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SEXUAL ORIENTATION DISCRIMINATION AND THE OPPORTUNITY FOR FLORIDA TO FINALLY MAKE AMENDS

Samantha Lambert*

I. INTRODUCTION

Introductions are all about getting to know one another; in the academic setting, there is arguably no better way than having both students and teachers alike share a little something about their personal lives with one another. In 2017, Stacey Bailey, a former art teacher at Charlotte Anderson Elementary School in Texas, thought it would be a good idea to start the school year off with a “Get to Know Your Teacher” presentation.¹ She also thought it would be a good idea to show her students a photo of herself and her “future wife” during the presentation, an act that would ultimately get her suspended and placed on administrative leave.² Allegedly, the administration admonished her for promoting a “homosexual agenda” after a parent complained.³ In modern-day society, the story seems far-fetched. After all, bans on same-sex marriages were struck down as unconstitutional in 2015 when *Obergefell v. Hodges*⁴ was decided; the Court declared that the right to marry is fundamental and “couples of the same-sex may not be deprived of that right and that liberty.”⁵ Can a teacher really be persecuted and discriminated against for his or her sexual orientation when, in reality, that same teacher has the constitutional right to marry whomever he or she chooses? Unfortunately, the answer in many states is yes.⁶ Even worse, Florida has both retained and exercised the power to do the same thing with its own teachers since at least 1957, when it sponsored a state-wide purge of homosexual teachers in the public education system.⁷

However, the discrimination the Florida LGBTQ community has faced throughout the years has seemingly never been contained to the education sector.⁸ There are countless stories from countless career paths, from police officers to salesmen alike, in which individuals in Florida have been discriminated against simply because of their sexual orientation.⁹ Florida has not and does not currently provide state-level protection for sexual orientation discrimination in the workplace.¹⁰

The federal government does not provide that protection either. Although Title VII of the Civil Rights Act of 1964 (hereinafter “Title VII”) makes it unlawful for employers subject to the act to discriminate on the basis of “race, color, religion, sex, or national origin,”¹¹ the federal circuit courts are split as to whether sexual orientation falls within the scope of Title VII protection.¹² With no present relief,

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¹ Tim Fitzsimmons, *Teacher suspended after showing photo of her 'future wife' is back in classroom*, NBC NEWS (Aug. 13, 2018), <https://www.nbcnews.com/feature/nbc-out/teacher-suspended-after-showing-photo-her-future-wife-back-classroom-n900326>, archived at <https://perma.cc/HXT5-NNXW>.

² *Id.*

³ *Id.*

⁴ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604 (2015).

⁵ *Id.*

⁶ Fitzsimmons, *supra* note 1.

⁷ See KAREN GRAVES, AND THEY WERE WONDERFUL TEACHERS: FLORIDA’S PURGE OF GAY AND LESBIAN TEACHERS (2009) (exploring the Florida Legislative Investigation Committee and its state-sponsored investigation of homosexual persons in the Florida public school system).

⁸ Christy Mallory, Taylor N.T. Brown, Susan E. Walch & Brad Sears, *The Impact of Stigma and Discrimination against LGBT People in Florida*, WILLIAMS INST. 1, at 25 (2017).

⁹ *Id.* at 28-29.

¹⁰ See Jennifer Calfas, *Employment discrimination: The next frontier for LGBT community*, USA TODAY (Jul. 31, 2015), <https://www.usatoday.com/story/news/nation/2015/07/31/employment-discrimination-lgbt-community-next-frontier/29635379/>, archived at <https://perma.cc/7Z4J-W4GR> (discussing the fact that firing an employee based on sexual orientation is legal in 28 states, including Florida).

¹¹ 42 U.S.C.A. § 2000a (2012).

¹² J. Dalton Courson, *Circuits Split on Interpretations of Title VII and Sexual-Orientation-Based Claims*, ABA, (Mar. 19, 2018), [https://www.americanbar.org/groups/litigation/committees/civil-rights/practice/2018/circuits-split-on-interpretations-of-title-vii-and-sexual-](https://www.americanbar.org/groups/litigation/committees/civil-rights/practice/2018/circuits-split-on-interpretations-of-title-vii-and-sexual-orientation-based-claims/)

and a history of anti-homosexual behavior and ideologies, it is past time for Florida to right some of its own wrongs by providing its LGBTQ citizens with workplace protection from sexual orientation discrimination.

This comment will focus on Florida's unique history of aversion to the LGBTQ community and how important adopting the Florida Competitive Workforce Act¹³ (hereinafter "FCWA") or similar legislation is, despite whatever remedy the federal government prescribes in the future. Part I will dissect part of Florida's history of resistance to the LGBTQ community, specifically highlighting two of the most notorious instances in which Florida was ultimately forced to change the way it treated homosexual persons. Part II will detail the Pulse nightclub tragedy and the community's call to honor the LGBTQ victims with action, as well as provide insight as to why the state leaders have failed to do so thus far. Part III will cover the past and present relationship between the United States Court of Appeals for the Eleventh Circuit (hereinafter "Eleventh Circuit") and Title VII of the 1964 Civil Rights Act, specifically in regard to the applicability of discrimination protection on the basis of sexual orientation as a subset of sex. Finally, Part IV will propose a path of redemption that Florida could look to for guidance while moving forward in the modern era. The proposed solution will argue the urgent need to adopt the FCWA, or similar legislation, to both mend fences with the LGBTQ community and appease the hundreds of businesses throughout the state that want equality for all employees,¹⁴ regardless of an individual's sexual orientation.

II. FLORIDA'S HISTORY OF RESISTANCE TO THE LGBTQ COMMUNITY

A. The Florida Legislative Investigation Committee

Florida and its relationship with the LGBTQ community can be summed up in two words: controversial and dark. The sheer amount of past discrimination the LGBTQ community in Florida has endured could never be summed up in one article alone; the volume is simply too vast. Florida's history of resistance is better understood when some of the most unfortunate instances are highlighted. Being the first state to launch a state-sponsored homosexual witch-hunt¹⁵ and the last state to lift an antiquated ban on homosexual adoptions¹⁶ are just two events of many that come to mind. Understanding the history of resistance to the LGBTQ community will help underline why it is crucial that Florida provide work-place protection against sexual orientation discrimination.

In 2019, Charley Johns may not be an immediately recognizable name for most, even within the state of Florida, but it should be. He is the perfect example of what a legislator should *not* be. Johns was a state senator in the 1950s and even acted as governor from 1955–1956.¹⁷ Post *Brown v. Board of Education*,¹⁸ and its perceived implications for desegregation, Johns spearheaded an effort in the Florida legislature to create the Florida Legislative Investigative Committee, better known as the Johns Committee, to investigate subversive social influences from educational institutions in the state.¹⁹ The Johns Committee

orientation-based-claims/, archived at <https://perma.cc/V4MC-4B6K> (distinguishing the difference in opinions between circuits and highlighting which circuits allow sexual orientation discrimination to be covered under Title VII)

¹³ See generally Equality Florida, <https://www.eqfl.org/Discrimination> (last visited Jan. 18, 2019), archived at <https://perma.cc/ZL94-ZPST> (outlining the origin and definition of the Florida Competitive Workforce Act)

¹⁴ See generally Florida Competes, <https://www.flcompetes.org/> (last visited Jan. 18, 2019), archived at <https://perma.cc/KB6L-V9YN> (describing the coalition of more than 450 businesses in Florida seeking to pass the Florida Competitive Workforce Act)

¹⁵ Stacy Braukman, *The Group of Florida Legislators Whose Attack On The NAACP Turned Into A Witch Hunt Against Liberal Minorities* [hereinafter *Witch Hunt*], ZOCALO PUB. SQUARE, (Oct. 12, 2018), <http://www.zocalopublicsquare.org/2018/10/12/group-florida-legislators-whose-attack-naacp-turned-witch-hunt-liberal-minorities/ideas/essay/>, archived at <https://perma.cc/Q6BT-9YP7>.

