as influential legislative mechanisms to foreclose LGBT antidiscrimination. Republicans dominate state legislatures across the nation, even in states with more liberal urban centers, and they are increasingly preempting city ordinances enacting progressive issues (LGBT rights, minimum wage, paid family leave, etc.).<sup>82</sup> Ironically, conservatives have long championed local control over their own affairs, yet nonetheless, these laws likely will continue to preclude even local communities from enacting workplace protections for LGBT employees. Tennessee and Arkansas explicitly bar their cities and counties from passing antidiscrimination provisions.<sup>83</sup> Last year, the Arkansas Supreme Court upheld the state’s law that preempts any county or city ordinance protecting classes that are not covered at the state level.<sup>84</sup>

North Carolina became a battleground in 2016 for preemption movement, when the city of Charlotte passed a non-discrimination ordinance that protected sexual orientation and gender identity. In an extraordinary one-day special session, North Carolina lawmakers passed HB 2, defining protected classes in the state to exclude LGBT individuals. HB 2 preempted Charlotte’s ordinance and outlawed any city’s attempts to expand their definitions of protected classes. In addition to its much-debated “bathroom laws” mandating that transgender persons use restrooms that do not correspond with their gender identity, HB 2 posed significant ramifications for LGBT employees. It amended state employment laws to replace “sex” with the terms “biological sex”—as in sex designated on an

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80. See Velte, *supra* note 77, at 22 (Four states feature both anti-LGBT discrimination and religious exemption laws; in nineteen other states with anti-LGBT discrimination laws, employers would seek a defense under the First Amendment).

81. See Shannon Gilreath & Arley Ward, *Same-Sex Marriage, Religious Accommodation, and the Race Analogy*, 41 VT. L. REV. 237, 270–78 (2016).

82. NICOLE DEPUIS ET AL., NAT’L LEAGUE OF CITIES, CITY RIGHTS IN AN ERA OF PREEMPTION: A STATE-BY-STATE ANALYSIS 1, 3 (2017), <http://www.nlc.org/sites/default/files/2017-03/NLC-SML%20Preemption%20Report%202017-pages.pdf>. See also Don Hazen and Steven Rosenfeld, *The Other Right-Wing Tidal Wave Sweeping America: Federal and State Preemption of Local Progressive Laws*, SALON (Feb. 28, 2016, 1:59 AM), [http://www.salon.com/2017/02/28/the-other-right-wing-tidal-wave-sweeping-america-federal-and-state-preemption-of-local-progressive-laws\\_partner/](http://www.salon.com/2017/02/28/the-other-right-wing-tidal-wave-sweeping-america-federal-and-state-preemption-of-local-progressive-laws_partner/).

83. See *Local Non-Discrimination Ordinances*, MOVEMENT ADVANCEMENT PROJECT, *supra* note 60.

84. Rebecca Hersher, *Arkansas Supreme Court Strikes Down Local Anti-Discrimination Law*, NPR (Feb. 23, 2017, 3:11 PM), <http://www.npr.org/sections/twotwo-way/2017/02/23/516702975/arkansas-supreme-court-strikes-down-local-anti-discrimination-law>.

individual's birth certificate—and prohibited employment discrimination claims on the basis of sexual orientation or gender identity. HB 2 unleashed a nationwide outcry and cost governor Pat McCrory his re-election.<sup>85</sup> While the Legislature ultimately repealed the most insidious provisions, the critical preemption language remained codified, continuing to prohibit local jurisdictions from passing nondiscrimination ordinances, thus representing a vicious and capacious attempt to preempt local antidiscrimination ordinances and license the discriminate against LGBT workers.<sup>86</sup>

LGBT advocates must therefore prepare for two simultaneous battles: advancing affirmative workplace protections and defending against religious freedom and preemption laws that would have a chilling effect on LGBT employees, even if they do not explicitly seek such consequences. Given the hurdles that Republican control of statehouses pose to inclusive workplace protections in the short-term, those who seek state legislative change should start now to organize and prepare candidates for upcoming off-year elections who can usher in a more positive environment for LGBT workers, a tactic we consider below in section C.

