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# Opening the door: The 2nd and 6th circuits' expansion of Title VII to include sexual orientation and transgender protection

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In the parlance of the Wild West, "There's a new sheriff in town."

For years, federal courts have held that Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000e-2, does not cover sexual orientation discrimination. These courts include the 2nd U.S. Circuit Court of Appeals, which held in *Simonton v. Runyon*, 232 F.3d 33 (2000), that sexual orientation is not included in the categories protected under Title VII.

But last year the 7th U.S. Circuit Court of Appeals broke ranks and held in its en banc decision in *Hively v. Ivy Tech Community College of Indiana*, 853 F.3d 339 (2017), that sexual orientation is a protected category under Title VII.

> For 50 years, courts offered many reasons to support the conclusion that Title VII does not cover sexual orientation discrimination, including interpretation of the law's language itself, history and precedent.

At the time *Hively* was decided, a panel of the 2nd Circuit had already issued its ruling in *Zarda v. Altitude Express Inc.*, 855 F.3d 76 (2017) (*Zarda I*), recognizing that only an en banc court could reverse the circuit's decision in *Simonton*. Taking a cue from the 7th Circuit's decision in *Hively*, the 2nd Circuit agreed to rehear the *Zarda I* panel decision en banc.

On Feb. 26, the 2nd Circuit agreed in *Zarda v. Altitude Express Inc.*, 883 F.3d 100 (*Zarda II*), that Title VII prohibits sexual orientation discrimination.

Shortly on the heels of this decision, a panel of the 6th U.S. Circuit Court of Appeals expanded the interpretation even further in *Equal Employment Opportunity Commission v. R.G. & G.R. Harris Funeral Homes Inc.*, 884 F.3d 560 (2018), squarely holding that Title VII also provides protection to employees based on their transgender and transitioning status.

This article explores the arguments considered in *Zarda II* and *Harris Funeral Homes* and examines what this trend means for other courts.[1]

## THE ISSUE

Title VII was enacted in 1964, a very different time from now both socially and politically. Initially, the proposed civil rights legislation included protections based only on race, religion, national origin and citizenship. Congress added "sex" as a protected category while debating the bill, sparking a still-existing debate about precisely what that addition was intended to cover.

In *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), the U.S. Supreme Court decided that Title VII covers gender stereotyping. And in *Oncale v. Sundowner Offshore Services Inc.*, 523 U.S. 75 (1998), the high court held that Title VII prohibits same-sex sexual harassment.

But for 50 years, federal appeals courts agreed that Title VII does not cover discrimination based on sexual orientation. Congress declined to enact legislation adding sexual orientation as a protected category under Title VII, although a number of states did so independently.

Courts offered many reasons to support the conclusion that Title VII does not cover sexual orientation discrimination, including interpretation of the law's language itself, history and precedent.

## *ZARDA V. ALTITUDE EXPRESS*

*Zarda II* was a 10-3 decision, with one judge filing a separate opinion concurring in the judgment, three judges filing separate opinions concurring in the opinion, and three judges filing dissenting opinions. None of the judges disagreed that society has progressed to the point that it might make sense for Title VII to cover sexual orientation, but their legal analyses and conclusions differed.

Chief Judge Robert A. Katzmann fittingly wrote the majority decision. It was the chief judge who had noted in an earlier panel decision that *Simonton* could be reversed only by the en banc court.[2]

In a 69-page decision, Judge Katzmann tackled the numerous arguments for and against interpreting Title VII to ban sexual orientation discrimination.

First, he explored the reasons for reviewing prior precedent on this issue, including the changing views of other circuits and the EEOC. When *Simonton* was decided in 2000, federal appeals courts — as well as the EEOC — generally agreed that Title VII does not bar sexual orientation discrimination.[3] Since then, however, the 7th and 11th Circuits have revisited the issue.

In *Hively* the 7th Circuit, sitting en banc, "took 'a fresh look at [its] position in light of developments at the Supreme Court extending over two decades and held that 'discrimination on the basis of sexual orientation is a form of sex discrimination.'"[4]

In *Evans v. Georgia Regional Hospital*, 850 F.3d 1248 (2017), a divided panel of the 11th U.S. Circuit Court of Appeals declined to recognize the claim, believing that it was bound by *Blum v. Gulf Oil*, 597 F.2d 936 (5th Cir. 1991).

