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# The Man Behind the Curtain: How Mandatory Arbitration Impedes the Advancement of LGBTQ+ Rights

Devon M. Loerch\*

## I. INTRODUCTION

Following a number of transformative decisions issued by the Supreme Court of the United States,<sup>1</sup> arbitration has become a popular method of dispute resolution nationwide.<sup>2</sup> Time and time again, the Supreme Court has permitted the inclusion of mandatory arbitration clauses in consumer and employment contracts,<sup>3</sup> and as a result, these clauses have become ubiquitous over the past thirty years.<sup>4</sup> During that time frame, as mandatory arbitration was steadily becoming more prevalent,<sup>5</sup> advocacy for the Lesbian, Gay, Bisexual, Transgender, and Queer (“LGBTQ+”)<sup>6</sup> community was also growing.<sup>7</sup> The LGBTQ+ community and its allies have continued to fight for equal protections, especially with respect to employment rights.<sup>8</sup>

Supreme Court decisions in *Price Waterhouse v. Hopkins*<sup>9</sup> and *Oncale v. Sundowner Offshore Services, Inc.*<sup>10</sup> played a major role in LGBTQ+ Americans’

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1. Michael L. Rustad et al., *An Empirical Study of Predispute Mandatory Arbitration Clauses in Social Media Terms of Service Agreements*, 34 U. ARK. LITTLE ROCK L. REV. 643, 676 (2012).

2. Arbitration has been an accepted method of dispute resolution for thousands of years. Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1631 (2005). While used since colonial times, arbitration did not gain its modern popularity until after Congress enacted the Federal Arbitration Act in 1925. See, e.g., JEROLD S. AUERBACH, JUSTICE WITHOUT LAW? 32–33, 43–44, 101–14 (1983) (examining arbitration as it existed in colonial America); William Catron Jones, *Three Centuries of Commercial Arbitration in New York: A Brief Survey*, 1956 WASH. U. L.Q. 193, 194 (1956) (examining uses of arbitration in New York, beginning with the Dutch West India Company in the 1600s, and concluding that “arbitration has been an important means of deciding disputes since the earliest days of European settlement in New York in the seventeenth century.”).

3. Rustad, *supra* note 1.

4. Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration*, ECON. POLICY INST. (Apr. 6, 2018), <https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration-access-to-the-courts-is-now-barred-for-more-than-60-million-american-workers/>.

5. *Id.*

6. This Comment will use the acronym “LGBTQ+” for lesbian, gay, bisexual, transgender, and queer. While the plus is not expressly written in the acronym, it “is intended as an all-encompassing representation of sexual orientations and gender identities.” *Glossary of Terms*, BLOOMINGTON PRIDE, <https://bloomingtonpride.org/glossary> (last visited Nov. 6, 2019).

7. Jared Odessky, *LGBTQ+ Workers Are Winning Their Rights. But Because of Their Forced Arbitration, They Can’t Use Them.*, NAT’L EMP’T LAW PROJECT (June 15, 2018), <https://www.nelp.org/blog/LGBTQ+-workers-winning-rights-forced-arbitration-cant-use/>.

8. *Id.*

9. See *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), *superseded by statute*, 42 U.S.C. § 2000e–2 (1991).

10. See *Oncale v. Sundowner Offshore Serv., Inc.*, 523 U.S. 75 (1998).

fight to be free from employment discrimination.<sup>11</sup> In *Price Waterhouse*, the Court recognized that prohibited sex discrimination under Title VII of the Civil Rights Act of 1964 (“Title VII”)<sup>12</sup> encompasses discrimination based on sex stereotypes, including assumptions or expectations about how an individual of a certain gender should dress or behave.<sup>13</sup> Subsequently, in *Oncale*, the Court determined that Title VII’s prohibition of sex discrimination also applies in cases of same-sex harassment.<sup>14</sup> Though neither plaintiff was a member of the LGBTQ+ community, both *Price Waterhouse* and *Oncale* have proven to be pivotal for LGBTQ+ individuals who rely on these decisions in cases of employment discrimination.<sup>15</sup> In *Oncale*, Justice Scalia famously wrote that “statutory provisions often go beyond the principal evil to cover reasonably comparative evils, and it is ultimately the provisions of our laws rather than the principle concerns of our legislators by which

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11. Cf. *Price Waterhouse*, 490 U.S. at 228; *Oncale*, 523 U.S. at 75 (establishing precedent in *Price Waterhouse* and *Oncale* that has led to numerous federal court decisions supporting the premise that Title VII’s prohibition of sex discrimination encompasses sexual orientation and gender identity). See generally *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339 (7th Cir. 2017) (en banc); *Muhammad v. Caterpillar, Inc.*, 767 F.3d 694 (7th Cir. 2014); *Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014); *Boutillier v. Hartford Pub. Sch.*, 221 F. Supp. 3d 255 (D. Conn. 2016); U.S. Equal Opportunity Comm’n v. *Scott Med. Health Ctr.*, 217 F. Supp. 3d 834 (W.D. Pa. 2016); *Winstead v. Lafayette Cty. Bd. Of Cty. Comm’rs*, 197 F. Supp. 3d 1334 (N.D. Fla. 2016); *Videckis v. Pepperdine Univ.*, 150 F. Supp. 3d 1151 (C.D. Cal. 2015); *Isaacs v. Felder Serv., LLC*, 143 F. Supp. 3d 1190 (M.D. Ala. 2015); *Strong v. Grambling State Univ.*, 159 F. Supp. 3d 697 (W.D. La. 2015); *Hall v. BNSF Ry. Co.*, 2014 WL 4719007 (W.D. Wash. Sept. 22, 2014); *Terveer v. Billington*, 34 F. Supp. 3d 100 (D.D.C. 2014); *Koren v. Ohio Bell Tel. Co.*, 894 F. Supp. 2d 1032 (N.D. Ohio 2012); *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212 (D. Or. 2002); *Centola v. Potter*, 183 F. Supp. 2d 403 (D. Mass. 2002); *Chavez v. Credit Nation Auto Sales, LLC*, 641 F. App’x 883 (11th Cir. 2016); *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011); *Barnes v. Cincinnati*, 401 F.3d 729 (6th Cir. 2005); *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004); *Rosa v. Parks W. Bank & Tr. Co.*, 214 F.3d 213 (1st Cir. 2000); *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000); *Baker v. Aetna Life Ins.*, 228 F. Supp. 3d 764 (N.D. Tex. 2017); *Mickens v. General Elec. Co.*, 2016 WL 7015665 (W.D. Ky. Nov. 29, 2016); *Roberts v. Clark Cty. Sch. Dist.*, 215 F. Supp. 3d 1001 (D. Nev. 2016); *Doe v. Arizona*, 2016 WL 1089743 (D. Ariz. Mar. 21, 2016); *Fabian v. Hospital of Cent. Conn.*, 172 F. Supp. 3d 509 (D. Conn. 2016); *Lewis v. High Point Reg’l Health Sys.*, 79 F. Supp. 3d 588 (E.D.N.C. 2015); *Finkle v. Howard Cty.*, 12 F. Supp. 3d 780 (D. Md. 2014); *Parris v. Keystone Foods, LLC*, 959 F. Supp. 2d 1291 (N.D. Ala. 2013); *Radtke v. Miscellaneous Drivers & Helpers Union Local No. 638*, 867 F. Supp. 2d 1023 (D. Minn. 2012); *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008); *Lopez v. River Oaks Imaging & Diagnostic Grp., Inc.*, 542 F. Supp. 2d 653 (S.D. Tex. 2008); *Mitchell v. Axcan Scandipharm, Inc.*, 2006 WL 456173 (W.D. Pa. Feb. 17, 2006); *Tronetti v. TLC HealthNet Lakeshore Hosp.*, 2003 WL 22757935 (W.D.N.Y. Sept. 26, 2003); *Creed v. Family Express Corp.*, 2007 WL 2265630 (N.D. Ind. Aug. 3, 2007); *Miles v. New York Univ.*, 979 F. Supp. 248 (S.D.N.Y. 1997).

12. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (1991) [hereinafter Title VII] (amended in 2009) (prohibiting employers from “refus[ing] to hire or . . . discharg[ing] any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin,” and prohibiting employment discrimination on the basis of sex, including the hiring and termination of employees and discrimination “with respect to [an individual’s] compensation, terms, conditions, or privileges of employment.”).

13. *Price Waterhouse*, 490 U.S. at 235 (telling plaintiff, among other things, that she needed to “walk more femininely, talk more femininely, [and] dress more femininely” in order to secure a partnership).

14. *Oncale*, 523 U.S. at 79–82.

15. See Mark Joseph Stern, *Thank Scalia for the Revolutionary EEOC Workplace Discrimination Decision*, SLATE (July 17, 2015, 1:08 PM), <https://slate.com/human-interest/2015/07/scalia-and-the-eecoc-how-oncale-made-sexual-orientation-discrimination-illegal.html>; Matt Schudel, *Ann Hopkins, Who Won Supreme Court Gender-Bias Case After Being Denied a Promotion, Dies at 74*, WASH. POST (July 18, 2018), [https://www.washingtonpost.com/local/obituaries/ann-hopkins-who-won-supreme-court-gender-bias-case-after-being-denied-a-promotion-dies-at-74/2018/07/18/cb70f81a-8a99-11e8-8aea-86e88ae760d8\\_story.html](https://www.washingtonpost.com/local/obituaries/ann-hopkins-who-won-supreme-court-gender-bias-case-after-being-denied-a-promotion-dies-at-74/2018/07/18/cb70f81a-8a99-11e8-8aea-86e88ae760d8_story.html).

we are governed.”<sup>16</sup> This statement is of monumental importance to LGBTQ+ plaintiffs, who assert they are protected by the plain language of statutes that forbid sex discrimination even though legislators may not have had LGBTQ+ persons in mind when the statutes were enacted. Unfortunately, mandatory arbitration clauses, especially those within employment contracts, have played an often-overlooked role in diluting the progress of the LGBTQ+ movement and the hard-won protections recognized over the last several decades.<sup>17</sup>

This Comment will examine how the enforcement of mandatory arbitration clauses has impacted LGBTQ+ individuals’ ability to vindicate their rights. Section II of this Comment explores the history of LGBTQ+ rights and important legal victories. Section III discusses the Federal Arbitration Act (“FAA”), including its history, the legislative intent behind the statute, its modern interpretation, and the implications it has on the rights of LGBTQ+ employees. Section IV assesses the prevalence of arbitration and its consequences. Finally, Section V examines how mandatory arbitration clauses have stalled the progression of LGBTQ+ rights, as well as the necessity of supplemental legislative action to protect LGBTQ+ employees.