### *B. Inclusive Corporate and Business Policies for LGBT Workers*

Even when legislatures outlaw LGBT employment discrimination by statute, there is no guarantee that employers will abide by the law.<sup>87</sup> Given that the law offers limited remedies for employees, we believe that a mindset shift and behavior change should be critical goals for long-term, sustainable societal change. In this context, we recommend going directly to the employers themselves to influence corporate policies and structures that might enhance LGBT rights. In this section, we offer a critique of external standards certifying corporate commitment to LGBT inclusion and shareholder proposals, considering their effectiveness especially in light of

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85. See Michael Gordon et al., *Understanding HB2: North Carolina's Newest Law Solidifies State's Role in Defining Discrimination*, CHARLOTTE OBSERVER (last updated Sept. 14, 2016), <http://www.charlotteobserver.com/news/politics-government/article68401147.html>; *How North Carolina's House Bill 2 Governs Bathrooms And Beyond*, NPR (May 12, 2016), <http://www.npr.org/2016/05/12/477835922/how-north-carolinas-house-bill-2-governs-bathrooms-and-beyond>.

86. See Jason Hanna, Madison Park & Eliott C. McLaughlin, *North Carolina repeals 'bathroom bill'*, CNN (Mar. 30, 2017), <https://www.cnn.com/2017/03/30/politics/north-carolina-hb2-agreement/index.html>. The HB 2 experience also has inspired other state legislators to push transphobic restrictions through such "bathroom laws," while the ensuing outcry against North Carolina similarly has engendered caution from other lawmakers. The Republican-dominated Texas House of Representatives narrowly defeated a bathroom bill after moderates feared an economic backlash. See David Montgomery & Manny Fernandez, *Texas Bathroom Bill Dies Again, Raising Republican Acrimony*, N.Y. TIMES (Aug. 16, 2017), <https://www.nytimes.com/2017/08/16/us/politics/texas-bathroom-bill-dies-again-raising-republican-acrimony.html>.

87. See, e.g., Lester, *supra* note 67, at 671 (finding that after Massachusetts added workplace protections for sexual orientation, many companies ignored the law by disavowing employee claims, retaliating against claimants, or neglecting to inform employees about antidiscrimination policies).

the significant small business economy in the U.S. and the lack of independent mechanisms to enforce these standards.

Inclusive LGBT workplace policies have been shown to increase job satisfaction, job commitment, productivity, and health costs (thereby decreasing costs overall to the employer in terms of retention, absenteeism, and health insurance).<sup>88</sup> Studies even report increasing stock value of companies that have inclusive workplace policies.<sup>89</sup> Furthermore, public antidiscrimination policies likely benefit a company's bottom line, as LGBT consumers, a demographic with growing purchasing power and disposable income, are far more likely to consider brands providing equal workplace benefits.<sup>90</sup> Indeed, President Obama relied on the salutary business effects of LGBT antidiscrimination policies when he signed Executive Order 13672 protecting LGBT federal employees and contractors.<sup>91</sup>

The paramount assessment of corporate antidiscrimination policies is the Corporate Equality Index (CEI). Published by the Human Rights Campaign (HRC) annually since 2002, the CEI evaluates companies based on the strength and comprehensiveness of their LGBT antidiscrimination and inclusion policies.<sup>92</sup> Each year, HRC invites publically traded corporations listed in the *Fortune* 1,000 and the 200 top-grossing law firms listed in *AmLaw* to complete surveys about their internal policies. Any private-sector, for-profit employer with 500 or more full-time U.S. employees can also request to participate. While the data is self-reported, HRC cross-checks survey results and also relies on IRS 990 tax filings of corporate foundations, legal and media sources, employee groups, and an internal HRC Foundation database on U.S. employers to produce its final report.<sup>93</sup> For the 2017 index, HRC invited 2,106 employers to participate, of which 887 were officially rated.<sup>94</sup> The Index has grown significantly over the years; the number of rated employers has almost tripled since 2002.<sup>95</sup> It is now considered the leading benchmark for policies and practices for LGBT employees.<sup>96</sup>

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88. See M.V. Lee Badgett et al., *The Business Impact of LGBT-Supportive Workplace Policies*, THE WILLIAMS INST. (May 2013), <https://williamsinstitute.law.ucla.edu/research/workplace/business-impact-of-lgbt-policies-may-2013.pdf>.