¹⁶ See Yolanne Almanzar, *Florida Gay Adoption Ban Is Ruled Unconstitutional*, N.Y. TIMES (Nov. 25, 2008), <https://www.nytimes.com/2008/11/26/us/26florida.html>, archived at <https://perma.cc/R8A7-JHFW> (pointing out that Florida retained an out-right ban on homosexual adoption for over three decades).

¹⁷ Raymond Arsenaault, *Perspective: The Johns Committee and its infamy*, TAMPA BAY TIMES (Nov. 5, 2015), <https://www.tampabay.com/news/perspective/perspective-the-johns-committee-and-its-infamy/2252756>, archived at <https://perma.cc/7SD7-46RL>.

¹⁸ See *Brown v. Bd. of Educ. of Topeka, Shawnee Cty., Kan.*, 347 U.S. 483 (1954) (marking a turning point in American history when the Supreme Court declared that separate educational institutions were not equal).

¹⁹ *Witch Hunt*, *supra* note 15.

was called a great deal of things, but in so many words, it was a push-back from the White South against the idea that somehow African Americans could be equals in the education system.²⁰

What started as an official group effort to keep white schools white, despite the Supreme Court's ruling in *Brown*,²¹ eventually evolved into a group that would ultimately identify, interrogate, and remove homosexuals from schools and universities across the state.²² To be clear, this was not some one-off effort by a racist and homophobic Senator; the committee required approval from both chambers of the Florida Legislature, something it would gain consistently over a nine-year span.²³ Students, professors, and administrators alike were investigated and interrogated about their own homosexual tendencies, or those of colleagues and friends.²⁴ The committee spied on private residences and went undercover at gay bars, all in an effort to seek out homosexuals and eradicate them from the public education system.²⁵ Although the investigations into the existence of homosexuality began at Florida's flagship school, the University of Florida,²⁶ it eventually spread across the state to other prominent institutions.²⁷

In 1963, the Johns Committee produced a report entitled, *Homosexuality and Citizenship in Florida*, otherwise known as the "Purple Pamphlet," which attempted to understand and effectively deal with the growing "problem" of homosexuality.²⁸ This was the beginning of the end for the Johns Committee, as the Purple Pamphlet paved the way for it to finally and openly be viewed as an institutional embarrassment.²⁹ The Purple Pamphlet was so explicit in nature, including graphic pictures and colorful descriptions of homosexual activities, that it was deemed a work of pornography.³⁰ The damage was done; the Purple Pamphlet was extremely inflammatory and it painted the Johns Committee in too negative of a light. Public outcry was swift, and in the same year the Johns Committee ceased operation and received no further funding.³¹

The Johns Committee was a dark and unfortunate stain on Florida's history with the LGBTQ community. Florida openly and notoriously discriminated against individuals on the basis of their sexual orientation. With hindsight and a modern era, one would think the Florida government had learned its lesson. Regrettably, it did not. Even in the twenty-first century, Florida had to be forced into changing some of its views on homosexuality.

B. B. The Ban on Homosexual Adoption

In 2010, Florida reluctantly ushered in a new era when its Third District Court of Appeal struck down a state statute that expressly banned gay adoptions without exception or explanation.³² The saga began in 2006, when a homosexual foster father named Martin Gil petitioned to adopt the two children he was caring for, but the Florida Department of Children and Families (hereinafter, "FDCF") denied his application and claimed he was ineligible to adopt the children under subsection 63.042(3) of the Florida

²⁰ *Id.*

²¹ *Brown*, *supra* note 17, at 495 (holding that "separate but equal" has no place in public education and segregation is a denial of equal protection of the laws).

²² STACY BRAUKMAN, COMMUNISTS AND PERVERTS UNDER THE PALMS: THE JOHNS COMMITTEE IN FLORIDA, 1956–1965 at 2–4 (2012) [hereinafter COMMUNISTS AND PERVERTS] (describing the Johns committee behavior as "outrageous" and "unconstitutional", and detailing the labels such as "witch-hunt" and "gestapo" to explain the actions of the Johns Committee investigations).

²³ *Id.* at 3.

²⁴ *Id.* at 71–74.

²⁵ *Id.*

²⁶ *Id.* at 68.

²⁷ *Id.* at 111–12.

²⁸ COMMUNISTS AND PERVERTS, *supra* note 23, at 169–77 (describing the March 1964 and the Florida Legislative Investigation Committee's goal of reporting on the "dangers of homosexuality" in the Florida education system).

²⁹ Ron Cunningham, *The unearthing of the Johns Committee's dirty work*, GAINESVILLE SUN (Mar. 17, 2013), <https://www.gainesville.com/news/20130317/the-unearthing-of-the-johns-committees-dirty-work>, archived at <https://perma.cc/6RWZ-QYC5>.

³⁰ *Id.*

³¹ Allan H. Terl, *An Essay on the History of Lesbian and Gay Rights in Florida*, 24 NOVA L. REV. 793, 800 (2000).

³² Fla. Dep't of Children & Families v. Adoption of X.X.G., 45 So. 3d 79, 81 (Fla. Dist. Ct. App. 2010) (noting that "Florida is the only remaining state to expressly ban all gay adoptions").

Statutes.³³ Even though persons with criminal or substance abuse histories were evaluated on a case-by-case basis for their fitness to adopt, homosexuals were flat-out banned from adopting no matter how qualified they were in other respects.³⁴ With such a harsh result, the logical conclusion is that the FDCF and the Florida legislature surely must have believed homosexuals were unfit to parent. Why else would a state agency, at the direction of the legislature, discriminate against a group of people for no other reason than their sexual orientation? Why else would it deny Mr. Gil's heartfelt request to adopt the neglected and ringworm laden children³⁵ who were dropped off on his doorstep?

On the contrary, the FDCF actually admitted that homosexual and heterosexual persons make equally good parents.³⁶ The State, represented by then-Attorney General Bill McCollum, claimed there was a rational basis for the prohibition because children would have better role models and face less discrimination if placed with non-homosexual households.³⁷ The State called two expert witnesses to make its case and collectively paid them at least \$87,000 for their time, although the figures vary between reports.³⁸ However, the real star witness was Dr. George Rekers, both a clinical psychologist and a Southern Baptist minister, but most notably a self-proclaimed anti-gay activist.³⁹ Dr. Rekers preached the same message at trial that he always preached: homosexuals are unfit to parent because they are unstable and have mental issues.⁴⁰ Dr. Rekers's assertions should not have come as a surprise for anyone familiar with his work. In 2005, the *St. Thomas Law Review* published his 99-page article, in which he equated the placement of children with homosexuals to the placement of children with the blind or, even worse in his opinion, with the terrorist group known as Al-Qaida.⁴¹ At a hefty \$300 an hour for his testimony,⁴² Dr. Rekers was clearly the best candidate to defend the adoption ban that was in place without any justification.

Unimpressed with the overall rationale and the State's expert witnesses, Florida's Third District Court of Appeal held that the ban violated the Equal Protection Clause of the Florida Constitution.⁴³ The court upheld the lower court's opinion that Dr. Rekers's testimony was not valid from a scientific point of view.⁴⁴ Having Dr. Rekers take the stand was embarrassing in itself for the State's reputation, but what followed next was downright humiliating. Dr. Rekers was caught at the airport with a male prostitute he allegedly solicited from "rentboy.com" to accompany him on his ten-day European vacation.⁴⁵ Although Dr. Rekers claimed he hired the man to carry his luggage and not to be his personal prostitute, he nonetheless retired from his board position for the National Association for Research and Therapy for Homosexuality, an organization that promotes the idea that homosexuality can be cured through therapy.⁴⁶

The end result left yet another blemish on the face of Florida's relationship with the LGBTQ community. Then-Attorney General Bill McCollum, who was at the forefront of the fight to keep the senseless adoption ban in place, refused to back down on his position that Dr. Rekers was "the best expert

³³ *Id.* at 82.