## II. A BRIEF HISTORY OF LGBTQ+ RIGHTS

LGBTQ+ relationships have been criminalized sporadically throughout the Western world since the 1500s.<sup>18</sup> For example, Paragraph 175 of the German Imperial Code outlawed LGBTQ+ relations,<sup>19</sup> and a proposed Virginia law endorsed by Thomas Jefferson<sup>20</sup> punished LGBTQ+ relations with mutilation.<sup>21</sup> Similarly, sodomy laws<sup>22</sup> remained in force for centuries,<sup>23</sup> and prior to their invalidation by the Supreme Court in the early 2000s,<sup>24</sup> fourteen states still had sodomy statutes that forbade and criminally sanctioned LGBTQ+ relations.<sup>25</sup> Had

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

17. *Odyssey*, *supra* note 7.

18. See Michael Levy, *Gay Rights Movement*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/gay-rights-movement> (last visited June 20, 2019).

19. See *Paragraph 175, THE U.S. HOLOCAUST MEM’L MUSEUM* (1990), <https://www.ushmm.org/learn/students/learning-materials-and-resources/homosexuals-victims-of-the-nazi-era/paragraph-175>; see also *Paragraph 175: The Nazi Persecution of Gays*, LESBIAN NEWS (Oct. 13, 2016), <http://www.lesbianews.com/paragraph-175-nazi-persecution-gays/>.

20. See generally *Brief Biography of Thomas Jefferson*, THOMAS JEFFERSON FOUND., <https://www.monticello.org/thomas-jefferson/brief-biography-of-jefferson/> (last visited Nov. 8, 2019) (Thomas Jefferson was the third President of the United States who, prior to his presidency, served as a legislator from Virginia and helped draft the American Declaration of Independence).

21. *Timeline of LGBT History in Virginia and the U.S.*, VA. DEP’T OF HISTORIC RES., [https://www.dhr.virginia.gov/wp-content/uploads/2018/09/LGBTQ\\_Timeline-Virginia-and-US.pdf](https://www.dhr.virginia.gov/wp-content/uploads/2018/09/LGBTQ_Timeline-Virginia-and-US.pdf) (last visited Nov. 8, 2019).

22. See generally *Why Sodomy Laws Matter*, AM. CIVIL LIBERTIES UNION FOUND., <https://www.aclu.org/other/why-sodomy-laws-matter> (last visited Nov. 8, 2019) (sodomy statutes aim to outlaw numerous sexual acts); WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* 161 (1999) (sodomy laws often target sexual relationship between individuals of the same sex).

23. ESKRIDGE, *supra* note 22 (many of the state statutes that were in effect until 2003 were inherited from the colonial laws established in the 1600s).

24. *Lawrence v. Texas*, 539 U.S. 558 (2003).

25. See *12 States Still Ban Sodomy a Decade After Court Ruling*, USA TODAY (Apr. 21, 2014, 6:42 PM), <https://www.usatoday.com/story/news/nation/2014/04/21/12-states-ban-sodomy-a-decade-after-court-ruling/7981025/> (the fourteen states that still had sodomy laws on their books in 2003 were Alabama, Florida, Idaho, Kansas, Louisiana, Michigan, Mississippi, Missouri, North Carolina,

it not been for the efforts of LGBTQ+ persons and their allies, it is possible laws such as this—realities of the not-so-distant past—might have persisted through today.

### A. *The Beginning of LGBTQ+ Advocacy*

Advocacy for the LGBTQ+ community began blossoming around the end of the Nineteenth Century.<sup>26</sup> The Scientific–Humanitarian Committee (“Committee”),<sup>27</sup> which is credited as being the world’s first LGBTQ+ organization, was formed in the late 1880s.<sup>28</sup> The Committee developed a presence in a multitude of major European cities<sup>29</sup> and was comprised of individuals from the LGBTQ+ community, as well as ally scientists and medical professionals.<sup>30</sup> The Committee’s dedication to LGBTQ+ advocacy centered on scientific and medical research that showed sexual orientation and gender identity are not “choices” but, rather, are intrinsic to a person’s being.<sup>31</sup>

The Committee garnered a large following in the decades after its formation and made substantial progress for the LGBTQ+ community.<sup>32</sup> The Committee’s growth in Europe inspired Henry Gerber, a German immigrant, to establish the Society for Human Rights (“Society”) in Illinois.<sup>33</sup> Upon its founding in 1924, the Society became the first LGBTQ+ rights organization in the United States.<sup>34</sup> Gerber, influenced by the Committee’s progress, began publishing *Friendship and Freedom*, the United States’ first LGBTQ+ newsletter, that same year.<sup>35</sup> Shortly after the Society was founded, Gerber’s home was raided by the Chicago Police Department.<sup>36</sup> Gerber was arrested, and everything associated with *Friendship and*

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Oklahoma, South Carolina, Texas, Utah, and Virginia); see Lou Chibbaro Jr., *Sodomy Laws Remain on Books in 17 States, Including Md. & Va.*, WASH. BLADE (Apr. 17, 2013, 5:00 PM), <https://www.washingtonblade.com/2013/04/17/sodomy-laws-remain-on-books-in-17-states-including-md-and-va/>.

26. See Levy, *supra* note 18 (citing Lord Alfred “Bosie” Douglas, Oscar Wilde’s partner, who wrote a poem entitled “Two Loves” in 1880 that later spurred a movement around the world by boldly declaring: “[I, homosexuality,] am the love that dare not speak its name.”).

27. The organization was founded in Berlin, Germany in the late 1800s and known as “Wissenschaftlich–humanitäres Komitee,” or WhK, which translates to “Science–Humanitarian Committee.” *Lost in History: The Scientific–Humanitarian Committee*, LESBIAN NEWS, <http://www.lesbiannews.com/history-scientific-humanitarian-committee/> (last visited Nov. 8, 2019) [hereinafter *Lost in History*].

28. Dustin Goltz, *Lesbian, Gay, Bisexual, Transgender, and Queer Movements*, in 1 BATTLEGROUND: WOMEN, GENDER, AND SEXUALITY 291, 292 (Amy Lind & Stephanie Brzuzu eds., 2008) (characterizing the committee as having carried out “the first advocacy for homosexual and transgender rights”).

29. *Lost in History*, *supra* note 27. Over its tenure, the Committee helped establish approximately one-hundred gay bars and cafés throughout Berlin, Germany and dozens in Vienna, Austria. The Committee also increased the visibility of LGBTQ+ nightlife in Paris, France and encouraged LGBTQ+ individuals to congregate in “gay districts” in Florence, Italy and other smaller European cities. *Id.*

30. *Id.*

31. *Id.* The Committee voiced its advocacy through the group’s motto: “justice through science.” *Id.*

32. *Id.*

33. *LGBTQ Activism: The Henry Gerber House, Chicago, Illinois*, NAT’L PARK SERV. (Feb. 18, 2018), <https://www.nps.gov/articles/lgbtq-activism-henry-gerber-house-chicago-il.htm> [hereinafter *LGBTQ Activism: The Henry Gerber House*].

34. #7: *First Gay Rights Group in the US (1924)*, CHI. TRIBUNE (Nov. 19, 2013), <https://www.chicago.tribune.com/business/blue-sky/chi-top-20-countdown-innovation-07-bsi-htmistory.html>.

35. *LGBTQ Activism: The Henry Gerber House*, *supra* note 33.

36. *Id.*

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*Freedom* was seized.<sup>37</sup> Numerous other Society members were also arrested, ultimately leading to the demise of the Society.<sup>38</sup> Police departments throughout the United States conducted similar raids on countless LGBTQ+ establishments during the Twentieth Century.<sup>39</sup>

By the 1950s, the United States had ushered in one of its most socially conservative periods of the century, and police raids against LGBTQ+ businesses became even more frequent.<sup>40</sup> While the decade is commonly associated with the “Red Scare,”<sup>41</sup> this period was also characterized by the “Lavender Scare.”<sup>42</sup> Numerous state governments, along with the federal government, began investigating individuals deemed a threat to national security simply because they were suspected of being part of the LGBTQ+ community.<sup>43</sup> During the Lavender Scare, thousands of LGBTQ+ employees were fired on the basis of their sexual orientation or gender identity.<sup>44</sup>

Ironically, the discriminatory actions of employers and the government brought visibility to the once-hidden LGBTQ+ community.<sup>45</sup> Increased awareness, in turn, led to the organization of advocacy groups and demonstrations dedicated to political and social consciousness.<sup>46</sup> For example, the LGBTQ+ community fought back against the raiding of the Stonewall Inn by police in 1969.<sup>47</sup> The “Stonewall Riots,”

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37. This included Gerber’s personal typewriter, as well as the uncirculated copies of the newsletter that were later destroyed by police. BETSY KUHN, *GAY POWER! THE STONEWALL RIOTS AND THE GAY RIGHTS MOVEMENT 1969* 13 (2011); JIM KEPNER, *ROUGH NEWS, DARING VIEWS: 1950S’ PIONEER GAY PRESS JOURNALISM* 8 (1998).

38. *LGBTQ Activism: The Henry Gerber House*, *supra* note 33. Gerber’s work with the Society is regarded as a precursor to the LGBTQ+ rights movement, and he has been repeatedly recognized for his contributions to the LGBTQ+ community. HENRY GERBER ON GOVERNORS ISLAND, NYC LGBT HISTORIC SITES PROJECT, <https://www.nyclgbtsites.org/site/henry-gerber-on-governors-island/> (last visited Nov. 8, 2019).

39. Jacob Ogles, *30 Infamous Police Raids of Gay Bars and Bath Houses*, *ADVOCATE* (Feb. 2, 2018), <https://www.advocate.com/politics/2018/2/02/30-infamous-police-raids-gay-bars-and-bathhouses>.

40. *Id.*

41. *Second Red Scare*, OHIO HISTORY CONNECTION, [http://www.ohiohistorycentral.org/w/Second\\_Red\\_Scare](http://www.ohiohistorycentral.org/w/Second_Red_Scare) (last visited Nov. 8, 2019).

42. Beth Sherouse, *LGBT History Month: Why LGBT History Matters*, HUMAN RIGHTS CAMPAIGN (Oct. 31, 2014), <https://www.hrc.org/blog/lgbt-history-month-why-lgbt-history-matters>; *see generally* THE LAVENDER SCARE, <https://www.thelavenderscare.com> (last visited Nov. 8, 2019).