89. *Id.*

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

91. Crawford, *supra* note 22, at 60.

92. *Corporate Equality Index 2017*, HUMAN RIGHTS CAMPAIGN (2017), <http://www.hrc.org/campaigns/corporate-equality-index>.

93. *Id.* at 8–9.

94. *Id.* at 9.

95. See *id.* at 9.

96. See, e.g., Samuel L. Felker, *How In-House Counsel Can Promote LGBT Diversity in the Legal Profession*, 5 LGBT LITIGATOR (2015).

The CEI evaluates a variety of factors to guarantee a fully inclusive workplace for LGBT employees. To receive a perfect score of 100, a company must have (1) a comprehensive nondiscrimination and equal employment policy covering sexual orientation and gender identity—both for internal operations and its contractors or vendors; (2) equivalent benefits for LGBT employees as enjoyed by heterosexual and cisgender employees; (3) transgender-inclusive health insurance; (4) organization-wide competency trainings and employee groups or diversity councils, and (5) a public commitment to LGBT-specific efforts, such as through its recruitment, advertising, or corporate giving.<sup>97</sup> In 2016, ninety-three percent of rated businesses professed policies protecting sexual orientation, and ninety-two percent professed policies protecting gender identity.<sup>98</sup> Employers that rated 100 are a cross-section of the U.S. economy from Anheuser-Busch and Chevron to Starbucks and Wal-Mart.<sup>99</sup> Businesses themselves take pride in their scores and use their rankings as a marketing and publicity tool.<sup>100</sup>

Studies of the CEI have indicated that the benchmark has had beneficial effects on LGBT employment policies in corporate America. A record 515 employers earned a 100 rating in 2016, compared to just thirteen businesses when the index was launched.<sup>101</sup> Studies using CEI data have found that companies that increased their score by adopting more inclusive LGBT policies have experienced increases in their stock performance the following year.<sup>102</sup> These positive stock price increases could be attributed to a more satisfied and motivated employee base or investors' perceptions that LGBT inclusion is beneficial to the firm, or both.<sup>103</sup> And CEI ratings may have a ripple effect across industries: companies listed on the CEI that

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97. See *Corporate Equality Index*, *supra* note 92, at 16–18.

98. *Id.* at 20.

99. See *id.* at 38–50. Of special interest to Berkeley Law audiences: much of Silicon Valley is represented (e.g. Apple, Google, Facebook, LinkedIn, and Oracle) as well as top Big Law firms with offices in the Bay Area.

100. See, e.g., *UPS Named a 2017 Best Place to Work for LGBT Equality*, UNITED PARCEL SERVICE (Dec. 5, 2016), <https://pressroom.ups.com/pressroom/ContentDetailsViewer.page?ConceptType=PressReleases&id=1480952529320-972>; *Cigna Earns Top Marks in 2017 Corporate Equality Index for 5th Consecutive Year*, CIGNA (Dec. 5, 2016), <https://www.cigna.com/newsroom/news-releases/2016/cigna-earns-top-marks-in-2017-corporate-equality-index-for-5th-consecutive-year>. See also *Corporate Equality Index: 2017 Statements from Employers that Rated 100 Percent*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/resources/corporate-equality-index-2017-statements-from-employers-that-rated-100-perc> (last visited Mar. 1, 2017).

101. See *Corporate Equality Index*, *supra* note 92, at 4; Felker, *supra* note 96, at 3.

102. See, e.g., Peng Wang & Joshua L. Schwarz, *Stock Price Reactions to GLBT Non-Discrimination Policies*, 49 HUM. RESOURCE MGMT. 195, 209 (2010); Derek Johnston & Mary A. Malina, *Managing Sexual Orientation Diversity: The Impact on Firm Value*, 33 GROUP & ORG. MGMT. 602, 621 (2008).