³⁴ *Id.* at 83.

³⁵ Bonnie Rochman, *Florida's Gay Adoption Ban Crumbles: The Dad Behind the Case Celebrates*, TIME (Nov. 19, 2010), <http://healthland.time.com/2010/11/19/floridas-gay-adoption-ban-crumbles-the-dad-behind-the-case-celebrates/>, archived at <https://perma.cc/D2E4-L6VX>.

³⁶ *Adoption of X.X.G.*, 45 So. 3d at 85.

³⁷ *Id.*

³⁸ Jeffery C. Billman, *Florida's Case Against Gay Adoption*, ORLANDO WEEKLY (Dec. 18, 2008),

<https://www.orlandoweekly.com/orlando/floridas-case-against-gay-adoption/Content?oid=2256857>, archived at <https://perma.cc/CG4E-V72T>.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Steve Rothaus, *State doubled fee paid to anti-gay psychologist who just resigned from NARTH*, PALM BEACH POST (Mar. 31, 2012), <https://www.palmbeachpost.com/news/state--regional/state-doubled-fee-paid-anti-gay-psychologist-who-just-resigned-from-narth/RopJuywDDx5XPgmu93vVjK/>, archived at <https://perma.cc/FQ6L-DQSN>.

⁴³ *Adoption of X.X.G.*, 45 So. 3d at 92.

⁴⁴ *Id.* at 90.

⁴⁵ John Schwartz, *Scandal Stirs Legal Questions in Anti-Gay Cases*, N.Y. TIMES (May 18, 2010),

<https://www.nytimes.com/2010/05/19/us/19rekers.html>, archived at <https://perma.cc/Z656-QDD2> (discussing the implications of Dr. Rekers being caught at the airport with a male prostitute and how that may impact his work on previous cases during his crusade against homosexuality).

⁴⁶ *Id.*

for the case.”⁴⁷ Despite heavy criticism about the excessive fees and radically unfounded claims relating to Dr. Rekers’s testimony, and despite the judge essentially calling the testimony worthless,⁴⁸ McCollum claimed, “he actually performed the function he was asked to do.”⁴⁹

Although a clear victory in the aggregate, Florida was the last state to repeal its outright prohibition on gay adoption.⁵⁰ It is just another blatant example of Florida’s resistance to letting go of some archaic ideology regarding the LGBTQ community. Although both instances seem horrendous when looking back in time, in the spirit of fairness it must be noted that Florida has not always been the worst offender when it comes to anti-LGBTQ discrimination.⁵¹ Florida is not alone in its resistance against the LGBTQ population.⁵²

As of December 2018, 26 states, in addition to Florida, do not have explicit prohibitions against discrimination based on sexual orientation.⁵³ Still, being one of many does not negate Florida’s long history of discrimination when it comes to providing equality to the LGBTQ community. Adopting the FCWA would be a tremendous start in what will undoubtedly be a long journey for Florida to separate itself from such a distasteful past.

III. THE PULSE NIGHTCLUB TRAGEDY AND OPPOSITION TO HONORING THE LGBTQ COMMUNITY WITH ACTION

A. The Pulse Massacre

On June 12, 2016, a disgruntled shooter decided to end the lives of 49 people at Pulse nightclub, one of Orlando’s best-known gay nightclubs.⁵⁴ The devastating attack left both the Orlando LGBTQ community and the world in utter shock.⁵⁵ Described as both a terror attack and a hate crime by leaders and experts alike,⁵⁶ no matter what the description, it was ultimately another vile attack on a community in Florida that has historically suffered for being different.

The response from the traditionally conservative community was actually quite interesting. Then-presidential-candidate Donald Trump called the attack a “very dark moment in America’s history” and vowed to protect the LGBTQ community from the “violence and oppression of a hateful foreign ideology.”⁵⁷ This was surprising coming from a man who went on to amass a staggering anti-LGBTQ record in his first year in office.⁵⁸ Even the ultra-conservative and religiously rooted Chick-fil-A corporation

⁴⁷ Penn Bullock & Brandon K. Thorp, *McCollum: Rekers Was “The Best Expert,”* MIAMI NEW TIMES (Aug. 4, 2010), <https://www.miaminewtimes.com/news/mccollum-rekers-was-the-best-expert-6533279>, archived at <https://perma.cc/HMH3-R6SL> (detailing an interview with Bill McCollum regarding the hiring and retention of Dr. Rekers).

⁴⁸ Kilian Melloy, *Fla. Editorials Gang Up on Attorney General’s Support of ‘Rentboy Rekers,’* EDGE (May 15, 2010), <https://culteducation.com/group/955-george-rekers/9085-fla-editorials-gang-up-on-attorney-generals-support-of-rentboy-rekers.html>, archived at <https://perma.cc/W742-XKUQ>.

⁴⁹ *Id.*

⁵⁰ *Adoption of X.X.G.*, 45 So. 3d at 81 (noting that in 2010 Florida was the last remaining state to ban gay adoptions without exception).

⁵¹ Rochman, *supra* note 36.

⁵² *Id.*

⁵³ *See generally* Movement Advancement Project, http://www.lgbtmap.org/equality-maps/non_discrimination_laws (last visited Jan. 19, 2019), archived at <https://perma.cc/43PF-GPF7> (providing a map of the United States depicting the states with non-discrimination employment laws in place).

⁵⁴ Ariel Zambelich & Alyson Hurt, *3 Hours in Orlando: Piecing Together An Attack And Its Aftermath*, NPR (Jun. 26, 2016), <https://www.npr.org/2016/06/16/482322488/orlando-shooting-what-happened-update>, archived at <https://perma.cc/J8SW-PV4B> (describing the events and aftermath of the Pulse nightclub tragedy).

⁵⁵ Katie Hunt, Bryony Jones & Angela Dewan, *Horror, sympathy as world reacts to Orlando mass shooting*, CNN (Jun. 14, 2016), <https://www.cnn.com/2016/06/13/world/orlando-shooting-world-reaction/index.html>, archived at <https://perma.cc/P8AR-BHKF> (discussing both the global and national reaction to the Pulse nightclub tragedy).

⁵⁶ Jane Coaston, *New evidence shows the Pulse nightclub shooting wasn’t about anti-LGBTQ hate*, VOX (Apr. 5, 2018), <https://www.vox.com/policy-and-politics/2018/4/5/17202026/pulse-shooting-lgbtq-trump-terror-hate>, archived at <https://perma.cc/6ND6-XHH2>.

⁵⁷ *Id.*

⁵⁸ Sean Cahill, *Trump administration amasses striking anti-LGBT record in first year*, HILL (Jan. 19, 2018), <https://thehill.com/opinion/campaign/369790-trump-administration-amasses-striking-anti-lgbt-record-in-first-year>, archived at <https://perma.cc/4WGD-U7YP> (exploring the Trump administration’s anti-LGBT record and policy agenda).

departed from its normal anti-LGBTQ stance,⁵⁹ opening an Orlando area store on a Sunday to help feed first responders, volunteers, and blood donors.⁶⁰ While these events were great, talk and chicken sandwiches are cheap.

Arguably, the most cogent and desired resolution in the aftermath was stricter gun control laws. In the wake of the Pulse massacre, the debate for stricter laws surrounding gun control was reignited in the Nation and in Congress.⁶¹ Many of the democratic members of Congress claimed that the Pulse tragedy could have been avoided if Republicans had not previously defeated a measure that could have prevented the gunman from buying the deadly weapon used in the attack.⁶² Unfortunately, national efforts and state efforts within Florida have failed to come to fruition. Almost every effort at gun control in the Florida legislature post-Pulse has been blocked.⁶³

The natural runner-up solution in any mass shooting conversation is mental health, and whether or not we are doing enough as a country to catch the signs before it is too late.⁶⁴ Unfortunately, experts always seem to be at odds when it comes down to whether mental illness is the real problem this country needs to address.⁶⁵ In 2018, the Secret Service issued a report that claims a striking number of suspects linked to violent attacks in the United States were stalked by symptoms of mental illness.⁶⁶ The report claims that 64% of mass-shooting suspects showed symptoms of mental illness.⁶⁷ Two immediate problems come to mind: are the numbers accurate, and if so, how can Florida use the data to actually fix the problem?