43. Sherouse, *supra* note 42.

44. *Id.*

45. *Id.*

46. *Id.* Two organizations, the Mattachine Society and the Daughters of Bilitis (“DOB”), thrived during this time. Both organizations were at the forefront of the gay rights movement and dedicated to fostering a welcoming community, educating the general public, encouraging members to seek leadership roles in society, and assisting those who had been victimized. DOB was created as a social alternative to lesbian bars, which were considered illegal. As such, DOB events were often subject to raids and police harassment. *Id.* at 41. *See generally* JONATHAN KATZ, *GAY AMERICAN HISTORY* (1976); MARCIA GALLO, *DIFFERENT DAUGHTERS: A HISTORY OF THE DAUGHTERS OF BILITIS AND THE RISE OF THE LESBIAN RIGHTS MOVEMENT* (2006).

47. The Stonewall Inn opened in Greenwich Village in 1967. *Stonewall Riots*, HISTORY, <https://www.history.com/topics/gay-rights/the-stonewall-riots> (last visited Nov. 8, 2019). The gay bar was a place of refuge where members of the LGBTQ+ community could express themselves openly without fear of criminal repercussions. Unannounced raids of gay bars were the norm in the 1960s, and the Stonewall Inn was not notified of a raid that was to take place in the early morning hours of June 28, 1969. On that date, the New York City Police, armed with a warrant, openly beat patrons of the bar and arrested thirteen people. Patrons of the bar and residents of Greenwich Village grew increasingly agitated as the events unfolded. When a police officer hit a patron over the head, she encouraged the remaining individuals outside the bar to act. Fed up with the police harassment and the discrimination they faced regularly,

as the event is commonly remembered, became one of the turning points in the fight for LGBTQ+ rights in the United States.<sup>48</sup>

### B. Landmark Legal Victories for the LGBTQ+ Community

The United States has evolved considerably on the issue of LGBTQ+ rights since the Stonewall Riots—most notably in the last two decades.<sup>49</sup> The decisions rendered by the Supreme Court in *Lawrence v. Texas*,<sup>50</sup> *United States v. Windsor*,<sup>51</sup> and *Obergefell v. Hodges*<sup>52</sup> are undoubtedly historic. The Supreme Court, however, has not weighed in on whether discrimination against LGBTQ+ individuals constitutes sex discrimination under Title VII—the explicit federal protections against employment discrimination. At least, *not yet*. The Court heard oral arguments for *Zarda v. Altitude Express, Inc.*,<sup>53</sup> *Bostock v. Clayton County, Georgia*,<sup>54</sup> and *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*<sup>55</sup> on October 8, 2019.<sup>56</sup> Combined, the outcome of these cases will determine whether LGBTQ+ individuals are protected under Title VII’s prohibition of sex discrimination.

Historically, the rights of LGBTQ+ individuals have been fragmented, ranging in degrees of protection and varying from state to state.<sup>57</sup> The protections afforded to LGBTQ+ individuals in the workplace also vary widely from one state to the next.<sup>58</sup> Thirty-three states have provided some measure of workplace protection to

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the individuals began throwing coins, bottles, and other objects at the officers. Minutes later, a full-blown riot had ensued—one that would last for days and involve thousands of people. While the riots at Stonewall Inn were not singlehandedly responsible for beginning the gay rights movement, they represented a pivotal moment in LGBTQ+ advocacy and activism, and numerous gay rights organizations were formed shortly thereafter. *Id.* For more information on the Stonewall Riots of 1969, see STONEWALL FOREVER: A LIVING MONUMENT TO 50 YEARS OF PRIDE, <https://stonewallforever.org> (last visited Nov. 8, 2019).

48. *Stonewall Riots*, *supra* note 47.

49. See *Lawrence v. Texas*, 539 U.S. 558, 558 (2003) (invalidating fourteen states’ sodomy laws and holding such laws to be a constitutional violation of a person’s right to privacy); *United States v. Windsor*, 570 U.S. 744 (2013) (holding that Section 3 of the Defense of Marriage Act (“DOMA”), which restricted the federal interpretation of “marriage” and “spouse” to opposite-sex couples, was a due process violation); *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (holding that the fundamental right to marry is guaranteed to same-sex couples under the Due Process and Equal Protection Clauses of the Fourteenth Amendment).

50. *Lawrence*, 539 U.S. at 558.

51. *Windsor*, 570 U.S. at 744.

52. *Obergefell*, 135 S. Ct. at 2584.

53. *Zarda v. Altitude Express*, 855 F.3d 76 (2d Cir. 2017), *on reh’g en banc sub nom.*, 883 F.3d 100 (2d Cir. 2018), *cert. granted sub nom.*, 139 S. Ct. 1599 (2019).

54. *Bostock v. Clayton Cty., Ga.*, 723 F. App’x 964 (11th Cir. 2018), *cert. granted sub nom.*, 139 S. Ct. 1599 (2019).

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

56. *ABA Asks Supreme Court to Ensure That Title VII Covers LGBT Employees*, A.B.A. (July 3, 2019), <https://www.americanbar.org/news/abanews/aba-news-archives/2019/07/aba-asks-supreme-court-to-ensure-that-title-vii-covers-lgbt-empl/> [hereinafter *A.B.A. Asks*].

57. *State Maps of Laws & Policies*, HUMAN RIGHTS CAMPAIGN, <https://www.hrc.org/state-maps> (last visited Nov. 8, 2019).

58. *State Maps of Laws & Policies: Employment*, HUMAN RIGHTS CAMPAIGN, <https://www.hrc.org/state-maps/employment> (last visited Nov. 8, 2019).

members of the LGBTQ+ community.<sup>59</sup> To this day, however, members of the LGBTQ+ community are not afforded any explicit federal protection prohibiting discrimination in the workplace based on sexual orientation or gender identity<sup>60</sup>—though advocates argue they are already protected by Title VII’s prohibition of sex discrimination. The Supreme Court will either affirm or deny that contention in *Zarda*, *Bostock*, and *Harris Funeral Homes*.

The map below, created and maintained by Lambda Legal,<sup>61</sup> depicts the protections, if any, provided in each state.<sup>62</sup> Of the thirty-three states that provide protections to members of the LGBTQ+ community, only twenty provide protections for *all* members.<sup>63</sup> Those twenty states<sup>64</sup> prohibit employment discrimination based on sexual orientation *and* gender identity<sup>65</sup> in the public *and* private sectors.<sup>66</sup> Meanwhile, over half of the states permit employers to discriminate against a portion of the LGBTQ+ community in some fashion, providing protections on the basis of sexual orientation but not gender identity, or vice versa.<sup>67</sup>

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59. *In Your State—Workplace*, LAMBDA LEGAL, <https://www.lambdalegal.org/states-regions/in-your-state> (last visited Nov. 8, 2019) (the remaining seventeen states do not offer LGBTQ+ employees any express protections).

60. *What You Should Know About EEOC & the Enforcement Protections for LGBT Workers*, EEOC, [https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement\\_protections\\_lgbt\\_workers.cfm](https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm) (last visited Nov. 8, 2019) (interpreting Title VII to prohibit discrimination against LGBTQ+ employees; however, the EEOC’s decisions, while persuasive, may not be binding on the courts).

61. Lambda Legal is a non-profit organization dedicated to obtaining the “full recognition of the civil rights of lesbians, gay men, bisexuals, transgender people and everyone living with HIV through impact litigation, education and public policy work.” *About Us*, LAMBDA LEGAL, <https://www.lambdalegal.org/about-us> (last visited Nov. 8, 2019).

62. The author has created a table that depicts the information collected by Lambda Legal; the table shows the legal landscape in each state—whether the state has any protections for LGBTQ+ individuals; if so, whether those protections are based on sexual orientation, gender identity, or both; and whether those protections exist in the public and/or private sector. See Appendix, *infra* Section VII.

63. *In Your State—Workplace*, *supra* note 59.

64. Those twenty states include: California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, Rhode Island, Utah, Vermont, and Washington. *Id.*

65. It is important to note that sexual orientation and gender identity do *not* describe the same concepts, and the terms cannot be used interchangeably. A person’s sexual orientation describes their “enduring physical, romantic, and/or emotional attraction to another person.” *GLAAD Media Reference Guide—Transgender*, GLAAD, <https://www.glaad.org/reference/transgender> (last visited Nov. 8, 2019). A person’s gender identity, on the other hand, is an “internal, deeply held sense of their gender. For many transgender people, their own internal gender identity does not match the sex they were assigned at birth. Most people have a gender identity of man or woman (or boy or girl). For some people, their gender identity does not fit neatly into one of those two choices.” Further, a person’s gender identity is different from their gender expression. A person’s gender expression is comprised of “[e]xternal manifestations of gender, expressed through a person’s name, pronouns, clothing, haircut, behavior, voice, and/or body characteristics. Society identifies these cues as masculine and feminine, although what is considered masculine or feminine changes over time and varies by culture. Typically, transgender people seek to align their gender expression with their gender identity, rather than the sex they were assigned at birth.” *Id.*

66. *In Your State—Workplace*, *supra* note 59.

67. *Id.*



*State-Based Protections*

Some states provide protections to all LGBTQ+ individuals employed in the public sector but none to LGBTQ+ individuals employed in the private sector.<sup>68</sup> For example, Kentucky, Montana, Michigan, North Carolina, Ohio, Pennsylvania, and Virginia protect LGBTQ+ employees working in the public sector from discrimination based on sexual orientation and gender identity. Yet, those same states provide no such protections to those working in the private sector. Likewise, some states protect only certain LGBTQ+ individuals in the public sector by prohibiting discrimination based on sexual orientation but do not prohibit such discrimination in the private sector, nor do they prohibit discrimination based on gender identity.<sup>69</sup> Wisconsin, for example, prohibits discrimination based on sexual orientation, but it does not protect employees from discrimination based on gender

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68. *Id.*

69. *Id.*

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identity. Therefore, in Wisconsin, any transgender<sup>70</sup> or non-binary<sup>71</sup> individual can be openly discriminated against by an employer, while their gay, lesbian, and bisexual counterparts<sup>72</sup> are afforded protections.