103. Wang, *supra* note 102, at 209.

implement antidiscrimination policies may also encourage other companies in the same industry to follow suit.<sup>104</sup> Composition of the board of directors may play a role. For example, firms with more women on their boards are more likely to adopt LGBT inclusive policies.<sup>105</sup>

Another example of a business policy that advances inclusive workplaces is implementing corporate social responsibility initiatives through shareholder proposals. A company's shareholders may recommend that its management or board of directors take action in a certain area through a process governed by SEC regulations.<sup>106</sup> The first time a shareholder fund was used to advance LGBT protections was in 1992, when shareholders of the restaurant chain Cracker Barrel requested that the company formally prohibit sexual orientation discrimination after the company publicly announced that it was "inconsistent with . . . [its] concept and values" to employ gay or lesbian workers whose "sexual preferences fail to demonstrate normal heterosexual values which have been the foundation of families in our societies."<sup>107</sup> Pension funds and socially responsible investors have primarily filed LGBT-inclusive shareholder resolutions calling for their companies to add sexual orientation, and more recently gender identity, workplace protections.<sup>108</sup> While the resolutions themselves may fail at a formal shareholder vote (as most shareholder resolutions do on any matter), they have nonetheless motivated companies to incorporate LGBT antidiscrimination policies.<sup>109</sup> LGBT-inclusive proposals have typically shown that a company's industry peers and public opinion at large favor extending workplace rights to LGBT employees, or that antidiscrimination policies are beneficial to the company culture, morale, or bottom line.<sup>110</sup> Faced with an LGBT-inclusive proposal, companies are more likely to negotiate a settlement with its sponsors; between 2005 and 2012, fifty-nine percent of such proposals were immediately successful in establishing a company antidiscrimination policy.<sup>111</sup>

As the CEI and shareholder proposal efforts have consistently shown, corporate America is far ahead of legislators and policymakers in implementing LGBT employment protections. Efforts like the HRC's to

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104. Benjamin A. Everly & Joshua L. Schwarz, *Predictors of the Adoption of LGBT-Friendly HR Policies*, 54 HUM. RES. MGMT. 368, 379 (2015).

105. *Id.*

106. See Matthew Petrozziello, *Beyond Cracker Barrel: Shareholder Proposals as a Means of Effectuating CSR Policies*, 13 RUTGERS BUS. L. REV. 22, 23 (2016).

107. See Neel Rane, *Twenty Years of Shareholder Proposals After Cracker Barrel: An Effective Tool for Implementing LGBT Employment Protections*, 162 U. PENN. L. REV. 929, 931 (2014).

108. *Id.* at 947.

109. *Id.* at 950, 977.

110. *Id.* at 956–60.

111. See *id.* at 977.

profile inclusive businesses contribute to the growing acceptance in the business community of workplace antidiscrimination policies.

Yet LGBT advocates have more to do. Small businesses, defined as having less than 500 employees, make up 48 percent of the private workforce and employ over 56.8 million people.<sup>112</sup> The largest share of small businesses are firms with twenty or less employees.<sup>113</sup> But the CEI does not capture this half of the American labor market. As noted above, CEI does not even accept surveys from employers with less than 500 employees. Shareholder agreements seeking inclusivity are also likely not a relevant strategy for businesses that are not incorporated. Low-wage LGBT workers who are especially vulnerable to LGBT discrimination are frequently employed by small businesses like restaurants.<sup>114</sup> To protect them in the absence of statutory safeguards, LGBT advocates should focus more concretely on small businesses' policies. For example, advocates could create localized inclusivity indexes modeled after the CEI, or partner with chambers of commerce to mobilize campaigns for LGBT antidiscrimination policies. Another model could be the Diners' Guide published by the Restaurant Opportunities Centers United, which advocates for improved working conditions and wages in the restaurant industry, and who certifies restaurants with a demonstrated commitment to providing their employees with fair pay, benefits, and worker-focused policies.<sup>115</sup>

Another concern for antidiscrimination strategies at the corporate level includes enforcement of a business's own antidiscrimination policies. The EEOC and state agencies police only statutory violations and not company policy. Absent agency efforts, workers must rely on the good faith of their employers to uphold the standards and values they espouse. The CEI does not hold employers legally accountable for its policies. An employer may present stellar LGBT inclusion policies on paper, but nonetheless maintain a corporate culture resistant to the LGBT community. For instance, one of Legal Aid at Work's transgender clients faced significant gender identity-based harassment at his workplace, despite the company's 100 rating on the CEI. He reported his experiences to his immediate supervisors and to the corporate human resources department, but besides having them reiterate their company's "zero tolerance" for gender identity discrimination, the individual managers said they could do nothing to stop the harassment. After repeated phone calls, many unanswered, and letters, he ultimately quit

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112. SMALL BUSINESS ASSOCIATION, ANNUAL REPORT OF THE OFFICE OF ECONOMIC RESEARCH 24 (2017).