In addition to these two circuit decisions, the *Zarda II* decision also notes that in 2018, the 1st U.S. Circuit Court of Appeals addressed a related question, taking the position that a plaintiff may pursue "sex-plus claims under Title VII where, in addition to the sex-based charge, the 'plus' factor is the plaintiff's status as a gay or lesbian individual."[5]

The *Zarda II* court also reviewed sexual orientation discrimination through the "lens of associational discrimination," concluding that associational discrimination based on sex should be treated no differently from associational discrimination based on race.

Next, Judge Katzmann turned to an analysis of the statute itself. The majority decision said its conclusion flowed naturally from existing Title VII doctrine and the language of the statute. It addressed the language of Title VII and noted the unanimous view that it should be interpreted broadly to achieve equal employment opportunity.

Title VII provides, in relevant part: "It shall be an unlawful employment practice for an employer ... to fail or refuse to hire or to discharge ... or otherwise to discriminate against any individual with respect to his [or her] compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin."

The relevant guiding words are "because of ... sex." Finding that the circuit's interpretation should be guided by the entirety of the statute and relevant precedent, the majority opinion reviewed a number of relevant cases.

Citing cases dealing with other sex-based factors, such as life expectancy, the court agreed that Title VII prohibits not just discrimination based on sex itself, but discrimination based on traits that are a function of sex, such as life expectancy.[6]

Since "sexual orientation discrimination is motivated, at least in part by sex, [it] is thus a subset of sex discrimination," the court said. This is "because sexual orientation discrimination is predicated on assumptions about how [a] person [] of a certain sex should be."

The court found that "because one cannot fully define a person's sexual orientation without identifying his or her sex, sexual orientation is a function of sex." In fact, it is "doubly delineated by sex" because it is defined by both the person's own sex as well as the sex of the person to whom he or she is attracted, the court said.

The majority in *Zarda* rejected the significance of the argument that it was not even remotely possible that in 1964, when Title VII was enacted, a reasonable person would have contemplated it to include sexual orientation.

The court suggested that interpreting what was contemplated at the time of enactment has not been determinative with respect to other forms of discrimination that the Supreme Court has adopted as protected.

The high court has routinely found that Title VII bans sexual harassment discrimination and hostile environment discrimination even though the statute contains no such language. For example, the Supreme Court held in *Oncale* that male-on-male sexual harassment is prohibited even though few people in 1964 would have understood the statutory text to cover that specific subcategory.

The *Zarda II* majority decision next buttressed its conclusion with what it considered to be the proper application of the Supreme Court's "comparative test," asking whether an employee's treatment would have been different "but for that person's sex."

Judge Katzmann rejected the government's arguments about how the "but for" test should be structured and its argument that the test produces false positives.

Using the *Hively* case as an example, the majority illustrated the test by concluding that the plaintiff in that case would not have been denied a promotion but for her sex. Therefore, it said, sexual orientation is a subset of sex.

Similarly, it illustrated the test by reviewing the Supreme Court's decision in *City of Los Angeles, Department of Water & Power et al. v. Manhart*, 435 U.S. 702 (1978), which struck down the Los Angeles Water Department's requirement that female employees make larger pension contributions than males because of their mortality data.

Applying the simple "but for" test, the Supreme Court compared a man and a woman, both of whose pension contributions were based on mortality, and asked whether they were required to make different pension contributions.

Changing the sex of the comparator changed the result, because life expectancy is a function of sex. The court

concluded that because life expectancy was simply a proxy for sex, the pension policy was discriminatory.

Lastly, Judge Katzmann looked at *Price Waterhouse*, where "the Supreme Court asked whether a female accountant would have been denied a promotion based on her aggressiveness and failure to wear jewelry and makeup 'if she had been a man.'"[7]

Next, the *Zarda II* court examined the relationship between sexual orientation and sex through "the lens of gender stereotyping." The court said both *Manhart* and *Price Waterhouse* stand for the proposition that employment decisions cannot be based on stereotypical impressions about the characteristics of males or females.