To avoid the complexities among the states' varying protections, LGBTQ+ individuals have sought recourse for workplace discrimination under federal law.<sup>73</sup> Following the Supreme Court's decision in *Price Waterhouse v. Hopkins*,<sup>74</sup> LGBTQ+ individuals were then able to pursue legal remedies for employment discrimination.<sup>75</sup> In *Price Waterhouse*, Ann Hopkins brought suit against a national accounting firm, Price Waterhouse,<sup>76</sup> after being denied a promotion for failing to conform to traditional societal expectations of femininity.<sup>77</sup> Hopkins was passed over for the promotion because she did not walk, talk, or dress femininely enough.<sup>78</sup> The Court found that Price Waterhouse's reasoning for denying Hopkins the promotion was a clear sign that the firm was "responding adversely to her because she was a woman."<sup>79</sup>

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70. "Transgender [is] an umbrella term for people whose gender identity and/or gender expression differs from what is typically associated with the sex they were assigned at birth. People under the transgender umbrella may describe themselves using one or more of a wide variety of terms—including transgender . . . Many transgender people are prescribed hormones by their doctors to bring their bodies into alignment with their gender identity. Some undergo surgery as well. But not all transgender people can or will take those steps, and a transgender identity is not dependent upon physical appearance or medical procedures." *GLAAD Media Reference Guide—Transgender*, *supra* note 65. The term transgender is not synonymous with transsexual or gender non-conforming. The term transsexual is "[a]n older term that originated in the medical and psychological communities. [It is s]till preferred by some people who have permanently changed—or seek to change—their bodies through medical interventions, including but not limited to hormones and/or surgeries. Unlike transgender, transsexual is *not* an umbrella term. Many transgender people do not identify as transsexual and prefer the word transgender." Moreover, "[g]ender non-conforming [is] a term used to describe some people whose gender expression is different from conventional expectations of masculinity and femininity. Please note that not all gender non-conforming people identify as transgender; nor are all transgender people gender non-conforming. Many people have gender expressions that are not entirely conventional—that fact alone does not make them transgender. Many transgender men and women have gender expressions that are conventionally masculine or feminine. Simply being transgender does not make someone gender non-conforming. [Therefore, the] term [gender non-conforming, like the term transsexual] is not a synonym for transgender . . . and should only be used if someone self-identifies as gender non-conforming." *Id.*

71. "Non-binary and/or genderqueer [are t]erms used by some people who experience their gender identity and/or gender expression as falling outside the categories of man and woman. They may define their gender as falling somewhere in between man and woman, or they may define it as wholly different from these terms. The term is not a synonym for *transgender* or *transsexual* and should only be used if someone self-identifies as non-binary and/or genderqueer." *Id.*

72. The author recognizes that there are numerous other sexual orientations beyond those listed. For more information, see *LGBTQIA Resource Center*, U.C. DAVIS, <https://lgbtqia.ucdavis.edu/educated/glossary> (last visited Oct. 13, 2019).

73. Taylor Payne, *A Narrow Escape: Transcending the GID Exclusion in the Americans with Disabilities Act*, 83 MO. L. REV. 799, 814 (2018).

74. 490 U.S. 228 (1989).

75. Sasha Buchert, *Price Waterhouse v. Hopkins at Thirty*, ALL. FOR JUSTICE (May 1, 2019), <https://www.afj.org/blog/price-waterhouse-v-hopkins-at-thirty>.

76. In 1989, the accounting firm now known as PwC was named Price Waterhouse. *History & Milestones*, PwC, <https://www.pwc.com/us/en/about-us/pwc-corporate-history.html> (last visited Oct. 13, 2019). In 1998, Price Waterhouse merged with Coopers & Lybrand to create PricewaterhouseCoopers. While the firm has shortened its brand name to PwC, it legally remains PricewaterhouseCoopers. *Id.*

77. *Price Waterhouse*, 490 U.S. at 235.

78. *Id.*

79. Payne, *supra* note 73, at 815.

The Supreme Court's decision in *Price Waterhouse* shifted the legal landscape for LGBTQ+ individuals.<sup>80</sup> By holding the accounting firm impermissibly discriminated against Hopkins, "[t]he Court recognized that discrimination based on failure to conform to gender stereotypes is an actionable form of sex discrimination."<sup>81</sup> Members of the LGBTQ+ community have since utilized Title VII to address discrimination in the workplace and have asked courts throughout the United States to recognize that discrimination based on sexual orientation and gender identity "constitutes impermissible sex discrimination under Title VII."<sup>82</sup>

The United States Court of Appeals for the Second, Sixth, Seventh, and Eleventh Circuits have issued holdings regarding Title VII's definition of sex discrimination.<sup>83</sup> In April 2017, the Seventh Circuit rendered its decision in *Hively v. Ivy Tech Community College of Indiana*.<sup>84</sup> There, the Court held sex discrimination includes discrimination based upon sexual orientation.<sup>85</sup> That same year, the Second Circuit heard *Zarda v. Altitude Express*.<sup>86</sup> Originally, the three-judge panel in *Zarda* declined to recognize that discrimination on the basis of sexual orientation falls within the purview of Title VII's prohibition on sex discrimination.<sup>87</sup> The following year, however, the Second Circuit, sitting *en banc*, reversed its previous decision.<sup>88</sup>

The Second Circuit's holding in *Zarda* deepened the extant circuit split on whether Title VII affords protection to gay, lesbian, and bisexual individuals.<sup>89</sup> While the Seventh and Second Circuits have held "Title VII's prohibition against discrimination on the basis of sex in employment already encompasses sexual orientation,"<sup>90</sup> the United States Court of Appeals for the Eleventh Circuit held the opposite in *Evans v. Georgia Regional Hospital*.<sup>91</sup> In *Evans*, the Court refused to include discrimination on the basis of sexual orientation within Title VII's definition of sex discrimination.<sup>92</sup>

Some federal appellate courts "have explicitly ruled that federal laws prohibiting sex discrimination also prohibit discrimination on gender identity or

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80. *Id.* at 814.

81. *Id.* at 815.

82. *Id.* at 814.

83. Odessky, *supra* note 7.

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

85. *Id.* at 351 ("[T]he common-sense reality that it is actually impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex[] persuade[s] us that the time has come to overrule our previous cases that have endeavored to find and observe that line.").

86. *Zarda v. Altitude Express*, 855 F.3d 76 (2d Cir. 2017), *on reh'g en banc sub nom.*, 883 F.3d 100 (2d Cir. 2018), *cert. granted sub nom.*, 139 S. Ct. 1599 (2019).

87. Michelle E. Phillips, Richard I. Greenberg, & Christopher M. Repole, *Title VII Bars Discrimination Based on Sexual Orientation, Second Circuit Rules*, JACKSON LEWIS (Feb. 27, 2018), <https://www.jacksonlewis.com/publication/title-vii-bars-discrimination-based-sexual-orientation-second-circuit-rules>.

88. *Id.*

89. *Id.*

90. Odessky, *supra* note 7.

91. Phillips, Greenberg, & Repole, *supra* note 87; *Evans v. Ga. Reg'l Hosp.*, 850 F.3d 1248, 1255 (11th Cir. 2017), *cert. denied*, 138 S. Ct. 557 (2017).

92. *Evans*, 850 F.3d at 1255.

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[gender] expression as well.”<sup>93</sup> In its decisions in *Smith v. City of Salem*<sup>94</sup> and *Barnes v. City of Cincinnati*,<sup>95</sup> the United States Court of Appeals for the Sixth Circuit recognized protections for transgender employees under Title VII.<sup>96</sup> More recently, in *R.G. & G.R. Funeral Homes v. EEOC*, the Sixth Circuit held that an employer’s decision to fire a transitioning,<sup>97</sup> transgender individual violated Title VII.<sup>98</sup> The United States Court of Appeals for the First, Seventh, and Ninth Circuits have also provided protections for transgender individuals that fall outside of the scope of Title VII.<sup>99</sup> States have issued similar opinions. For example, in 2019, the Supreme Court of Missouri held that it is unlawful under state law for employers to discriminate against individuals who do not conform to gender stereotypes.<sup>100</sup>

Based on these decisions and numerous others, the judiciary appears to be trending towards protecting LGBTQ+ individuals in the workplace.<sup>101</sup> This trend,

93. *Background: Where We Stand in the Courts*, FREEDOM FOR ALL AM.S., <https://www.freedomforallamericans.org/litigation-tracker/background/> (last visited Oct. 13, 2019).

94. *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004) (“[D]iscrimination against a plaintiff who is . . . transgender . . . is no different from the discrimination directed against Ann Hopkins in *Price Waterhouse*, who, in sex–stereotypical terms, did not act like a woman.”); *Background: Where We Stand in the Courts*, *supra* note 93.

95. *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005) (holding that the transgender plaintiff stated a claim for sex discrimination “by alleging discrimination . . . for [their] failure to conform to sex stereotypes”); *Background: Where We Stand in the Courts*, *supra* note 93.

96. *Background: Where We Stand in the Courts*, *supra* note 93.

97. While the term “transition” is traditionally thought to encompass only a physical change, it is actually a “complex process that occurs over a long period of time. [A person’s] transition can include some or all of the following personal, medical, and legal steps: telling one’s family, friends, and co-workers; using a different name and new pronouns; dressing differently; changing one’s name and/or sex on legal documents; hormone therapy; and possibly (though not always) one or more types of surgery. The exact steps involved in transition vary from person to person.” *GLAAD Media Reference Guide—Transgender*, *supra* note 63.

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

99. *Rosa v. Park W. Bank & Tr. Co.*, 214 F.3d 213 (1st Cir. 2000); *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000) (determining Gender Motivated Violence Act parallels the sex discrimination standard of Title VII). See *Whitaker v. Kenosha County School Board*; see also *Videckis v. Pepperdine Univ.*, 150 F. Supp. 3d 1151 (C.D. Cal. 2015) (holding that sex discrimination includes sexual orientation discrimination “because it involved treatment that would not have occurred but for the individual’s sex.”); *Miles v. New York Univ.*, 979 F. Supp. 248, 249–50 (S.D.N.Y. 1997) (holding that a transgender female student could proceed with a claim that she was sexually harassed in violation of Title IX). The Seventh Circuit has also held that transgender students are protected under Title IX of the Education Amendments of 1972 (“Title IX”). *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7th Cir. 2017), *cert. dismissed sub nom.*, 138 S. Ct. 1260 (2018).

100. See *Lampley v. Missouri Comm’n on Human Rights*, 570 S.W.3d 16 (Mo. 2019). While Missouri does not expressly prohibit discrimination based on sexual orientation, it has held that discrimination based on sex stereotypes is a form of sex discrimination prohibited under the Missouri Human Rights Act. *Id.* The Supreme Court of Missouri has also remanded a case that had been dismissed by a lower court, permitting R.M.A., a transgender man, to pursue a claim that his former high school had discriminated against him in the use of a public accommodation on the grounds of his sex. See *R.M.A. by Appleberry v. Blue Springs R–IV Sch. Dist.*, 568 S.W.3d 420 (Mo. 2019), *reh’g denied* (Apr. 2, 2019).