113. *Id.*

114. See Elizabeth Kristen, Blanca Bañuelos & Daniela Urban, *Workplace Violence and Harassment of Low-Wage Workers*, 36 BERKELEY J. EMP. & LAB. L. 169, 178–79 (2015).

115. See *Diners Guide*, RESTAURANT OPPORTUNITIES CENTERS UNITED, <http://rocunited.org/diners-guide/> (last visited Oct. 23, 2017).

the hostile workplace. His case shows that internal policies alone are not a bulwark against discrimination. LGBT organizations cannot rely on internal enforcement mechanisms alone to ensure that a CEI-rated company keeps its word, although likely the Human Rights Campaign and other groups could punish a delinquent organization through non-legal means such as boycotts or petitions.

To ensure that corporations keep their word, LGBT advocates should adopt greater enforcement mechanisms. To begin with, antidiscrimination advocates can systematically report instances of client discrimination to the CEI production team so that they can consider these cases in their future ratings of the employer. A more uniform and streamlined feedback loop to CEI would help. Advocates could also consider other strategies, like certifications with explicit enforcement protections (although attempts to create external certification regimes have not been successful).<sup>116</sup> One idea is to institute a so-called “Fair Employment” trademark, distinguished from CEI, which would amount to a licensing agreement between the employer and the licensor. Advocates could seek enforcement via contract in the event the company backed down from its antidiscrimination policy and thereby breached its licensing agreement.<sup>117</sup>

Antidiscrimination advocates should pursue a strategy that enjoins the corporate and business communities to institute inclusive LGBT employment policies that have proven to be “good for business.” They can capitalize on corporate America’s momentum toward equality, shown in part through the amicus brief that several large corporations jointly filed on behalf of Gavin Grimm in his Title IX case. In their brief, they argued that discriminatory policies harm their employees who are transgender, employees with transgender students, and would adversely affect commerce and the labor force, as well as their own recruitment efforts.<sup>118</sup> While we caution that partnering with inclusive employers could place advocates in conflict with the employees they typically represent, we recognize that harnessing pro-inclusion attitudes in the corporate sector will pay dividends across the LGBT labor force.

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116. See Ian Ayres & Jennifer Gerarda Brown, *Mark(et)ing Discrimination: Privatizing ENDA with a Certification Mark*, 104 MICH. L. REV. 1639, 1642 (2006) (presenting a “Fair Employment” symbol, trademarked by the authors, and license for businesses that agree to abide by the strictures of ENDA absent formal federal legislation). See also Christopher She, *Fair Employment Mark*, *The N.Y. TIMES* (Dec. 11, 2005), [http://www.nytimes.com/2005/12/11/magazine/fair-employment-mark-the.html?\\_r=0](http://www.nytimes.com/2005/12/11/magazine/fair-employment-mark-the.html?_r=0). An attempt to find the current status of the Fair Employment Mark at the website noted in Ayres and Brown’s article, [www.fairemploymentmark.org](http://www.fairemploymentmark.org), reveals that the website has been taken down.

117. See Ayres, *supra* note 116, at 1661–65.

118. See Brief for Apple, IBM Corporation, Microsoft and 50 Other Companies as Amici Curiae Supporting Respondent, *Gloucester Cty. Sch. Bd. v. G.G. ex. rel. Grimm.*, No. 16-273, 2017 WL 894895 (filed Mar. 1, 2017).



### C. *Moving Outside the Law: Mobilizing for Social Change*

Strategic litigation sometimes results in narrow or pyrrhic victories.<sup>119</sup> Social movements have been most successful when they incorporate legal strategies as a tool among many instruments of mass change. Employing a concerted effort to influence business practices, as discussed above, is one example of these multidimensional approaches LGBT advocates can use. We recommend that those within the LGBT movement who focus on employment antidiscrimination learn from other experiences in social movements, align with other organizations and causes to generate a more democratic and comprehensive coalition, and take leadership roles in political institutions themselves as a means of protecting LGBT workers.