Applying this concept to the issue of sexual orientation, where an employer takes action against a male employee who is attracted to men, on the basis that men cannot be attracted to men, but that same employer takes no action against women attracted to men, the employer has acted based on gender.

The court said simply that the gender stereotype here is that "real" men should date women, not other men.

The *Zarda II* majority discounted the government's suggestion that antipathy about sexual orientation may not be rooted in sex, but may have its roots in "moral beliefs about sexual marital and family relationships."

The court found that this begs the question, because moral beliefs necessarily take sex into consideration. It similarly made short shrift of the government's argument that sexual orientation discrimination is not really sex discrimination because it treats women no worse than men, by finding that employers may not discriminate against women or men for failing to comport with conventional gender norms.

The court also reviewed sexual orientation discrimination through the "lens of associational discrimination," concluding that associational discrimination based on sex should be treated no differently than associational discrimination based on race.

The 2nd Circuit recognized associational discrimination based on race as a violation of Title VII when it decided *Holcomb v. Iona College*, 521 F.3d 130 (2008). In that case, the court held that taking an adverse employment action based on an employee's association with a person of another race violates Title VII.

The application of prohibitions against associational discrimination based on race to associational discrimination based on sex is reinforced by the Supreme Court's decision in *Loving v. Virginia*, 388 U.S. 1 (1967).

The court's holding in *Loving* that anti-miscegenation statutes violated the equal protection clause of the U.S. Constitution was based upon the reasoning that "policies that distinguish according to protected characteristics cannot be saved by equal application," according to the *Zarda II* court.

Because the Supreme Court developed the law of sex discrimination via analogy to race discrimination, the 2nd Circuit extended the principles of the *Loving* decision to associational discrimination based on sex.

Last, the *Zarda II* majority rejected the proposed distinction that associational discrimination is based only on acts while sexual orientation is a status. Relying on *Lawrence v. Texas*, 539 U.S. 558 (2003), in which the Supreme Court invalidated consensual sodomy laws, the majority cited the high court's conclusion that "laws that target 'homosexual conduct' are 'an invitation to subject homosexual persons to discrimination.'"

In *Harris Funeral Homes*, the 6th Circuit went through the same type of analysis as the *Zarda II* court, considering several of the same arguments before concluding that Title VII protects transgender and transitioning employees.

The majority also addressed the argument that subsequent legislative developments militate against a finding in favor of coverage. It said it did not believe that the Civil Rights Act of 1991 had anything to do with sexual orientation discrimination and rejected the argument that Congress, by its silence, ratified decisions holding that sexual orientation is not discrimination under Title VII.

There are many reasons why Congress may remain silent, and any presumption of ratification by silence is "in direct tension with the Supreme Court's admonition that 'subsequent legislative history is a hazardous basis for inferring the intent of an earlier Congress,'" the *Zarda II* majority said.

Circuit Judge Dennis Jacobs concurred in only part of the decision. He was persuaded only by the associational discrimination arguments and believed the majority may have said "somewhat more" than necessary to justify it.

Judge Jacobs said he could see no reason why associational discrimination based on sex would not encompass association between people of the same sex, but he was unconvinced by the other arguments.

He took issue with the majority's conclusion that its analysis was the most natural reading of Title VII, finding that the word "sex" is not synonymous with the phrase "sexual orientation," and that the comparator analysis is an evidentiary tool, not a method of statutory analysis.

Judge Jacobs was also not persuaded by the analogy to sexual stereotyping cases and what he classified as the majority's conclusion that heterosexuality and homosexuality

are sexual conventions; instead, he said he believes them to be innate and true, "not stereotypes of anything else."

He also found that in this case, the plaintiff, Donald Zarda, could not "fairly be described as evoking somebody's sexual stereotype of homosexual men."[8]

Finding the matter to be a "straightforward case of statutory construction" because Zarda's sexual orientation is a function of sex, Circuit Judge Jose A. Cabranes concurred only in the judgment.

Circuit Judge Robert Sack concurred in the judgment and several parts of the majority opinion, cautioning that although we are in the middle of a "revolution in American law respecting gender and sex," it was best to tread carefully by deciding no more than is necessary to resolve the appeal.