101. Following *Price Waterhouse* and *Oncale*, numerous federal courts have held the purview of Title VII’s prohibition of sex discrimination encompasses sexual orientation and transgender status. *Boutillier v. Hartford Pub. Sch.*, 221 F. Supp. 3d 255 (D. Conn. 2016) (concluding that “straightforward statutory interpretation and logic dictate that sexual orientation cannot be extricated from sex; the two are necessarily intertwined in a manner that, when viewed under the Title VII paradigm set forth by the Supreme Court, place sexual orientation discrimination within the penumbra of sex discrimination.”); *Winstead v. Lafayette Cty. Bd. of Cty. Comm’rs*, 197 F. Supp. 3d 1334 (N.D. Fla. 2016) (“To hold that Title VII’s prohibition on discrimination ‘because of sex’ includes a prohibition on discrimination based

however, could be upended by forthcoming decisions of the Supreme Court of the United States.<sup>102</sup> On April 22, 2019, the Court announced it had granted petitions for certiorari<sup>103</sup> in *Altitude Express v. Zarda*,<sup>104</sup> *Bostock v. Clayton County, Georgia*,<sup>105</sup> and *R.G. & G.R. Harris Funeral Homes Inc. v. EEOC*.<sup>106</sup> In *Zarda* and *Bostock*, which were heard together, the Court will determine whether Title VII's prohibition of sex discrimination includes discrimination based on sexual orientation.<sup>107</sup> In *Harris Funeral Homes*, the Court will address the parallel question of whether Title VII protects transgender employees from discrimination.<sup>108</sup> In short, the Court will soon be answering whether gay, lesbian,

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on an employee's homosexuality or bisexuality or heterosexuality does not require judicial activism or tortured statutory construction. It requires close attention to the text of Title VII, common sense, and an understanding that "[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.""); *Hall v. BNSF Ry. Co.*, 2014 WL 4719007 (W.D. Wash. Sept. 22, 2014) (the Court found that an employee's challenge of an employer's policy providing health insurance to opposite-sex spouses but not same-sex spouses was sufficient to allege sex discrimination under Title VII); *Koren v. Ohio Bell Tel. Co.*, 894 F. Supp. 2d 1032 (N.D. Ohio 2012) (denying defendant's motion for summary judgment of plaintiff's claims that his supervisor discriminated against him on the basis of sex stereotypes after learning plaintiff married his husband and took his last name and holding that the plaintiff's claim fell within the purview of Title VII as sex discrimination); *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212, 1224 (D. Or. 2002) (recognizing that a manager's belief that women should only be attracted to and date men and subsequent harassment of the plaintiff based upon that belief is a sufficient claim for a violation of Title VII); *Centola v. Potter*, 183 F. Supp. 2d 403 (D. Mass. 2002) ("Sexual orientation harassment is often, if not always, motivated by a desire to enforce heterosexually defined gender norms. In fact, stereotypes about homosexuality are directly related to our stereotype about the proper roles of men and women."); *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011) (holding that the defendant impermissibly discriminated against the plaintiff on the basis of her sex because she is transgender); *Roberts v. Clark Cty. Sch. Dist.*, 215 F. Supp. 3d 1001 (D. Nev. 2016) (holding that denying a transgender employee's ability to use any bathroom at the workplace was impermissible sex discrimination under Title VII); *Fabian v. Hosp. of Central Conn.*, 172 F. Supp. 3d 509 (D. Conn. 2016) (holding that *Price Waterhouse* eliminated the narrow interpretation of Title VII's plain language that previously excluded sex discrimination claims by transgender individuals, citing supportive rulings by the Sixth, Ninth, and Eleventh Circuits); *Lewis v. High Point Reg'l Health Sys.*, 79 F. Supp. 3d 588 (E.D.N.C. 2015) (denying the employer's motion to dismiss and allowing plaintiff's transgender discrimination claim to proceed under Title VII); *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008) (stating an employer's offer of employment and rescission of the offer upon discovery the prospective employee was to begin treatment for gender dysphoria and undergo gender affirming surgery was literal discrimination on the basis of sex and impermissible); *Lopez v. River Oaks Imaging & Diagnostic Grp., Inc.*, 542 F. Supp. 2d 653 (S.D. Tex. 2008) (determining that the transgender plaintiff had an actionable claim under Title VII after her employer rescinded her job offer after learning she is transgender).

102. *Supreme Court Agrees to Hear Cases Determining Extent of Title VII Protection for LGBT Workers*, NAT'L LAW REVIEW (Apr. 25, 2019), <https://www.natlawreview.com/article/supreme-court-agrees-to-hear-cases-determining-extent-title-vii-protection-lgbt>.

103. *Id.*

104. *Zarda v. Altitude Express*, 855 F.3d 76 (2d Cir. 2017), *on reh'g en banc sub nom.*, 883 F.3d 100 (2d Cir. 2018), *cert. granted sub nom.*, 139 S. Ct. 1599 (2019).

105. *Bostock v. Clayton Cty., Ga.*, 723 F. App'x 964 (11th Cir. 2018), *cert. granted sub nom.*, 139 S. Ct. 1599 (2019).

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

107. Vin Gurrieri, *High Court to Consider Whether Title VII Covers LGBT Bias*, LAW 360 (Apr. 22, 2019), <https://www.law360.com/articles/1107325/high-court-to-consider-whether-title-vii-covers-lgbt-bias>.

108. *Id.*

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bisexual, and transgender individuals are protected under Title VII.<sup>109</sup> These decisions will have a tremendous impact on the lives of LGBTQ+ Americans.

### III. INCREASING PRESENCE OF ARBITRATION AGREEMENTS IN EMPLOYMENT CONTRACTS

Congress enacted the FAA in order to provide an enforceable alternative to litigation and ensure the validity of arbitration agreements.<sup>110</sup> The FAA was intended to reach only parties with similar bargaining power who knowingly and voluntarily agree to arbitrate.<sup>111</sup> Further, the act was constructed narrowly because Congress intended to limit its reach: “When [a] Senator raised a concern that arbitration contracts might be ‘offered on a take-it-or-leave-it basis to captive customers or employees,’ the Senator was reassured by the bill’s supporters that they did not intend to cover such situations.”<sup>112</sup> In other words, Congress intended to restrict the FAA to any “contract evidencing a transaction involving commerce.”<sup>113</sup> As anticipated, the corporate world embraced arbitration.<sup>114</sup> Businesses found that arbitration was more efficient, less expensive, and thus more desirable than traditional litigation.<sup>115</sup> Shortly thereafter, an “encroachment of arbitration agreements [infiltrated] the realm of the private citizen.”<sup>116</sup> Many businesses began routinely incorporating arbitration agreements into labor and employment contracts, thus expanding the use of arbitration into employment disputes.<sup>117</sup> The expansive use of arbitration agreements has since continued. Moreover, the Supreme Court of the United States has acted on the belief that the FAA was intended to be “a national policy favoring arbitration.”<sup>118</sup> Thus, the Court has interpreted the FAA broadly, despite the intentions of Congress.<sup>119</sup>

The Supreme Court recently reaffirmed its deference to the arbitration process in *Henry Schein v. Archer & White Sales*.<sup>120</sup> In *Henry Schein*, the Court ruled that courts must enforce contracts that delegate to an arbitrator the question of whether a dispute is arbitrable in the first place.<sup>121</sup> The Court also held delegation clauses are enforceable even if a party “claims that the argument for arbitration is ‘wholly groundless.’”<sup>122</sup> The decision in *Henry Schein*, like the decisions rendered in *AT&T*

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109. *A.B.A. Asks*, *supra* note 56.

110. Gregg Weiner, Christian Reigstad, & Dielai Yang, *Recent Rulings Reaffirm Courts’ High Degree of Deference to Arbitration Process*, N.Y. LAW JOURNAL (Mar. 15, 2019), [https://www.law.com/newyorklawjournal/2019/03/15/recent-rulings-reaffirm-courts-high-degree-of-deference-to-arbitration-process/?cmp\\_share](https://www.law.com/newyorklawjournal/2019/03/15/recent-rulings-reaffirm-courts-high-degree-of-deference-to-arbitration-process/?cmp_share).

111. Sternlight, *supra* note 2, at 1636.

112. Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court’s Preference for Binding Arbitration*, 74 WASH. U. L. Q. 637, 647 (1996) (citing Hearing on S. 4213 and S. 4214 before the Subcommittee of the Senate Committee on the Judiciary, 67th Cong., 4th Sess. 9–11 (1923)).

113. Sternlight, *supra* note 2, at 1636; 9 U.S.C. § 2 (1947).

114. Rustad, *supra* note 1, at 676.

115. *Id.* at 665.

116. *Id.* at 676.

117. *Id.* at 645.

118. *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984); Weiner, Reigstad, & Yang *supra* note 110.

119. Rustad, *supra* note 1, at 675.

120. Weiner, Reigstad, & Yang, *supra* note 110; *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019).

121. Weiner, Reigstad, & Yang, *supra* note 110.

122. *Henry Schein, Inc.*, 139 S. Ct. at 524.

*Mobility, LLC v. Concepcion*,<sup>123</sup> *American Express Co. v. Italian Colors Restaurant*,<sup>124</sup> and *Epic Systems Corp. v. Lewis*,<sup>125</sup> further solidified the use of arbitration in the United States, directly contradicting legislative history and congressional intent.<sup>126</sup>

No decision, however, has been as transformative as that rendered in *Gilmer v. Interstate/Johnson Lane Corp.*<sup>127</sup> In *Gilmer*, the Supreme Court held that employees could be forced to arbitrate discrimination claims against their employers.<sup>128</sup> The decision shocked the nation,<sup>129</sup> as many people—employers and employees alike—believed public policy disfavoring mandatory arbitration would prevent the Court from compelling employees to arbitrate, of all things, discrimination claims.<sup>130</sup>

After the *Gilmer* decision, businesses began integrating mandatory arbitration clauses into contracts in a wide array of contexts, a practice previously avoided for fear that such clauses would not be enforced.<sup>131</sup> Over time, the use of mandatory arbitration clauses became universal, making it nearly impossible for consumers to bring contract, tort, or invasion of privacy claims against large corporations without

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123. “In *AT&T Mobility LLC v. Concepcion*, the Supreme Court held that the Federal Arbitration Act required the enforcement of class action waivers in consumer arbitration agreements, even though the waivers at issue were deemed unconscionable under state law.” *Arbitration and Class Actions—National Labor Relations Act—District Court Enforces Class Action Waiver in Employment Arbitration Agreement.—Morvant v. P.F. Chang’s China Bistro, Inc.*, 126 HARV. L. REV. 1122 (2013). Vincent and Liza Concepcion bought cellphones from AT&T Mobility, LCC (“AT&T”) after seeing an advertisement offering free cellphones. AT&T did not charge the couple for the cellphones but *did* charge them \$30.22 in sales tax. The Conceptions brought suit against AT&T as part of a class action, alleging that AT&T had fraudulently advertised its cellphones as “free.” AT&T filed a motion to compel the Conceptions to arbitrate their dispute with the company, citing the service agreement that required all disputes to be resolved by arbitration and prohibited class action arbitration. The district court denied AT&T’s motion, relying on *Discover Bank v. Superior Court*, 36 Cal. 4th 148 (2005), in which the Supreme Court of California held that an adhesion contract between a consumer and a company with superior bargaining power was unenforceable when that contract included an arbitration clause requiring a waiver of class actions. The Ninth Circuit affirmed, and the Supreme Court of the United States granted certiorari. Upon review, the Court held that the Federal Arbitration Act (“FAA”) preempts any state law that conflicts with it. Because California’s case law was interfering with arbitration by permitting parties to consumer adhesion contracts to demand class arbitrations when damages were predictably small, the Court held *Discover Bank* was an obstacle to execution of the FAA. As a result, the *Discover Bank* rule—and any other state rules or laws in conflict with the FAA—are preempted by the FAA. *See AT&T Mobility, LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

124. *See American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013) (holding that the exorbitant price of arbitration is not a sufficient reason for an arbitration clause prohibiting class actions to be deemed unenforceable).