The mental health debate does not seem to have an immediately workable solution because there is too much uncertainty involving the issues. Other experts and studies suggest the exact opposite when it comes to mental health and mass shootings; they claim the hysteria and blame comes from social media and sensationalist headlines.⁶⁸ The truth is, the water is murky and many studies and reports seem to suggest the opposite of what the Secret Service purports is true.⁶⁹ The alternative studies suggest that very few mass shooters actually suffer from a diagnosable mental illness.⁷⁰

The inconsistency and uncertainty surrounding the mental health debate make it an infeasible short-term solution; likely, it will take the country decades to get on the same page. Gun control also seems unlikely to happen any time soon because the country is divided on whether or not it is even the issue in the first place.⁷¹ With neither obvious solution likely to happen, why doesn't Florida pay homage to the victims of the Pulse tragedy in another meaningful way? Any victory is better than no victory at all. If Florida were to provide the LGBTQ community with *something*, by passing legislation that will protect its

⁵⁹ Kate Taylor, *For Chick-fil-A, impact trumps 'any political or cultural war' when it comes to controversial donations*, BUS. INSIDER (May 15, 2019), <https://www.businessinsider.com/chick-fil-a-explains-donations-groups-considered-anti-gay-2019-5>, archived at <https://perma.cc/83W8-9HK3> (exposing controversial donations that Chick-fil-A has made to anti-LGBTQ organizations and how deep its devotion to continue doing so runs).

⁶⁰ Hadley Malcom, *Orlando Chick fil A workers reverse Sunday hours policy to feed volunteers*, USA TODAY (Jun. 14, 2016), <https://www.usatoday.com/story/money/2016/06/14/chick-fil-a-opens-on-sunday-to-feed-orlando-blood-donors/85868494/>, archived at <https://perma.cc/JBS5-DDQ9>.

⁶¹ David M. Herszenhorn & Eric Lichtblau, *Orlando Shooting Reignites Gun Control Debate in Congress*, N.Y. TIMES (Jun. 14, 2016), <https://www.nytimes.com/2016/06/14/us/politics/terrorist-watch-list.html>, archived at <https://perma.cc/23WB-LVNJ>.

⁶² *Id.*

⁶³ Clark Mindock, *Gun control efforts stalled in Orlando following largest mass shooting in US history*, INDEPENDENT, (Jun. 11, 2017), <https://www.independent.co.uk/news/world/americas/florida-gun-control-laws-orlando-pulse-nightclub-shooting-a7785061.html>, archived at <https://perma.cc/V4WM-QF97>.

⁶⁴ Rachel Nuwer, *Is there a link between mass shootings and mental illness?*, BBC (May 10, 2018), <http://www.bbc.com/future/story/20180509-is-there-a-link-between-mass-shooting-and-mental-illness>, archived at <https://perma.cc/7VUT-Q66C>.

⁶⁵ Jamie Ducharme, *Politicians Keep Blaming Mass Shootings on Mental Health Issues. Doctors Say They're Wrong*, TIME (Aug. 5, 2019), <https://time.com/5644147/mass-shootings-mental-health/>, archived at <https://perma.cc/ZN6Z-4ENR>.

⁶⁶ Kevin Johnson, *64% of assailants in mass attacks suffered from symptoms of mental illness, Secret Service report finds*, USA TODAY (Mar. 29, 2018), <https://www.usatoday.com/story/news/politics/2018/03/29/secret-service-mental-illness-stalks-many-suspects-mass-attacks/466251002/>, archived at <https://perma.cc/JR8K-3W74>.

⁶⁷ *Id.*

⁶⁸ Nuwer, *supra* note 64.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ Andrew Van Dam, *The surprising way gun violence is dividing America*, WASH. POST (May 31, 2018), https://www.washingtonpost.com/news/wonk/wp/2018/05/31/the-surprising-way-gun-violence-is-dividing-america/?utm_term=.c2e0e6bb3955, archived at <https://perma.cc/N69B-ZPR6>.

LGBTQ citizens in the workplace, it would at least be a step in the right direction. Passing the legislation will never bring back the victims or lessen the pain from the Pulse tragedy, but it would certainly show the community that, at least on some level, times have changed. Passing adequate legislation might be enough to show the LGBTQ community that they are more than just a sensationalist headline.

The LGBTQ community has, and still does, want more than false promises.⁷² At the two-year mark of the Pulse nightclub tragedy, National Equality March started the “Honor Them With Action” campaign, which used hashtag “#honorthemwithaction” to help unify pro-LGBTQ organizations nationally.⁷³ The goal is to encourage pro-LGBTQ actions, both large and small.⁷⁴ The campaign provides the ideal mantra for Florida legislators to step up and pass the FCWA.

However, Florida legislators will be unlikely to act without pressure or guidance from the Federal Government. Much of the debate surrounds the uncertainty on the federal level.⁷⁵ It is impossible to have an intrastate conversation about the issue without looking to the Eleventh Circuit for clues. Unfortunately, at least for the LGBTQ community within Florida, the outlook is grim and the situation is a mess.

IV. III. THE ELEVENTH CIRCUIT AND ITS UPS AND DOWNS WITH TITLE VII APPLICABILITY

A. Sexual Orientation and Application Under Title VII

In 2017, the Eleventh Circuit struck a devastating blow to the LGBTQ community when it decided *Evans v. Georgia Regional Hospital*, in which Jameka Evans brought suit against her former employer, Georgia Regional Hospital, as well as certain individuals she worked with.⁷⁶ Evans claimed she was discriminated against on the basis of her sexual orientation and gender non-conformity.⁷⁷ Having worked as a security guard, Ms. Evans was allegedly denied equal pay, harassed, and physically assaulted.⁷⁸ She claimed she was targeted for termination for failing to carry herself in a “traditional womanly manner” and being a gay female.⁷⁹

Having filed *pro se*,⁸⁰ the battle for Ms. Evans was uphill from the start. At the trial level, the Magistrate Judge *sua sponte* screened Ms. Evans’ complaint in order to verify compliance with Equal Employment Opportunity Commission (hereinafter “EEOC”) requirements and to review case law from other circuits.⁸¹ The Magistrate Judge declared, “Title VII was not intended to cover discrimination against homosexuals.”⁸² The district court agreed,⁸³ leaving Ms. Evans no choice but to appeal to a higher power. Ms. Evans’s case would soon make its way to the Eleventh Circuit.

Once the case reached the appellate level, the Eleventh Circuit was able to circumvent the question as to whether or not sexual orientation fell under the scope of Title VII’s protection.⁸⁴ In order to understand how the court was able to avoid the issue, it is important to revisit the Eleventh Circuit’s origin story. On

⁷² See generally Honor Them With Action, <https://honorthemwithaction.org/> (last visited Jan. 19, 2019), archived at <https://perma.cc/BV9E-9VEH> (defining the #honorthemwithaction campaign as a grassroots movement started by the Orlando LGBTQ community).

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ See generally Alex Bollinger, *Florida’s LGBTQ community is going to (civil) war over nondiscrimination protections* LGBTQ NATION (Jan. 25, 2019), <https://www.lgbtqnation.com/2019/01/pragmatism-versus-inclusion-lgbtq-activists-fight-bills-florida/>, archived at <https://perma.cc/L5JM-FHTM> (discussing the difficulty Florida has faced passing the FCWA bill for nearly a decade with a bipartisan split).

⁷⁶ *Evans v. Ga. Reg’l Hosp.*, 850 F.3d 1248, 1250–51 (11th Cir. 2017) (alleging she was discriminated against on the basis of her sex and ultimately terminated for failing to carry herself in a traditional womanly manner).