Circuit Judge Raymond J. Lohier Jr. concurred in parts of the majority opinion in general and in other parts only to the extent that they apply to Zarda's particular case. He said there is no reasonable way to disentangle sex from sexual orientation in interpreting the plain meaning of "because of sex."

The *Harris Funeral Homes* panel considered and rejected similar arguments tackled by the *Zarda II* majority, such as the argument that Congress' failure to modify Title VII to expressly include gender identity is significant.

In response to the dissent's focus on legislative history, he penned the pithy response that "the Supreme Court has told us that the cart of legislative history is pulled by the plain text, not the other way around."

Circuit Judge Gerard Lynch filed a dissenting opinion that Circuit Judge Debra Ann Livingston joined in certain parts.

Judge Lynch began by noting that if he was looking at the issue solely as a citizen, he would be "delighted to awake one morning to learn that Congress had just passed legislation adding sexual orientation" to Title VII.

He continued by saying that he would be equally delighted to learn that Congress had done just that a half century ago, but added "we all know that Congress did no such thing."

Under Judge Lynch's analysis, the Civil Rights Act was wholly a product of the civil rights movement, and the political and social history of the times reflects Congress' intent in using the words "because of sex."

He pointed out that the notion that women should have equality was controversial at that time; the addition of the wording "because of sex" was an afterthought and possibly an attempt to add a "poison pill" so that the statute would not be enacted.

Same-sex relations were criminalized in nearly all states at the time, and the classification of homosexuality as a mental illness or disorder by the American Psychiatric Association and the American Psychological Association further compounded the stigma of employing gay men and women.

Viewed through this lens, Judge Lynch said "the majority misconceives the fundamental public meaning of the language of the Civil Rights Act." He said the drafters added "sex" as a protected category to remedy the problem of pervasive discrimination against women in the employment market — and not to offer protection from discrimination based on sexual orientation.

In other words, the category of "sex" was added to remedy the inequities suffered by one sex: women. According to Judge Lynch, it is logical to expand coverage under this category to claims of quid pro quo sexual harassment and hostile-environment harassment.

But he also said that because Title VII does not adopt broad equal protection in the workplace, it does not cover all injustices.[9]

The dissent noted that not every employment practice that can be applied only by identifying an employee's sex is prohibited, giving as an example an employer's requirement that male and female lifeguards wear different bathing suits.

Similarly, it said discrimination that is impermissible when race is the criterion may be acceptable when the criterion is gender.

Returning to the bathing suit analogy, the dissent said Title VII would not permit differently designed bathing suits for white and black lifeguards, but because of physiological differences, it permits them for male and female lifeguards.

Judge Lynch also noted that in those states that have prohibited sexual orientation discrimination, the decision to do so was made by the legislature rather than the judiciary.

Similarly, the executive branch has done so by adding the term "sexual orientation" to other previously protected grounds, the dissent noted.

The dissent further pointed out that only three federal appeals courts had ruled on the issue by 1991, in contrast to 25 proposed amendments to add "sexual orientation," all of which were rejected.

The dissent also rejected the majority's reliance on gender stereotyping and associational discrimination analogies.

Finding the stereotyping argument to be more appealing, Judge Lynch still rejected it because discrimination based on traits that employers associate with men or women imposes different conditions of employment on men and women.

But "the homophobic employer is not deploying a stereotype about men or about women to the disadvantage of either

sex."[10] This is an essential difference between stereotyping based on sex and discriminating based on sexual orientation, the dissent said.

Similarly, associational discrimination, a concept illustrated by cases based on race, is not analogous. Discrimination based on sexual orientation is not discrimination against people with whom the employee associates — in Zarda's case, men.

In sum, the dissent concluded, "Discrimination against people whose sexual orientation is homosexual rather than heterosexual, however offensive such discrimination may be to me and to many others, is not discrimination that treats men and women differently" and therefore is not covered by Title VII.

It is wrong not because it treats men and women differently; it is wrong because it "denies the dignity and equality of gay men and lesbians," Judge Lynch said.

As much as Judge Lynch hoped that Congress will join the states to outlaw sexual orientation discrimination, however, not every injustice is prohibited by law.