125. The Supreme Court of the United States has determined how the FAA and the National Labor Relations Act (“NLRA”) co-exist when employment contracts prohibit employees from using collective arbitration. *See Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018) (holding that employment contracts that include arbitration agreements requiring individual arbitration are enforceable under the FAA regardless of the allowances set out within the NLRA).

126. David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WISC. L. REV. 33, 76 (1997).

127. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

128. Sternlight, *supra* note 2, at 1637.

129. *Id.*

130. *Id.* at 1638.

131. *Id.*

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utilizing arbitration.<sup>132</sup> The pervasive use of mandatory arbitration clauses<sup>133</sup> is also visible in today's employment agreements.<sup>134</sup>

The Economic Policy Institute<sup>135</sup> estimates the number of American employees who have signed mandatory arbitration clauses is approximately sixty-million.<sup>136</sup> In other words, over half of the American workforce has signed away their ability to vindicate their rights in court.<sup>137</sup> This was, plainly, not the aim of Congress.<sup>138</sup> Congress did not intend for arbitration to be imposed involuntarily or used as a means for stripping away employees' opportunities to pursue litigation.<sup>139</sup> Yet, the predominate effect of many mandatory arbitration clauses in employment contracts is the elimination of employee rights such as the right to a jury trial.<sup>140</sup>

#### IV. THE MODERN PREVALENCE OF ARBITRATION AND WHY IT MATTERS

Before the Supreme Court issued its decision in *Gilmer v. Interstate/Johnson Lane Corp.*<sup>141</sup> in 1991, employers preferred litigating employment disputes over arbitrating them.<sup>142</sup> Following *Gilmer*, that preference changed.<sup>143</sup> By 1995, seventy-eight percent of Fortune 500 companies were willing to have an arbitrator solve employment disputes.<sup>144</sup> Today, eighty percent of Fortune 100 companies *mandate* their employees arbitrate any employment dispute.<sup>145</sup>

Employers of all sizes are now following in the country's largest companies' footsteps.<sup>146</sup> Today, employers commonly integrate mandatory arbitration clauses into employment contracts<sup>147</sup> that require employees to waive their right to a jury trial and class action suits.<sup>148</sup> Such agreements are generally required before an

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132. Rustad, *supra* note 1, at 675.

133. Colvin, *supra* note 4.

134. Odessky, *supra* note 7.

135. The Economic Policy Institute is a nonprofit, nonpartisan organization that was created in order to include the needs of low- and middle-income workers in economic policy discussions across the country. *About*, ECON. POLICY INST., <https://www.epi.org/about/> (last visited Nov. 8, 2019).

136. Colvin, *supra* note 4.

137. Odessky, *supra* note 7. In other words, over half of "private-sector non-union employees" cannot utilize their rights.

138. Sternlight, *supra* note 2, at 1631.

139. *Id.*

140. Rustad, *supra* note 1, at 675; Schwartz, *supra* note 127, at 126.

141. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 20 (1991).

142. Donna Meredith Matthews, *Employment Law After Gilmer: Compulsory Arbitration of Statutory Antidiscrimination Rights*, 18 BERKELEY J. EMP. & LAB. L. 347, 354 (1997).

143. *Id.*

144. *Id.*

145. Megan Leonhardt, *Getting Screwed at Work? The Sneaky Way You May Have Given up Your Right to Sue*, MONEY (Sept. 27, 2017), <http://money.com/money/4958168/big-companies-mandatory-arbitration-cant-sue/>.

146. *Id.*

147. Imre S. Szalai & John D. Wessel, *The Widespread Use of Workplace Arbitration Among American Top 100 Companies*, THE EMP. RIGHTS ADVOCACY INST. FOR LAW & POL'Y (Mar. 2018), <http://employeeriightsadvocacy.org/wp-content/uploads/2018/03/NELA-Institute-Report-Widespread-Use-of-Workplace-Arbitration-March-2018.pdf>; Vail Kohnert-Yount, Jared Odessky, & Sejal Singh, *No, Companies That Force Workers to Sign Away Their Right to Sue Are Not LGBTQ-Friendly*, SLATE (Jan. 23, 2019), <https://slate.com/news-and-politics/2019/01/human-rights-campaign-corporate-equality-index-arbitration-lgbtq.html>.

148. Kohnert-Yount, Odessky, & Singh, *supra* note 147.



employer will permit a new employee to begin working.<sup>149</sup> Moreover, many employers are now requiring current employees to agree to amendments in their existing employment contracts or, alternatively, sign separate arbitration agreements.<sup>150</sup> Modern employment requirements like these have caused over half of the employment disputes in the last decade to be mandatorily arbitrated.<sup>151</sup>

Mandatory arbitration is detrimental to employees for numerous reasons.<sup>152</sup> Arbitration, unlike litigation, generally lacks sufficient discovery, meaning an employee seeking to bring a claim against their<sup>153</sup> employer oftentimes does not have access to enough evidence to make a viable claim.<sup>154</sup> Arbitration also removes procedural safeguards afforded to employees in a jury trial.<sup>155</sup> Moreover, employers typically choose the arbitrator without the input of employees, meaning arbitrators are incentivized to rule in favor of the employer to increase their chances of being chosen to arbitrate for that organization again in the future.<sup>156</sup> Employees are also more likely to lose their claim when it is arbitrated rather than litigated.<sup>157</sup> Research has consistently shown that arbitrators are more likely to rule against an employee than judges or juries<sup>158</sup> and less likely to fully compensate the small amount of employees who prevail.<sup>159</sup> In essence, the deck is stacked against an employee before the cards are even dealt, and LGBTQ+ employees are often at an even further disadvantage than their non-LGBTQ+ peers.

#### V. MANDATORY ARBITRATION IMPEDES THE ADVANCEMENT OF LGTBQ+ RIGHTS

Over the last thirty years, the Supreme Court of the United States has stripped American employees of their rights. The Court has held: employees can be required to arbitrate despite an inequity of bargaining power and resources;<sup>160</sup> the excessive cost of arbitration is not a sufficient reason for an arbitration clause prohibiting class actions to be deemed unenforceable;<sup>161</sup> employers can expressly prohibit employees from bringing class arbitrations in employment disputes despite the National Labor Relations Act's protections;<sup>162</sup> arbitration agreements must explicitly call for class

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149. Szalai & Wessel, *supra* note 147.

150. *Id.*

151. *Id.*

152. Genie Harrison, *Forced Arbitration Is Bad News for Employees, California Stats Show*, BLOOMBERG LAW (Aug. 15, 2019, 3:01 AM), <https://news.bloomberglaw.com/daily-labor-report/insight-forced-arbitration-is-bad-news-for-employees-california-stats-show>.

153. The author recognizes the singular “they” and will use “they” and “their” instead of “he” or “she” to be inclusive of all gender identities. For more information, see *Words We’re Watching*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/words-at-play/singular-nonbinary-they> (last updated 2019).

154. Odessky, *supra* note 7.

155. *Id.*

156. *Id.*

157. Szalai & Wessel, *supra* note 147.

158. *Id.*; Kohnert-Yount, Odessky, & Singh, *supra* note 147. The Economic Policy Institute estimates that workers subject to mandatory arbitration win only fifty-nine percent as often as they would in federal court and only thirty-eight percent as often as in state court.

159. Szalai & Wessel, *supra* note 147.

160. *AT&T Mobility, LLC v. Concepcion*, 131 S. Ct. 1740, 1740 (2011).

161. *See American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 2304 (2013).

162. *See generally* 29 U.S.C. § 151–62 (1947).

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arbitrations in order for the process to be utilized;<sup>163</sup> and contracts that delegate to an arbitrator the question of whether a dispute is arbitrable are enforceable.<sup>164</sup>

### A. Obstacles Facing LGBTQ+ Employees

While the Supreme Court's decisions regarding employment disputes and arbitration have impacted the American workforce as a whole, the decision in *Gilmer* was particularly devastating to LGBTQ+ employees.<sup>165</sup> There, the Court "mandated the enforcement of clauses in individual employment contracts requiring the submission of [all] claims exclusively to arbitration," including discrimination or other civil rights claims.<sup>166</sup> This is problematic because arbitrators are not always required to apply governing law.<sup>167</sup> Therefore, an arbitrator does not have to abide by a particular jurisdiction's determination that discrimination based upon sexual orientation or gender identity is within the purview of Title VII's protections. As a result, LGBTQ+ individuals can be openly discriminated against by their employer despite protections in certain jurisdictions.

A ruling recently handed down by the National Labor Relations Board ("NLRB") has also allowed employers to rescind job offers or terminate an existing job if an individual fails to accept the terms laid out in an employment contract.<sup>168</sup> This ruling, coupled with the Supreme Court's holdings in *Lamps Plus* and *Henry Schein* pose problems for unemployed Americans. These cases are especially challenging for LGBTQ+ individuals,<sup>169</sup> who statistically experience higher rates of unemployment than the general American public.<sup>170</sup> In other words, it is unlikely that an LGBTQ+ individual would turn down a job mandating arbitration or refuse to sign an amended mandatory arbitration clause.<sup>171</sup> To further complicate matters, it is estimated that twenty–five percent of LGBTQ+ Americans are currently living

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163. See *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407 (2019).

164. *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 524 (2019); Weiner, Reigstad, & Yang, *supra* note 110.

165. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 20 (1991).