⁷⁷ *Id.*

⁷⁸ *Id.* at 1251.

⁷⁹ *Id.*

⁸⁰ *Id.* at 1250.

⁸¹ *Id.* at 1252.

⁸² *Id.*

⁸³ *Id.* at 1253 (the district court conducted a de novo review of the record and adopted it without any further comment).

⁸⁴ *Id.*

October 1, 1981, the Eleventh Circuit, comprised of Alabama, Georgia, and Florida, was delivered into existence by Congress for the sake of judicial economy.⁸⁵ Deemed “The Fifth Circuit Court of Appeals Reorganization Act of 1980,” the Eleventh Circuit was spawned from the United States Court of Appeals for the Fifth Circuit (hereinafter “Fifth Circuit”).⁸⁶ On that same day, in its inaugural decision, the Eleventh Circuit (sitting *en banc*) adopted as binding all prior decisions of the former Fifth Circuit that were handed down prior to October 1, 1981.⁸⁷ Thus, the Eleventh Circuit was bound to follow prior precedent, unless a decision is overruled by the court itself sitting *en banc* or by the Supreme Court of the United States (hereinafter “Supreme Court”).⁸⁸

When *Evans* was decided, the prior precedent from the Fifth Circuit that the Eleventh Circuit was bound to rely on was *Blum v. Gulf Oil Corporation*,⁸⁹ which was lackluster at its very best. In *Blum*, the Fifth Circuit refused to analyze the substantive issues and asserted that Title VII does not expressly provide coverage regarding claims based on sexual orientation.⁹⁰ The Fifth Circuit simply held, “[d]ischarge for homosexuality is not prohibited by Title VII or Section 1981.”⁹¹ The initial lack of comment by the court in *Blum* is frustrating in its own right but when it is coupled with the court’s refusal to analyze the issue in *Evans*—a lengthy 36 years later—it leaves one wondering when either court will say more than just a negative one-liner regarding Title VII’s applicability to sexual orientation discrimination. Unfortunately, the court did not even hint at whether or not *Blum* still held a rational basis in a modern society.⁹²

B. The Need for the Eleventh Circuit to Find Its Own Voice

Despite which side of the argument you might fall under, the next logical step would have been for the Eleventh Circuit to speak in its own voice—either for or against Title VII’s applicability to sexual orientation discrimination—by granting a rehearing *en banc* for *Evans*. Unfortunately, the court denied the petition⁹³ and essentially shut down the question, at least for the foreseeable future. The result is harsh, but not totally unexpected. The logical deduction is that the Eleventh Circuit did not want anything to do with such a controversial issue. Relying on *Blum* was the easiest way to avoid what would ultimately become a hot-button issue.

The Fifth Circuit is arguably known as the most conservative in the Nation.⁹⁴ From the decisions, the Fifth Circuit has a reputation for being ultra-conservative;⁹⁵ it is both dreadful and traditionalistic if you identify as non-conservative, but particularly so if you are a member of the LGBTQ community. Critics have gone so far as to say that the Fifth Circuit “is a bonfire of a court that destroys every hope for equal justice in its path.”⁹⁶ Although poetic and intriguing, it depicts a frightening reality. Admittedly, it sounds like a nightmare for an LGBTQ litigant. It is no wonder that *Evans* was decided the

⁸⁵ Pub L. No. 96-452, 94 Stat. 1994.

⁸⁶ *Id.*

⁸⁷ *Bonner v. Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981).

⁸⁸ *Id.* at 1209–10.

⁸⁹ *Evans*, 850 F.3d at 1255.

⁹⁰ *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979) (holding sexual orientation discrimination is not prohibited by Title VII or Section 1981 without analysis of the merits).

⁹¹ *Id.*

⁹² *Id.*

⁹³ Donald C. Davis, *Eleventh Circuit Won’t Rehear Title VII Sexual Orientation Case; LGBT Advocacy Group Will Appeal to United States Supreme Court*, MINTZ (Jul. 11, 2017), <https://www.mintz.com/insights-center/viewpoints/2017-07-eleventh-circuit-wont-rehear-title-vii-sexual-orientation-case>, archived at <https://perma.cc/S4VL-229B>.

⁹⁴ Emma Platoff, *Trump-appointed judges are shifting the country’s most politically conservative circuit court further to the right*, TEX. TRIB. (Aug. 30 2018), <https://www.texastribune.org/2018/08/30/under-trump-5th-circuit-becoming-even-more-conservative/>, archived at <https://perma.cc/EX9V-77MT> (suggesting the Fifth Circuit is the most politically conservative in the United States and will continue to be so under the Trump administration and his conservative appointments).

⁹⁵ *Id.*

⁹⁶ See deadpan, *Better Know a Circuit: The 5th Circuit, the Horrible 5th*, DAILY KOS (Oct. 10, 2015), <https://www.dailykos.com/stories/2016/10/10/1580236/-Better-Know-a-Circuit-The-5th-Circuit-the-horrible-5th>, archived at <https://perma.cc/DX3K-XZZD> (discussing the composition of the Fifth Circuit and its reputation for being extremely conservative).

way it was. Following in the footsteps of the Fifth Circuit is almost guaranteed to produce conservative-leaning results.

The prior precedent rule seems logical in terms of judicial economy until the realization hits that the Eleventh Circuit needs its own identity. The year 1981 has come and gone. There is no longer a justifiable need to hide behind prior precedent and blanket assertions, especially when the Eleventh Circuit does not have to do so. What was once born out of common-sense needs to evolve into a unique voice for the people of Florida, Alabama, and Georgia. What is the point in leaving an “out” (Eleventh Circuit could choose to not follow precedent if it sits *en banc*),⁹⁷ if the modern Eleventh Circuit will not use it? Instead of cementing its own voice on such a crucial and controversial issue, the Eleventh Circuit used the prior precedent rule as both a shield and a scapegoat. The end result is that an entire community of people were shut out of Title VII protection.⁹⁸ It might be more bearable had the court offered some semblance of justification, but it failed to do so.

As luck would have it, the Eleventh Circuit had yet another chance to find its own voice post-*Evans*, but yet again declined to rehear a worthy case *en banc*.⁹⁹ On July 18, 2018, the Eleventh Circuit declined to rehear *Bostock v. Clayton County Board. of Commissioners*,¹⁰⁰ even though the case posed the same question as *Evans*. Seemingly, it did not occur to the Eleventh Circuit that sexual orientation discrimination is an issue that will not be going away any time soon. In *Bostock*, the court stated, “[a]nd under our prior panel precedent rule, we cannot overrule a prior panel’s holding, regardless of whether we think it was wrong, unless an intervening Supreme Court or Eleventh Circuit *en banc* decision is issued.”¹⁰¹ Further, the court reminded the world that *Blum* remains binding in the Eleventh Circuit, and *Evans* forecloses any claim regarding sexual orientation discrimination and Title VII applicability.¹⁰² Yet again, no real discussion on the merits occurred.

Bostock, in so many words, was another punt by the Eleventh Circuit. In a vigorous dissent to the denial of the rehearing *en banc*, the Honorable Robin S. Rosenbaum was joined by the Honorable Jill A. Prior when they voiced their concerns about the Eleventh Circuit yet again avoiding the substance of Title VII applicability to sexual orientation discrimination.¹⁰³ One of the main concerns they shared was that two of their sister circuits had found the issue of “such extraordinary importance” that they each addressed it *en banc* within the previous 15 months.¹⁰⁴ The dissenting judges also made a point to declare the issue “*en-banc-worthy*” numerous times.¹⁰⁵ Indeed, if ever an issue was *en-banc-worthy*, it would be Title VII’s applicability regarding sexual orientation discrimination in the Eleventh Circuit, particularly in the aftermath of *Blum* and *Evans*.