Judge Livingston joined in parts of Judge Lynch's dissent. She also wrote a separate dissent to explain that although she shares in the commitment that all workers should be treated fairly, she cannot conclude that sexual orientation discrimination is a subset of sex discrimination.

Judge Livingston said that because courts should not legislate, she cannot conclude that sexual orientation discrimination is covered by Title VII. Simply, she concluded that a reasonable reader would not have understood the "because of sex" language in Title VII to cover sexual orientation when it was written.

Last, Judge Reena Raggi joined in parts of Judge Lynch's dissent and in Judge Livingston's dissent.

### *EEOC V. R.G. & G.R. HARRIS FUNERAL HOMES*

Less than two weeks after the 2nd Circuit decided *Zarda II*, the 6th Circuit decided the *Harris Funeral Homes* case and held that Title VII also bans transgender and transitioning status.

Aimee Stephens was born biologically male and worked as a man for the funeral home. She was terminated from employment shortly after advising the funeral home that she intended to transition from male to female and would be representing herself as a female at work.

A second claim arose during the investigation when the EEOC learned that the funeral home provided a clothing allowance to men who interacted with the public, but not to women.

The District Court granted summary judgment to the funeral home on both claims. The 6th Circuit reversed, granting summary judgment to the EEOC on the termination claim and remanding the clothing allowance claim.

The 6th Circuit went through the same type of analysis as the 2nd Circuit did in *Zarda II*, considering several of the same arguments before concluding that Title VII protects transgender and transitioning employees.

The District Court had held that the allegations set forth a claim of sex stereotyping. The 6th Circuit went even further, saying "discrimination on the basis of transgender and transitioning status is necessarily discrimination on the basis of sex," so that an alternative ground for liability was discrimination based on Stephens' being transgender and transitioning from male to female.

Relying on *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004), the appellate panel reiterated that "Title VII proscribes discrimination both against women who 'do not wear dresses or makeup and men who do."

In deciding whether to take the step forward to hold that transgender and transitioning status are protected under Title VII, the 6th Circuit found two points to be determinative.

First, the appellate panel said "it is analytically impossible to fire an employee based on that employee's status as a transgender person without being motivated, at least in part, by the employee's sex."

> It is also evident that courts need direction, as district courts are already taking the lead from *Zarda II* and *Harris Funeral Homes* and refusing to dismiss sexual orientation claims because the law is in flux.

Relying on *Hively* and applying the "but for" test, the court asked "whether Stephens would have been fired if Stephens had been a woman who sought to comply with the dress code." Since the answer is "no," Stephens' sex impermissibly governed the decision to terminate her employment, the court reasoned.

Second, the appeals court found that discrimination against transgender people "necessarily implicates Title VII's proscriptions against sex stereotyping."

Because a transgender person is someone who "fails to act and/or identify with his or her gender," an employer cannot discriminate based on a person's transgender status without imposing stereotypes of how sexual organs and gender identity ought to align, the court said.

The 6th Circuit rejected the argument that sex refers only to a trait common to all men or all women as well as the corollary argument that transgender status is not unique to one biological sex. Instead, it found that a trait need not be exclusive to one sex to be a function of sex, citing the majority opinion in *Zarda II*.

The panel considered and rejected similar arguments tackled by the *Zarda II* majority, such as the argument that Congress' failure to modify Title VII to expressly include gender identity is significant. It concluded that "nothing precludes discrimination based on transgender status from being viewed both as discrimination based on 'gender identity' for certain statutes and for the purposes of Title VII, discrimination based on sex."

The 6th Circuit panel had one other issue to tackle. That circuit had previously decided *Vickers v. Fairfield Medical Center*, 453 F.3d 757 (2006), which held that a plaintiff could not pursue a claim for impermissible sex stereotyping on the ground that his perceived sexual orientation failed to conform to gender norms unless he alleged that he was discriminated against for failing to "conform to traditional gender stereotypes in any observable way at work."

In this case, the 6th Circuit found that *Vickers* concerned a legal question distinct from the question of discrimination against a transgender individual, and that it was not bound to *Vickers* to the extent that it contravenes *Smith*.

## WHERE DO WE GO FROM HERE?

Several questions arise from these cases.