The LGBT equality movement has had a number of recent victories as a result of impact litigation, such as *Windsor* and *Obergefell*. One way that impact litigators have shaped LGBT equality is through messaging. Leaders of the marriage equality movement employed a careful, deliberate communications strategy to change public opinion. Originally, they framed their arguments in the language of legal and constitutional rights. Yet as the legal right to marry gained traction more broadly, advocates shifted to embrace cultural and social dimensions around love and acceptance.<sup>120</sup> It is likely that this strategy was crucial, not only in changing public opinion to be more accepting of same-sex marriage, but also in securing Justice Kennedy's vote in the *Obergefell* decision.<sup>121</sup>

Advocates for employment antidiscrimination laws may also consider their framing. Arguments in favor of anti-LGBT workplace discrimination laws range from the moral and rights-based (ensuring the equal dignity and respect of persons) to the economic (to avoid the negative impact that discrimination has in terms of higher turnover or mass mobilization against discriminatory companies).<sup>122</sup> To the extent that language can blend more cultural and social schemas into organizing rhetoric, and less legal or economic, it is possible that employment champions could garner greater popular attention and mobilization for their cause. Put simply, the more advocates minimize the legalese in their communication, the more likely they will curry popular goodwill and opinion.

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119. See, e.g., Gerald N. Rosenberg, *THE HOLLOW HOPE* (1991).

120. Douglas NeJaime, *The Legal Mobilization Dilemma*, 61 EMORY L.J. 663, 705–08 (2012).

121. See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015) (Kennedy, J.) (“No union is more profound than marriage . . . [i]t would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it.”); Sheryl Gay Stolberg, *Justice Antony Kennedy's Tolerance is Seen in His Sacramento Roots*, N.Y. TIMES (Jun. 21, 2015), <https://www.nytimes.com/2015/06/22/us/kennedys-gay-rights-rulings-seen-in-his-sacramento-roots.html>.

122. See Isaac Saidel-Goley, *The Right Side of History: Prohibiting Sexual Orientation Discrimination in Public Accommodations*, 31 WIS. J. L. GENDER & SOC'Y 117, 124–39 (2016) (elaborating on moral, rights-based, economic, and other normative justifications).

In addition to framing and messaging, the movement for LGBT employment rights could enhance the links between impact-oriented organizations and direct legal services. Such connections would ensure that the facets of LGBT discrimination faced by the most disadvantaged, such as low-wage workers or transgender people of color, are prominent in advocacy strategies.<sup>123</sup> At Legal Aid at Work, our approach harnesses our experiences and learning with direct services to inform and drive our policy and impact litigation priorities. In the employment context, this means advocating for policies that predominantly affect clients of our LGBT Rights Program, who are primarily low-wage transgender and/or gay or lesbian immigrant workers in the restaurant and unskilled services economy.

LGBT legal organizations should strengthen their partnerships and coalitions across the community, including and especially with non-legal organizations. A more comprehensive coalition will ensure that our message encompasses the perspectives of the diverse LGBT community, and above all the most exploited employees: low-wage, immigrant, transgender, and HIV-positive workers of color. Polls repeatedly show that Americans support antidiscrimination laws for LGBT employees, but are largely unaware that they can be fired because of sexual orientation or gender identity in a majority of states.<sup>124</sup> Therefore, placing the vulnerability of LGBT workers at the center of political mobilization and campaigns is critical to raising wider consciousness of this issue.

Intersectionality is essential for our movement. Our community itself is intersectional; for example, approximately 75,000 Dreamers, the undocumented immigrant youth brought to the United States as children, are LGBT.<sup>125</sup> LGBT advocates should use their positions on intersectional coalitions of minority groups to more vocally advocate for antidiscrimination workplace protections because of the frequent cultural and ethnic intersections for LGBT workers. A significant proportion of our LGBT clients who face discrimination are also immigrants or people of color and confront harassment predicated on national origin, gender, and

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123. See Leonore F. Carpenter, *Getting Queer Priorities Straight: How Direct Legal Services Can Democratize Issue Prioritization in LGBT Rights Movement*, 17 U. PA. J. L. & SOC. CHANGE 107, 132–34 (2014).