The judges were nothing less than critical when discussing *Blum*; they pointed out that the Eleventh Circuit has unexplainedly clung to a 39-year-old conclusory precedent that makes no sense in modern times.¹⁰⁶ Even more significant, the dissenting judges stated that the Eleventh Circuit has an obligation as a court to, at the very least, subject the issue to the “crucial crucible of adversarial testing.”¹⁰⁷ Further, they called for a “reasoned and principal explanation” regarding the court’s position on the issue, which is something that has never been done before.¹⁰⁸ Harsh and critical? Yes, but necessary when the issue has gone unaddressed for so long.

Although the dissenting opinion is a breath of fresh air, it is far from the answer. Only two judges dissented for the denial of the rehearing *en banc*.¹⁰⁹ It is highly unlikely the entire court will come together

⁹⁷ Thomas E. Baker, *A Primer on Precedent in the Eleventh Circuit*, 34 MERCER L. REV. 1175, 1181-83 (1983).

⁹⁸ Courson, *supra* note 12.

⁹⁹ *Bostock v. Clayton Cty. Bd. of Comm’rs*, 894 F.3d 1335, 1335 (11th Cir. 2018).

¹⁰⁰ *Id.* at 1336.

¹⁰¹ *Bostock v. Clayton Cty. Bd. of Comm’rs*, 723 F. App’x 964, 965 (11th Cir. 2018).

¹⁰² *Id.*

¹⁰³ *Bostock*, 894 F.3d at 1336.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 1337.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 1338.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 1336.

on an issue that clearly has the judges divided. With the Eleventh Circuit almost certain to be a dead-end, Florida is likely going to have to look within its own borders to protect its LGBTQ citizens from sexual orientation discrimination in the workplace. There is always room for the right case to creep up the docket and change the climate, but for now, the Eleventh Circuit seems content with standing its ground until it is otherwise ordered by the Supreme Court.

C. Florida Must Look Outside the Eleventh Circuit to Find Suitable Answers

Just because something is not likely does not mean it is impossible. It is important to look at the potential outcome of an actual decision on the merits if the right case were to come along. Even if the Eleventh Circuit were to have another opportunity to decide the issue, it would likely rule that the scope of Title VII's protection does not extend to sexual orientation. This is mostly because of the standoffish position the Eleventh Circuit has already taken, but also because President Trump has been packing the court with his conservative nominations in recent years.¹¹⁰ The two judges President Trump has appointed to the Eleventh Circuit are expected to cast "reliably conservative votes" for years to come.¹¹¹ It does not take a fortune teller to figure out how a conservative-leaning court will rule.

With the Eleventh Circuit as a dead-end, Florida, as a sovereign state, should exercise its constitutional right under the Tenth Amendment¹¹² and afford its citizens with more protection than is absolutely required. The Tenth Amendment states: "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."¹¹³ Florida is free to cast a broader net of protection if it so chooses. Even if the Supreme Court eventually and definitively decides that sexual orientation does not fall under the scope of Title VII's protection, Florida has the right¹¹⁴—constitutionally speaking—to adopt a law that does exactly that. Citizens with claims regarding sexual orientation discrimination would still not be able to bring them under Title VII per se, but they would have a remedy within the state of Florida. Waiting around for the issue to be decided federally is too risky and Florida owes its LGBTQ community more than a roll of the dice. If Florida solitarily creates a workable piece of intrastate legislation, or adopts the FCWA, it may just turn out to be the voice of reason for many undecided states across the Nation.

V. THE ROAD AHEAD AND THE STEPS FLORIDA SHOULD TAKE TO GET THERE

Pioneering can be a terrifying activity, but as luck would have it, Florida has a plethora of sources it can turn to for guidance: different circuits within the United States Court of Appeals, the EEOC, and currently proposed intrastate legislation like the FCWA. Before Florida can pass meaningful legislation, it must look outside of its own borders for guidance first.

A. Circuit Court Split

It should come as no surprise that the federal circuit courts are split on the issue of whether or not sexual orientation falls within Title VII coverage.¹¹⁵ The Eleventh and Fifth Circuits have made it clear that sexual orientation discrimination is not covered under Title VII.¹¹⁶ There is not much to look at in terms of analysis between the Fifth and Eleventh Circuits; both have stated that Title VII is inapplicable without any

¹¹⁰ Bill Rankin, *Trump packs influential Atlanta court with conservative judges*, ATLANTA GA. NEWS (Jul. 06, 2018), <https://www.ajc.com/news/local/trump-packs-influential-atlanta-court-with-conservative-judges/Yhbacu8m1stN9gwTEXcgwK/>, archived at <https://perma.cc/339H-VPSG>.

¹¹¹ *Id.*

¹¹² U.S. CONST. amend. X.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ See Courson, *supra* note 12.

¹¹⁶ *Id.*

serious explanation as to why.¹¹⁷ The United States Court of Appeals for the Sixth Circuit Court (hereinafter, “Sixth Circuit”) in colorful language, stated that a plaintiff bringing suit for sexual orientation discrimination under Title VII could not “bootstrap protection for sexual orientation into Title VII.”¹¹⁸ The Sixth Circuit also stated that even though many states actually do prohibit sexual orientation discrimination, federal law does not.¹¹⁹ Much like the Fifth and Eleventh Circuits, the Sixth Circuit did not offer any analysis on the substantive issue at hand. None of the three aforementioned circuits seem poised to either reverse or adequately explain their positions any time soon.

Conversely, the United States Court of Appeals for the Second and Seventh Circuits (hereinafter “Second Circuit” and “Seventh Circuit”) have made it clear that sexual orientation means “sex” in relation to Title VII protection.¹²⁰ If Florida wants to usher in protection for the modern era of workplace discrimination protection for its LGBTQ citizens, it should do so by following the lead of the Second Circuit, even though any authority from that jurisdiction is merely persuasive.¹²¹

The Second Circuit, which is comprised of Connecticut, Vermont, and New York,¹²² is the perfect place to start. With a groundbreaking decision in 2017, the Second Circuit, sitting *en banc*, held that sexual orientation discrimination constitutes a form of discrimination on the basis of sex under Title VII.¹²³ Instead of hiding behind its own prior precedent, which declared that Title VII was not applicable,¹²⁴ the Second Circuit decided to be proactive and look for a solution that fits an increasingly complex issue. Realizing that discrimination on the basis of sexual orientation was an evolving and problematic issue, the Second Circuit looked to the EEOC and its sister Seventh Circuit to shed some light on how best to move forward.¹²⁵

As recent as 2005, the Second Circuit stood firm in holding that although gender stereotyping was applicable under Title VII, sexual orientation was not.¹²⁶ However, in 2018, the Second Circuit ruled on the groundbreaking case of *Zarda v. Altitude Express Incorporated*, in which it held, “[w]e now conclude that sexual orientation discrimination is motivated, at least in part, by sex and thus is a subset of sex discrimination.”¹²⁷ In *Zarda*, plaintiff Donald Zarda brought suit against his former employer alleging he was fired because of his sexual orientation and failure to conform to sex stereotypes.¹²⁸ Mr. Zarda was a skydiving instructor and would often inform his female clients about his sexual orientation as a gay man to abate any fears they might have about being strapped in tandem with him.¹²⁹ Mr. Zarda was subsequently fired after a female client complained that he inappropriately touched her and tried to excuse his behavior with an explanation about his sexual orientation.¹³⁰

Mr. Zarda originally brought suit alleging gender stereotyping discrimination under Title VII and sexual orientation discrimination under New York state law.¹³¹ The lower court granted summary judgment for the employer in regard to the Title VII discrimination claim, and the jury subsequently found for Mr. Zarda’s employer regarding the state law claim.¹³² However, while Mr. Zarda’s claims were pending, the EEOC decided *Baldwin v. Foxx*,¹³³ which both changed the landscape of Title VII and the fate of Mr.

¹¹⁷ *Id.*

¹¹⁸ *Gilbert v. Country Music Ass’n*, 432 F. App’x 516, 520 (6th Cir. 2011).