The first is a companion question to Judges Jacobs' and Sacks' concurring opinions in *Zarda II*: If it was unnecessary to address all the issues to sustain the conclusion that sexual orientation is covered by Title VII, why did Judge Katzmann engage in a 69-page analysis?

While one can only speculate, there appear to be two reasons. First, unless Congress accepts Judge Lynch's invitation to expressly add sexual orientation as a protected category under Title VII, the issue of the scope of Title VII is likely to be addressed by the Supreme Court. There are cogent and potent arguments on both sides, and the lengthy majority opinion and dissent are ways to make the 2nd Circuit's voice heard.

The second reason is that many arguments were made to the appeals court by amici (and, as noted in a previous article,[11] differing arguments by the government with the EEOC taking one side and the Justice Department the other) and by each of the judges, and it was appropriate to respond to all the arguments. The issue is an important one, and as can be seen by the numerous opinions, not everyone agrees on all points.

The next question is whether the issue will be addressed by the Supreme Court. It is unclear whether the employers that lost in *Zarda II* and *Harris Funeral Homes* will request certiorari, but whatever the vehicle, it is clear that the time is ripe to address the issue at a higher level.

The issues are not easy ones, and the arguments are driven by a sea change in social views. There are powerful arguments for both sides, and either congressional or judicial action is needed, or both, if a narrow view is taken judicially about the power of a court to interpret a statute.

No one disagrees that change is needed — the only question is how to get there. And in the current political climate, it is unlikely that the change will come from Congress.

It is also evident that other courts need direction. Already, district courts are taking the lead from *Zarda II* and *Harris Funeral Homes* and refusing to dismiss sexual orientation claims because the law is in flux.[12]

It is therefore likely that the Supreme Court will soon hear cases dealing with the issues and if not, that other circuits will follow the lead of the 7th Circuit in *Hively*, the 2nd Circuit in *Zarda*, and the 6th Circuit in *Harris Funeral Homes* to expand the historical view of Title VII coverage.

## NOTES

[1] There were some arguments raised concerning jurisdiction and other matters that do not relate to the question of whether sexual orientation is a protected category under Title VII. Those arguments will not be addressed here.

[2] *Zarda v. Altitude Express Inc.*, 883 F.3d 100, 110 (2d Cir. 2018) (*Zarda II*).

[3] In 2015 the EEOC tipped the scales toward the circuit court trend of en banc reconsideration of sexual orientation as a protected category. In *Baldwin v. Foxx,* EEOC Decision No. 0120133080, 2015 WL 4397641 (July 15, 2015) (quoting *Price Waterhouse v. Hopkins,* 490 U.S. 228, 242 (1989) (plurality opinion), the EEOC held that "allegations of discrimination on the basis of sexual orientation necessarily state a claim of discrimination on the basis of sex." The decision identified three ways to demonstrate the "inescapable link between allegations of sexual orientation discrimination and sex discrimination."

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

[5] *Id.* at n. 3, citing *Franchina v. City of Providence,* 881 F.3d 32, 54 (1st Cir. 2018), qualifying *Higgins v. New Balance Athletic Shoe Inc.*, 194 F.3d 252, 259 (1st Cir. 1999).

[6] *Id.* at 112, citing *City of L.A., Dep't of Water & Power v. Manhart,* 435 U.S. 702, 711 (1978).

[7] *Id.* at 117, quoting *Price Waterhouse,* 490 U.S. at 258.

[8] *See also* Sharon P. Stiller, *What's Wrong with This Picture: Exploring Zarda v. Altitude Express,* WESTLAW J. EMP., Aug. 29, 2017, at *1.

[9] While the majority did not take issue with the dissent's view of history, it did take issue with the dissent's conclusion that sexual orientation discrimination is not a reasonably comparable evil to sexual harassment or male-on male harassment, the major areas in which the Supreme Court has already expanded the scope of Title VII.

[10] *Zarda II,* 883 F.3d 100 at 158 (Lynch, J., dissenting), *quoting Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, at 370 (7th Cir. 2017) (Sykes, J., dissenting).

[11] Stiller, supra note 19, at *1.

[12] *See, e.g., Philpot v. New York,* 252 F. Supp. 3d 313 (S.D.N.Y. 2017) (refusing to dismiss Title VII sexual orientation claim because the law is in flux).

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