124. See German Lopez, *How Most States Allow Discrimination Against LBGTQ People*, VOX.COM (Aug. 19, 2016), <http://www.vox.com/2015/4/22/8465027/lgbt-nondiscrimination-laws>.

125. See Kerith Conron & Taylor N.T. Brown, *There are Over 75,000 LGBT DREAMers; 36,000 Have Participated in DACA*, THE WILLIAMS INST. (Feb. 17, 2017), <https://williamsinstitute.law.ucla.edu/research/media-advisory-there-are-over-75000-lgbt-dreamers-36000-have-participated-in-daca/> (Over 36,000 have participated in the Deferred Action for Childhood Arrivals (DACA) program, created under President Obama to provide work authorization and protection for deportation for the Dreamers).

race in addition to sexual orientation or gender identity. Intersectional coalitions can help address these matters on a wider basis.

To raise more attention and advocate more concretely for LGBT employees, we also encourage more LGBT individuals to run for political office or become members of the judiciary. In 2016, a record 191 openly LGBT candidates—as both Democrats and Republicans—ran for election from congressional seats to state, county, and local positions across the country.<sup>126</sup> Importantly, nine candidates ran in Texas and Florida, and eight in Georgia, all states that ultimately voted for Trump but whose demographics are changing.<sup>127</sup> We are exceptionally heartened to see that more openly LGBT candidates are running for public office in 2018 than ever before. These candidates serve as role models for future LGBT leaders, can help raise the visibility of persistent inequalities faced by LGBT communities, and advocate for antidiscrimination laws in and out of office.

Indeed, since 1991, the Gay and Lesbian Victory Fund has raised funds and trained LGBT candidates for office, and they are now prioritizing regions of the country where LGBT individuals are most vulnerable.<sup>128</sup> The President and CEO of the Victory Fund recently declared, “[w]hen you have a seat at the table, you’re rarely on the menu. LGBT elected leaders are the antidote to the anti-equality efforts we see coming from the federal government.”<sup>129</sup> Political advocacy of this kind will help ensure that there are champions for LGBT issues, including workplace protections, at all levels of government.

Current LGBT politicians are already pressuring the Trump Administration. One hundred and fifty-six out elected officials sent an open letter to the president demanding that he advance LGBT equality, and among other matters, underscored the importance of employment antidiscrimination laws.<sup>130</sup> Many politicians were once in business themselves, so they have the background to advocate for inclusive LGBT employment laws and corporate policies.

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126. Lisa Keen, *An Essential Guide to the Record 191 LGBT Candidates on the Ballot Across the Country*, TOWLEROAD (Nov. 8, 2016), <http://www.towleroad.com/2016/11/lgbt-candidates/>.

127. *Id.* (California led the country with 43 openly LGBT candidates.).

128. See *Our History*, VICTORY FUND, <https://www.victoryfund.org/our-story/victory-fund-brief-history> (last visited Oct. 22, 2017); Liam Stack & Catie Edmondson, *A “Rainbow Wave”? 2018 Has more L.G.B.T. Candidates Than Ever*, N.Y. TIMES (Aug. 4, 2018), <https://nytimes.com/2018/08/04/us/politics/gay-candidates-midterms.html>; Liam Stack, *Christine Hallquist on Her Primary Victory; ‘It Gives the Transgender Community Hope’*, N.Y. TIMES (Aug. 15, 2018), <https://www.nytimes.com/2018/08/15/us/politics/transgender-christine-hallquist-vermont.html>.

129. Aisha Moodie-Mills, *LGBT Politicians Will Save Us From the Trump Apocalypse*, THE ADVOCATE (Mar. 2, 2017), <http://www.advocate.com/commentary/2017/3/02/lgbt-politicians-will-save-us-trump-apocalypse>.

130. Dan Avery, *156 LGBT Politicians Just Sent An Open Letter Asking Donald Trump to Further Equality*, NEWNOWNEXT (Jan. 13, 2017), <http://www.newnownext.com/open-letter-lgbt-trump/01/2017/>.