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ Donald C. Davis, *Second Circuit Becomes the Second to Prohibit Sexual Orientation Discrimination*, MINTZ (Mar. 1, 2018), <https://www.mintz.com/insights-center/viewpoints/2018-03-second-circuit-becomes-second-prohibit-sexual-orientation>, archived at <https://perma.cc/W7AS-PJ9S>.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 107 (2d Cir. 2018).

¹²⁶ *Id.*

¹²⁷ *Id.* at 112.

¹²⁸ *Id.* at 109.

¹²⁹ *Id.* at 108.

¹³⁰ *Id.*

¹³¹ *Zarda*, 883 F.3d at 105.

¹³² *Id.* at 109.

¹³³ *Id.* at 107.

Zarda's case. David Baldwin, a gay air traffic controller, was verbally harassed on the basis of his sexual orientation, as well as denied a permanent position after his supervisor informed him that he was "a distraction in the radar room."¹³⁴ In *Baldwin*, the EEOC stated that sexual orientation claims are cognizable under Title VII, and "sexual orientation" is a concept that cannot be understood or defined without a reference to sex.¹³⁵

The Second Circuit, relying on *Baldwin* and the text of Title VII, held that sexual orientation discrimination is a subset of sex discrimination.¹³⁶ In order to appreciate the full scope of *Zarda*, it is imperative to pay homage to *Hively v. Ivy Tech Community College of Indiana*, which was the decision that started the trend toward protecting sexual orientation discrimination under Title VII.¹³⁷ In 2017, the Seventh Circuit, comprised of Illinois, Indiana, and Wisconsin,¹³⁸ put forth a truly revolutionary decision when it decided *Hively*.¹³⁹ Kimberly Hively, an open lesbian and part-time adjunct professor at Ivy Tech Community College (hereinafter "Ivy Tech"), claimed she was discriminated against on the basis of her sexual orientation when she was denied full-time positions and Ivy Tech willingly declined to renew her contract.¹⁴⁰

The Seventh Circuit made a point of rejecting Ivy Tech's contention that Congress has considered amending Title VII to include sexual orientation discrimination, but has chosen not to thus far.¹⁴¹ The court stated, "it is simply too difficult to draw a reliable inference from these truncated legislative initiatives to rest our opinion on them."¹⁴² The court further noted that legislative history is "notoriously malleable."¹⁴³ Understandably, the Seventh Circuit did not want to stray too far down the road of guessing what Congress previously intended, or what Congress intends to do next.¹⁴⁴ It was a logical position, seeing as Congress has had ample time to step in and offer some clarity. The court pointed out the Supreme Court's stance on congressional intent and its effect when it stated, "the fact that the enacting Congress may not have anticipated a particular application of the law cannot stand in the way of the provisions of the law that are on the books."¹⁴⁵ In so many words, Congress had its chances.

Alternatively, the Seventh Circuit turned to the EEOC and its result in *Baldwin* to support the idea that Title VII's prohibition on sex discrimination encompasses within its protection discrimination on the basis of sexual orientation.¹⁴⁶ With that being said, Ms. Hively's complaint lived to see another day, as it was originally dismissed for failure to state a claim because Title VII was not applicable to sexual orientation discrimination.¹⁴⁷ *Hively* and *Zarda* opened the door for other circuits to follow suit, despite the absence of explicit congressional intent or language.¹⁴⁸

Legislators in Florida should look to circuits, such as the Second and Seventh, for guidance instead of relying on its own Eleventh Circuit and the always looming shadow of the Fifth Circuit. At the very least, in the Second and Seventh Circuits, there is analysis and debate on the controversial and complex issue of sexual orientation discrimination under Title VII. Relying on prior precedent that does nothing but

¹³⁴ Baldwin v. Foxx, EEOC Decision No. 0120133080, 2015 WL 4397641 at *2 (July 16, 2015).

¹³⁵ *Id.* at *5

¹³⁶ *Zarda*, 883 F.3d at 109.

¹³⁷ Michael Warner, *Second Circuit Court Finds Sexual Orientation Protected Under Title VII*, FRANCZEK (Feb. 28, 2018), <https://www.franczek.com/blog/second-circuit-court-finds-sexual-orientation-protected-under-title-vii/>, archived at <https://perma.cc/D7TS-MP2D>.

¹³⁸ See generally Ballotpedia, https://ballotpedia.org/United_States_Court_of_Appeals_for_the_Seventh_Circuit, (last visited Jan. 19, 2019), archived at <https://perma.cc/7LHJ-MRS6> (highlighting the intricacies and details of the Seventh Circuit).

¹³⁹ *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 340-41 (7th Cir. 2017).

¹⁴⁰ *Id.* at 341.

¹⁴¹ *Id.* at 344.

¹⁴² *Id.*

¹⁴³ *Id.* at 343.

¹⁴⁴ *Id.* at 341.

¹⁴⁵ *Id.* at 345.

¹⁴⁶ *Id.* at 344.

¹⁴⁷ *Id.* at 341.

¹⁴⁸ *Id.* at 344-45; See also *Zarda*, 883 F.3d at 115.

put forth conclusory statements of law will do little to protect LGBTQ Floridians in the workplace from sexual orientation discrimination.

As the last line of defense after a circuit court appeal, the Supreme Court ultimately gets to decide how the law applies. Once the Supreme Court imparts its wisdom on the issue, the circuit split will no longer be relevant, at least federally speaking. As fate would have it, on April 22, 2019, the Supreme Court finally granted certiorari in a trio of cases to determine once and for all, whether or not sexual orientation is covered under Title VII protection.¹⁴⁹ *Zarda* and *Bostock* will finally get their long-awaited day in front of the Supreme Court.¹⁵⁰ Whichever way it turns out, the decision and rationale behind it is going to be absolutely groundbreaking, with major implications for those on either side of the issues.

Even when the Supreme Court decides which level of protection sexual orientation will get an individual in the workplace, does it really matter to Florida? The answer should be no. Florida should extract the positive out of the circuit court debate and find a way to protect its own LGBTQ citizens, despite what the Supreme Court does. Florida has a lot to make up for with its LGBTQ citizens and waiting for the Supreme Court to eventually force them into action is unacceptable.

B. EEOC and Developing Branch Conflict

Title VII applicability in regard to sexual orientation has plagued lower courts and presidential administrations alike.¹⁵¹ When President Barack Obama was in power, the EEOC stated that Title VII was applicable to sexual orientation discrimination.¹⁵² However, the Trump administration has made it blatantly clear that the LGBTQ community does not deserve equal protection under our laws as a nation.¹⁵³ Under the leadership of Jeff Sessions, former Attorney General of the United States, the Department of Justice (hereinafter “DOJ”) filed countless amicus briefs that argue against a myriad of LGBTQ protections, extending well beyond discrimination in the workplace.¹⁵⁴ This stance has put the current presidential administration at odds with some of its own people.¹⁵⁵

The EEOC is an executive branch agency,¹⁵⁶ which might shock the public because its most recent position on the issue is directly adverse to that of another executive branch agency, the DOJ.¹⁵⁷ The DOJ, through its amicus brief in *Zarda*, made it *painstakingly* clear that the EEOC’s lenient position about the scope of Title VII applicability to sexual orientation discrimination is “entitled to no deference beyond its power to persuade.”¹⁵⁸ The DOJ, relying on the plain meaning of the statute, case law, and congressional ratification, vehemently stated that Title VII does not reach sexual orientation.¹⁵⁹ It was a slap in the face to the EEOC because the departments are supposed to be working together moving forward.¹⁶⁰

¹⁴⁹ Adrienne Spiegel, *Supreme Court grants cert in Title VII Sexual Orientation and Gender Identity Cases*, ON LABOR (Apr. 22, 2019), <https://onlabor.org/supreme-court-grants-cert-in-title-vii-sexual-orientation-and-gender-identity-cases/>, archived at <https://perma.cc/7BNX-7MGU>.