166. Odessky, *supra* note 7; see also *Gilmer*, 500 U.S. at 20.

167. *Arbitration*, A.B.A., [https://www.americanbar.org/groups/dispute\\_resolution/resources/DisputeResolutionProcesses/arbitration/](https://www.americanbar.org/groups/dispute_resolution/resources/DisputeResolutionProcesses/arbitration/) (last visited Nov. 8, 2019).

168. *Shifting Arbitration Pact Being Sued Is Legal*, *NLRB Says*, LAW 360 (Aug. 14, 2019, 4:54 PM), <https://www.law360.com/employment/articles/1188714>. The National Labor Relations Board recently handed down a decision that will now allow employers to change mandatory arbitration agreements after securing employee agreement and threaten to fire any employee who refuses to sign an amended mandatory arbitration agreement. Changes can include barring employees from opting into class actions and can be implemented by an employer in response to a suit brought by its employees. *Id.*

169. The United States Census Bureau ("Census Bureau") estimated that the United States' population would reach 327,167,434 in 2018. The Census Bureau estimates that 22.4% of the population is under the age of eighteen, meaning approximately seventy–three million Americans are minors, and 254 million Americans are adults. *QuickFacts*, U.S. CENSUS BUREAU (July 1, 2018), <https://www.census.gov/quickfacts/fact/table/US/AGE295218>. In 2017, a Gallup report found that approximately 4.5% of American adults self–identify as LGBTQ+. Thus, there are approximately eleven–and–a–half million LGBTQ+ Americans. Frank Newport, *In U.S., Estimate of LGBT Population Rises to 4.5%*, GALLUP (May 22, 2018), <https://news.gallup.com/poll/234863/estimate-lgbt-population-rises.aspx>.

170. *Socioeconomic Indicators: LGBT Proportions of Population: U.S.*, WILLIAMS INST., <https://williamsinstitute.law.ucla.edu/visualization/lgbt-stats/?topic=LGBT#economic> (last visited Nov. 8, 2019) [hereinafter *Socioeconomic Indicators*]. While only five percent of the American public is unemployed, nine percent of LGBTQ+ Americans are unemployed. *Id.*

171. Odessky, *supra* note 7.

below the poverty line, earning less than \$25,000 annually.<sup>172</sup> Many studies have shown LGBTQ+ Americans are not as financially secure as the general American public,<sup>173</sup> so it is improbable they would or even *could* incur the expense of bringing an employment discrimination claim.<sup>174</sup> The Supreme Court has also essentially dismantled the possibility of sharing costs by severely limiting class actions and class arbitration.<sup>175</sup> Without the opportunity to bring representative claims, LGBTQ+ employees are left with the sole option of individually arbitrating an employment discrimination claim in an expensive process that does not respect precedent.<sup>176</sup>

### B. *The Potential Impact of the Supreme Court's Upcoming Decisions*

To definitively establish that discrimination based on sexual orientation and gender identity constitute impermissible sex discrimination under Title VII, the Supreme Court needs to explicitly say so in *Zarda*, *Bostock*, and *Harris Funeral Homes*. If the Supreme Court does so hold, the LGBTQ+ community will finally be protected in the workplace under federal law. Alternatively, if the Supreme Court declines to include sexual orientation discrimination and gender identity discrimination within Title VII's definition of sex discrimination, it is crucial that the legislature pass the Equality Act to protect LGBTQ+ employees from all types of discrimination. Likewise, the Forced Arbitration Injustice Repeal Act of 2019 ("FAIR Act")<sup>177</sup> must also be passed to ensure those rights do not become fundamentally meaningless during the age of mandatory arbitration.

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172. *LGBT Demographic Data Interactive*, WILLIAMS INST. (Jan. 2019), <https://williamsinstitute.law.ucla.edu/visualization/lgbt-stats/?topic=LGBT#about-the-data>.

173. *See id.*; *see* Kohnert–Yount, Odessky, & Singh, *supra* note 147.

174. Odessky, *supra* note 7.

175. *Id.*; *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018) (the Supreme Court held that the FAA permits class action waivers—meaning the Court has recognized an employer's authority to require employees give up the opportunity to pursue class litigation). Accordingly, the Court will permit employers to expressly prohibit employees from bringing class arbitrations in employment disputes. *See* Liz Kramer, *Justice Gorsuch Delivered . . . A Win for Class Arbitration Waivers*, ARBITRATION NATION (May 22, 2018), <https://www.arbitrationnation.com/justice-gorsuch-delivered-win-class-arbitration-waivers/>. The Court also stated that no existing labor laws preclude these waivers' enforceability despite the protections set forth by the National Labor Relations Act in "other concerted activities for the purpose of . . . other mutual aid or protection." 29 U.S.C. § 157 (1947). This is commonly referred to as the catchall provision of the NLRA. Sarah Hamilton, *SCOTUS Holds Class Arbitration Waivers Do Not Violate the NLRA*, HUNTON EMP. & LABOR PERSPECTIVES (May 23, 2018), <https://www.huntonlaborblog.com/2018/05/articles/supreme-court-cases/scotus-holds-class-action-waivers-not-violate-nlra/>. Many advocates believed this provision provided employees with the right to class actions and class arbitrations, but the Court disagreed. *See Epic Sys. Corp.*, 138 S. Ct. at 1625 (the Court held that the failure to include arbitration or class actions expressly indicates that catchall provision of the NLRA should bow to the FAA's requirement to "respect and enforce agreements to arbitrate."). Subsequently the Court ruled that arbitration agreements must explicitly call for class arbitrations for the process to be invoked. *See Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1416–17 (2019).

176. Kohnert–Yount, Odessky, & Singh, *supra* note 147; *see also* Deanne Katz, *Is Litigation Actually Cheaper Than Arbitration?*, FINDLAW (Dec. 7, 2012, 9:32 AM), [https://blogs.findlaw.com/in\\_house/2012/12/is-litigation-actually-cheaper-than-arbitration.html](https://blogs.findlaw.com/in_house/2012/12/is-litigation-actually-cheaper-than-arbitration.html).

177. H.R. 1423, 116th Cong. (U.S. 2019).

Numerous versions of the Equality Act and bills with similar intentions have been introduced over the years.<sup>178</sup> For example, in 2017, Senator Jeff Merkley proposed an amendment to the Civil Rights Act of 1964 to include the prohibition of “discrimination on the basis of sex, gender identity, and sexual orientation.”<sup>179</sup> That specific bill was co-sponsored by forty-two other Senators and referred to the Senate Judiciary Committee.<sup>180</sup> Despite the co-sponsorship, the bill has not garnered any traction.<sup>181</sup> Representative David Cicilline introduced another version of the Equality Act in 2019.<sup>182</sup> This version of the Equality Act also intends to amend Title VII by expressly prohibiting discrimination based on sexual orientation and gender identity.<sup>183</sup> Unlike its predecessors, Representative Cicilline’s Equality Act received a hearing in front of the House Judiciary Committee.<sup>184</sup> Following the hearing, the House Judiciary Committee made a historic decision, voting to advance the Equality Act to the full House of Representatives.<sup>185</sup> On May 17, 2019, the House of Representatives voted on the Equality Act, and it was passed in a 236 to 173 vote.<sup>186</sup> The Equality Act has since been received by the Senate.<sup>187</sup> Upon receipt, the Senate referred it to its own Judiciary Committee.<sup>188</sup>

The Equality Act may become critical following the decisions to be rendered in *Zarda*, *Bostock*, and *Harris Funeral Homes*. If the Court finds that Title VII’s prohibition of sex discrimination, as written, does not encompass discrimination based upon sexual orientation or gender identity, the legislature can circumvent the Court’s statutory interpretation by passing the Equality Act. By doing so, Congress would be solidifying protections for the LGBTQ+ community by *expressly* prohibiting discrimination on the basis of sexual orientation and gender identity. In short, Congress could ensure the protections afforded to the LGBTQ+ community under Title VII would no longer be open to statutory interpretation.

Even if the Supreme Court holds that Title VII’s definition of “sex discrimination” includes sexual orientation discrimination and gender identity discrimination or Congress passes the Equality Act, LGBTQ+ employees will not be completely protected from employment discrimination unless the FAIR Act<sup>189</sup> is also passed by Congress. If the FAIR Act is not passed, the rights of LGBTQ+ employees may be disregarded in employment disputes being resolved in arbitration

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178. See generally H.R. 14752, 93d Cong. (U.S. 1976); H.R. 3185, 114th Cong. (U.S. 2015); S. 1858, 114th Cong. (U.S. 2015); H.R. 2282, 115th Cong. (U.S. 2017); S. 1006, 115th Cong. (U.S. 2017); H.R. 4636, 103d Cong. (U.S. 1994); S. 2238, 103d Cong. (1994); H.R. 1863, 104th Cong. (U.S. 1995); S. 932, 104th Cong. (U.S. 1995); S. 2056, 104th Cong. (U.S. 1996); H.R. 1858, 105th Cong. (U.S. 1997); S. 869, 105th Cong. (U.S. 1997); H.R. 2355, 106th Cong. (U.S. 1999); S. 1276, 106th Cong. (U.S. 1999); H.R. 2692, 107th Cong. (U.S. 2001); S. 1284, 107th Cong. (U.S. 2001); H.R. 3285, 108th Cong. (U.S. 2003); S. 1705, 108th Cong. (U.S. 2003); H.R. 2015, 110th Cong. (U.S. 2007); H.R. 3685, 110th Cong. (U.S. 2007); H.R. 3017, 111th Cong. (U.S. 2009); H.R. 2981, 111th Cong. (U.S. 2009); S. 1584, 111th Cong. (U.S. 2009); H.R. 1397, 112th Cong. (U.S. 2011); S. 811, 112th Cong. (U.S. 2011); H.R. 1755, 113th Cong. (U.S. 2013); S. 815, 113th Cong. (U.S. 2013).

179. S. 1006, 115th Cong. (U.S. 2017).

180. *Id.*

181. *Id.*

182. H.R. 5, 116th Cong. (U.S. 2019).

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. H.R. 5, 116th Cong. (U.S. 2019).

189. H.R. 1423, 116th Cong. (U.S. 2019).

because, as previously noted, the process does not require that governing law be applied.