The multipronged strategy we advocate—one that grooms new leaders and effectively capitalizes on intersections with other LGBT organizations and communities under attack by the Trump Administration—could pay dividends for the entire LGBT equality movement. While a singular movement focus on employment law could ensure diligence and discipline, it would myopically overlook the many other issues that our clients and other LGBT workers face on a daily basis. Breaking down the silos between legal and non-legal organizations, and between LGBT and other causes, and collaborating as a united front will be far more effective at driving change and inclusion for LGBT workers.

### CONCLUSION

In the months following Donald Trump's election, our community has rightly voiced fear and anguish. 2016 was the most violent year against LGBT Americans, likely the work of reactionary cabals of homophobes and transphobes who are relishing legitimization by a President who has also failed to unequivocally denounce white supremacists, racists, and Neo-Nazis.<sup>131</sup> LGBT workers are unlikely to enjoy much protection in the coming years from federal agencies, and the prospect of nationwide efforts to enact antidiscrimination appear increasingly distant. Yet, as community members, we feel more emboldened than ever to keep fighting.

The LGBT community has weathered great difficulties in the last fifty years—police raids and beatings in the 1960s; political and social turmoil facing the nascent LGBT Rights Movement in the 1970s; callous neglect of the Reagan Administration during the AIDS epidemic in the 1980s; and the enactment of the Defense of Marriage Act and Don't Ask, Don't Tell in the 1990s.<sup>132</sup> Previous generations of LGBT activists have battled against powerful foes, often using the tools of visibility and “coming out” to

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131. Samantha Allen, *2016 Was the Deadliest Year for LGBT Americans*, THE DAILY BEAST (Jun. 12, 2017), <http://www.thedailybeast.com/2016-was-the-deadliest-year-ever-for-lgbt-americans>; Daniel Reynolds, *America's LGBT Centers Are Under Attack*, THE ADVOCATE (Mar. 13, 2017), <http://www.advocate.com/crime/2017/3/13/americas-lgbt-centers-are-under-attack>; Ashley Parker & David Nakamura, *Trump Again Blames 'Both Sides' for Violence at White Supremacist Rally in Charlottesville*, WASH. POST (Aug. 15, 2017), [https://www.washingtonpost.com/politics/trump-defends-organizers-of-white-supremacist-rally-in-charlottesville/2017/08/15/de01ff66-81f9-11e7-902a-2a9f2d808496\\_story.html](https://www.washingtonpost.com/politics/trump-defends-organizers-of-white-supremacist-rally-in-charlottesville/2017/08/15/de01ff66-81f9-11e7-902a-2a9f2d808496_story.html).

132. Tragically, history seems to be repeating itself: transgender women of color are today the oft-forgotten victims of police brutality, members of the Presidential Advisory Council on HIV/AIDS resigned because the President “simply does not care,” and—until a court stepped in—transgender soldiers were prohibited from enlisting openly in the military. *See* Evans v. Georgia Reg'l Hosp., 850 F.3d 1248 (11th Cir. 2017); Jacqueline Thomsen, *Six Resign from President's HIV/AIDS Council Because Trump 'Doesn't Care'*, THE HILL (Jun. 17, 2017), <http://thehill.com/news-by-subject/healthcare/338296-six-resign-from-presidential-hiv-aids-council-because-trump-doesnt>; Maura Ewing, *"We, Too, Are Targets of Police Violence."* THE ATLANTIC (Jun. 1, 2017), <https://www.theatlantic.com/politics/archive/2017/06/we-too-are-targets-of-police-violence/528579/>.

demonstrate our equal humanity.<sup>133</sup> The current wave of reactionaries will not deter us. We see the “writing on the wall.”<sup>134</sup> Equal rights for LGBT workers are in our grasp, and we will redouble our commitments, engage our allies across the country, and continue to mobilize in the political, social, and economic spheres to achieve lasting equality.

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133. See, e.g., Katherine Turk, “Our Militancy is in Our Openness”: *Gay Employment Rights Activism in California and the Question of Sexual Orientation in Sex Equality Law*, 31 L. & HIST. REV. 423 (2013).

134. See *Hively I*, 830 F.3d 698, 718 (7th Cir. 2017).