Like the Equality Act, the FAIR Act has been introduced in various bills. A similar bill, the Arbitration Fairness Act (“Fairness Act”), was proposed in 2017.<sup>190</sup> The Fairness Act attempted to amend the FAA by prohibiting a “pre[–]dispute arbitration agreement from being valid or enforceable if it requires arbitration of an employment . . . or a civil rights dispute.”<sup>191</sup> Yet, the bill has not received much attention since its introduction and reference to the Subcommittee on Regulatory Reform, Commercial and Antitrust Law in 2017.<sup>192</sup>

Some scholars argue the Fairness Act failed to garner attention because its proposed amendment to the FAA did not extend far enough.<sup>193</sup> Interestingly, Justice Neil Gorsuch implies the same throughout the majority opinion in *Epic Systems*.<sup>194</sup> There, Justice Gorsuch acknowledges that the policy debate surrounding mandatory arbitration is robust<sup>195</sup> and explores, numerous times throughout the opinion, the possibility that the FAA could be flawed.<sup>196</sup> He states: “You might wonder if the balance Congress struck in 1925 between arbitration and litigation should be revisited in light of more contemporary developments.”<sup>197</sup> Justice Gorsuch also maintains, however, that the Court is bound by established precedent and must “rigidly enforce arbitration agreements.”<sup>198</sup> Some have interpreted these statements to mean that Justice Gorsuch, while bound by precedent, encourages Congress to amend the FAA in order to appease the public.<sup>199</sup> Justice Ruth Bader Ginsburg agrees with that sentiment.<sup>200</sup> In her dissent in *Epic Systems*, she expressly states that Congress is the branch of government responsible for an amendment:<sup>201</sup> “Congressional correction of the Court’s elevation of the FAA over workers’ rights to act in concert is urgently in order.”<sup>202</sup>

Representative Henry Johnson is attempting this congressional correction by amending the FAA through the FAIR Act. Representative Johnson introduced the FAIR Act in February 2019 shortly after the *Epic Systems* decision was issued.<sup>203</sup> On September 19, 2019, the House of Representatives voted on the FAIR Act, and it was passed in a 225 to 186 vote.<sup>204</sup> If enacted, as stated above, the FAIR Act would amend the FAA to prohibit pre–dispute, *mandatory* arbitration agreements from being valid or enforceable if arbitration is compelled in an employment or

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190. H.R. 1374, 115th Cong. (U.S. 2017).

191. *Id.*

192. *Id.*

193. Kohnert–Yount, Odessky, & Singh, *supra* note 147.

194. *See Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1612 (2018).

195. Kramer, *supra* note 175.

196. *Id.*

197. *See Epic Sys. Corp.*, 138 S. Ct. at 1621–22.

198. Kramer, *supra* note 175.

199. *See Epic Sys. Corp.*, 138 S. Ct. at 1632 (Justice Gorsuch also opined that the Court “is not free to substitute its preferred economic policies for those chosen by the people’s representatives.”). The implication of Gorsuch’s statement is that it is Congress’s responsibility to amend the FAA in order to appease the public’s appetite.

200. Kramer, *supra* note 175; *Epic Sys. Corp.*, 138 S. Ct. at 1633 (Ginsburg, J., dissenting).

201. Kramer, *supra* note 175.

202. *Epic Sys. Corp.*, 138 S. Ct. at 1633 (Ginsburg, J., dissenting).

203. H.R. 1423, 116th Cong. (U.S. 2019).

204. Alexia Fernández Campbell, *The House Just Passed a Bill That Would Give Millions of Workers the Right to Sue Their Boss*, VOX (Sept. 20, 2019, 11:30 AM), <https://www.vox.com/identities/2019/9/20/20872195/forced-mandatory-arbitration-bill-fair-act>.

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civil rights claim.<sup>205</sup> By passing the FAIR Act, Congress would be directly circumventing the Court's holding in *Gilmer v. Interstate/Johnson Lane Corp.*, meaning any employee wanting to *litigate* a discrimination claim against their employer would be permitted to do so. Because litigation is the only way to ensure that governing law is applied, the FAIR Act's enactment would ensure that the current protections the LGBTQ+ community has will be applied as intended. Moreover, Congress would be ensuring future protections are afforded to the LGBTQ+ community at a time when they may need them most.

## VI. CONCLUSION

The Supreme Court of the United States has handed down a series of cases sanctioning the use of mandatory arbitration clauses in contexts not originally intended by Congress. The Court's decision in *Gilmer*, in particular, provided the corporate world with the opportunity to begin integrating mandatory arbitration clauses into contracts that affect private citizens in their roles as consumers and employees.<sup>206</sup> The increased prevalence of mandatory arbitration clauses coincided with the recognition of rights for the LGBTQ+ community.<sup>207</sup> The implementation of such mandatory arbitration clauses in employment contracts has been to the detriment of the LGBTQ+ community, hindering their ability to vindicate their rights.

The employment protections currently enjoyed by LGBTQ+ workers in various pockets of the country—and employment rights that may be recognized in the future at the national level, including those the Supreme Court may recognize under Title VII in *Zarda*, *Bostock*, and *Harris Funeral Homes*<sup>208</sup>—will remain fundamentally meaningless unless the FAA is amended to prohibit employment discrimination claims from being mandatorily arbitrated. Without such an amendment, Congress will leave American employees with a single avenue to resolve a dispute with their employer: individual arbitration.

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205. *Id.*

206. Sternlight, *supra* note 2, at 1638.

207. Odessky, *supra* note 7.

208. The author understands that it is unclear how the Supreme Court will rule in these cases. At the very least, however, the Court's decision to hear these cases in the first place demonstrates the increasing national attention paid to LGBTQ+ rights—which, in turn, may prompt more courts and state legislatures to address LGBTQ+ rights. Perhaps Congress will even take up the scope of Title VII as it relates to LGBTQ+ workers. In that event, the number of LGBTQ+ workers who are forced to arbitrate employment discrimination claims will directly influence the continuing LGBTQ+ rights movement.

## VII. APPENDIX

State	No State Law Protecting LGBTQ+ Employees	State Law <sup>209</sup> Protections Prohibiting Discrimination on the Basis of <u>Sexual Orientation</u>		State Law Protections Prohibiting Discrimination on the Basis of <u>Gender Identity</u>	
		Protections in the Public Sector Only	Protections in Both Public and Private Sectors	Protections in the Public Sector Only	Protections in Both Public and Private Sectors
Ala.	X				
Alaska <sup>210</sup>		X			
Ariz. <sup>211</sup>		X			
Ark.	X				
Cal. <sup>212</sup>			X		X
Col. <sup>213</sup>			X		X
Conn. <sup>214</sup>			X		X
Del. <sup>215</sup>			X		X
Fla.	X				
Ga.	X				
Haw. <sup>216</sup>			X		X
Idaho	X				
Ill. <sup>217</sup>			X		X
Ind. <sup>218</sup>		X			
Iowa <sup>219</sup>			X		X
Kan.	X				
Ky. <sup>220</sup>		X		X	
La. <sup>221</sup>		X			
Me. <sup>222</sup>			X		X
Md. <sup>223</sup>			X		X
Mass. <sup>224</sup>			X		X
Mich. <sup>225</sup>		X		X	
Minn. <sup>226</sup>			X		X
Miss.	X				
Mo.	X				
Mont. <sup>227</sup>		X		X	

209. For purposes of this Comment, this chart also includes actions taken by gubernatorial executive order.

210. ALASKA ADMIN. Order No. 195 (Mar. 5, 2002).

211. Ariz. Exec. Order No. 2003–22 (June 21, 2003); ARIZ. REV. STAT. ANN. § 41–1463 (West 2010).

212. CAL. GOV'T CODE §§ 12920, 12940 (1980).

213. COLO. REV. STAT. §§ 24–34–301, 24–34–401, 24–34–402 (West 2017).

214. CONN. GEN. STAT. ANN. §§ 46a–60, 46a–81c (West 2019).

215. DEL. CODE ANN. tit. 19, § 711 (West 2016).

216. HAW. REV. STAT. ANN. §§ 368–1, 378–2.

217. 775 ILL. COMP. STAT. ANN. 5/1–102, 5/1–103 (West 2019).

218. IND. CODE ANN. § 22–9–1–2 (West 2014).

219. IOWA CODE ANN. § 216.6 (West 2018).

220. KY. REV. STAT. ANN. §§ 344.040–344.070 (West 2019); Ky. Exec. Order No. 2008–473 (June 2, 2008).

221. LA. STAT. ANN. § 23:332 (West 2014).

222. ME. REV. STAT. tit. 5, §§ 4553, 4571–4576 (West 2019).

223. MD. STATE GOV'T CODE ANN. § 20–606.

224. MASS. GEN. LAWS ANN. ch. 151B, §§ 3, 4 (West 2019).

225. MICH. COMP. LAWS ANN. § 333.20201, 21761 (West 2017); Mich. Exec. Directive No. 2003–24 (Dec. 23, 2003).

226. MINN. STAT. ANN. §§ 363A.02, 363A.03 (West 2019).

227. MONT. CODE ANN. § 49–2–303 (West 2011).

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Neb.	X				
Nev. <sup>228</sup>			X		X
N.H. <sup>229</sup>			X	X	
N.J. <sup>230</sup>			X		X
N.M. <sup>231</sup>			X		X
N.Y. <sup>232</sup>			X		X
N.C. <sup>233</sup>		X		X	
N.D.	X				
Ohio <sup>234</sup>		X		X	
Okla.	X				
Or. <sup>235</sup>			X		X
Pa. <sup>236</sup>		X		X	
R.I. <sup>237</sup>			X		X
S.C.	X				
S.D.	X				
Tenn.	X				
Tex.	X				
Utah <sup>238</sup>			X		X
Vt. <sup>239</sup>			X		X
Va. <sup>240</sup>		X		X	
Wash. <sup>241</sup>			X		X
W. Va.	X				
Wis. <sup>242</sup>			X		
Wyo.	X				

228. NEV. REV. STAT. ANN. §§ 338.125, 610.185, 613.330, 613.340, 613.405 (West 2018).

229. N.H. REV. STAT. ANN. §§ 354-A:6, 21-I:42, 21-I:52, 21-I:58 (West 2018).

230. *Id.*

231. N.M. STAT. ANN. § 28-1-7.

232. N.Y. EXEC. L. § 296 (West 2019).

233. N.C. GEN. STAT. ANN. § 143-422.2 (West 2017).

234. Ohio Exec. Order No. 2011-05K (Jan. 21, 2011).

235. S.B. 2, 74th Leg. Assemb., Reg. Sess. (Ore. 2007).

236. Pa. Exec. Order No. 2003-10 (Aug. 28, 2003).

237. R.I. Gen. Laws §§ 28-5-5, 28-5-7.

238. UTAH CODE ANN. § 34A-5-106 (West 2016).

239. VT. STAT. ANN. tit. 21, § 495 (West 2007).

240. VA. CODE ANN. §§ 2.2-3901, 36-96.3 (2002).

241. WASH. REV. CODE ANN. §§ 49.60.010 (West 2007), 49.60.030(1) (West 2009), 49.60.040(15) (West 2019).

242. WIS. STAT. §§ 106.50, 106.52, 111.31, 224.77, 230.18 (2001).