¹⁵⁰ *Id.*

¹⁵¹ Robert Barnes, *Supreme Court turns down case that raised issue of LGBT worker protections*, WASH. POST (Dec. 11, 2017), https://www.washingtonpost.com/politics/courts_law/supreme-court-turns-down-case-that-raised-issue-of-gay-worker-protections/2017/12/11/2789e740-dea0-11e7-89e8-edec16379010_story.html?utm_term=.894ae1fd6778, archived at <https://perma.cc/TQ7R-PGYX>.

¹⁵² *Id.*

¹⁵³ Chris Riotta, *Trump Administration Says Employers Can Fire People for Being Gay*, NEWSWEEK (Sep. 28, 2017), https://www.yahoo.com/news/trump-administration-says-employers-fire-195610268.html?soc_src=community, archived at <https://perma.cc/L9EH-J5C6>.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ EEOC, *Legislative Affairs*, <https://www.eeoc.gov/eeoc/legislative/index.cfm>, archived at <https://perma.cc/TH5Y-MEQ9>.

¹⁵⁷ Brief for United States as Amicus Curiae at 1, *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2018) (No. 15-3775), 2017 WL 3277292.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ See generally EEOC, *Memorandum of Understanding Between The U.S. Equal Employment Opportunity Commission and The U.S. Department of Justice - Civil Rights Division Regarding Title VII Employment Discrimination Charges Against State and Local Governments* [hereinafter *Memorandum of Understanding*], <https://www.eeoc.gov/laws/mous/eeoc-doj.cfm> (last visited Jan. 19, 2019), archived at <https://perma.cc/9AFE-2HUV> (describing the role of the EEOC and its relationship with the Department of Justice).

Giving credit where it is due, the DOJ did concede the obvious by stating that the issue of Title VII's scope should be directed to Congress.¹⁶¹ It would be nice to have Congress involved, but it has consistently chosen to stay quiet on the issue.¹⁶² It is unlikely that Congress is willing to step in to tidy up an unbelievably messy situation. Regardless, the EEOC currently takes the position that allegations of discrimination on the basis of sexual orientation fall within Title VII's protection of discrimination on the basis of sex.¹⁶³

It is almost impossible to reconcile these two positions because they are in direct contradiction with one another. However, the DOJ attempted to explain the discrepancy when it distinguished the specificity of the roles each agency plays; the DOJ claims it enforces Title VII against state or local government employers, and the EEOC enforces Title VII against private employers.¹⁶⁴ While that is true, does it matter when the two agencies, both under the executive branch, are fighting tooth and nail on different sides of the issue in the same exact cases?

It is crucial to develop a deeper understanding of the relationship between these two agencies moving forward, particularly because they have ended up on such opposite extremes on Title VII.¹⁶⁵ In an effort to establish boundaries and put forth some clarity on the differing roles of the agencies, on March 2, 2015, the EEOC released a "Memorandum of Understanding" (hereinafter "MOU") between the EEOC and DOJ regarding Title VII employment discrimination charges against state and local governments.¹⁶⁶ The stated mission of the MOU is to promote interagency coordination while maximizing effort, promoting efficiency, and eliminating duplication and inconsistency in the enforcement of federal employment discrimination laws.¹⁶⁷ Although the mission sounds great, achieving such is highly unlikely in the midst of an active turf war between executive branch agencies.

The moral of the story is this: agencies and courts of the Federal Government are not on the same page, and Congress has refused to act.¹⁶⁸ Answers and directions are not coming any time soon. With that being said, it makes it all the more important for Florida to act within its own authority to protect its LGBTQ citizens. Florida has a chance to be a voice of reason for its own people in a time of uncertainty and division, despite the mess in the federal government.

C. Intrastate Legislation: The Need for the Florida Competitive Workforce Act

Currently, laws in 20 states and Washington D.C. directly ban employment discrimination on the basis of sexual orientation and gender identity.¹⁶⁹ Not surprisingly, Florida is missing from the list. It must be noted that although there is no statewide protection for sexual orientation discrimination, some counties and cities have stepped out on their own and afforded the protection anyway.¹⁷⁰ However, there is still a huge desire to bring the protection state-wide, with the biggest effort being the FCWA.

The FCWA, first introduced in 2009, would prohibit discrimination based on sexual orientation and gender identity or expression in employment, housing, and public accommodations.¹⁷¹ The FCWA

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Baldwin*, EEOC Decision No. 0120133080 at *30.

¹⁶⁴ Brief for United States as Amicus Curiae at 1, *Zarda v. Altitude Express, Inc.*, 833 F.3d 100 (2018) (No. 15-3775), 2017 WL 3277292.

¹⁶⁵ Seyfarth Shaw, *EEOC and DOJ Oppose Each Other in Court*, N.Y. TIMES (Aug. 22, 2017),

<https://www.aseonline.org/News/Articles/ArtMID/628/ArticleID/1265/EEOC-and-DOJ-Oppose-Each-Other-in-Court>, archived at <https://perma.cc/8JN2-PVYW>.

¹⁶⁶ See *Memoranda of Understanding*, *supra* note 163.

¹⁶⁷ *Id.*

¹⁶⁸ Shaw, *supra* note 165.

¹⁶⁹ Chris Opfer, *Trump LGBT Rift Should Be Solved by Court, Congress: EEOC Leaders*, BLOOMBERG L., Nov. 9, 2018,

https://www.bloomberglaw.com/document/X2207FJ4000000?bna_news_filter=daily-labor-report&jcsearch=BNA%252000000166f578da91af77f778cdfc0000#jcite, archived at <https://perma.cc/S6WS-KYPT>.

¹⁷⁰ C. Eugene Emery Jr., *Florida doesn't protect LGBT workers, but some counties and cities do*, TAMPA BAY TIMES (Jun. 24, 2016),

<http://www.tampabay.com/news/business/florida-doesnt-protect-lgbt-workers-but-some-counties-and-cities-do/2283054>, archived at

<https://perma.cc/5V8J-U476>.

¹⁷¹ See *Equality Florida*, *supra* note 13.

would amend the Florida Civil Rights Act of 1992, which currently prohibits discrimination on the basis of race, color, religion, sex, national origin, age, handicap, or marital status.¹⁷² Notwithstanding the commendable amount of support the FCWA has received, the road to actually signing it into law has been long and treacherous.¹⁷³

In 2016, legislators attempted to pass the FCWA as Senate Bill 120, but it died in the Senate Judiciary Committee when it received five yeas and five nays as votes.¹⁷⁴ Legislators again tried to introduce the FCWA as Senate Bill 698, but it was withdrawn prior to official introduction.¹⁷⁵ Other legislators rallied together yet again to pass the act, this time as Senate Bill 66, but it died in the Governmental Oversight and Accountability Committee.¹⁷⁶ Disappointing? Yes, but some are calling even the failed attempts a victory.¹⁷⁷ For 10 years, there have been attempts at passing similar bills.¹⁷⁸ At the very least, it seems as if passing the FCWA is a possibility in the future.

According to Florida Competes, a coalition of Florida businesses interested in passing the FCWA, it has more than 450 members, ranging from local shops to huge Fortune 500 companies located within the state.¹⁷⁹ Two of Florida's largest and most influential employers, Darden Restaurants and Disney World, have joined the coalition in the hopes that FCWA will eventually pass in the Florida legislature.¹⁸⁰ Even though the proposed bills have died off before they could be passed, Florida Competes remains more dedicated than ever to strengthening Florida's economy by supporting the FCWA. With support from so many different types of individuals and businesses, the chance for Florida to act is now.

VI. Conclusion

Not all hope is lost. Despite popular belief, Florida is more than just snow-birds and alligators. It is more than just conservatives and former confederates. Florida is more than just the weird and crazy news stories that frequent the media, especially the ones about "Florida Man." It is more than just theme parks and beautiful beaches. Hopefully, with the shift in the political climate, Florida will become more than just *the exception* to the rule when it comes to the LGBTQ community, as it so often is. Despite a grueling history with the LGBTQ community, Florida may still redeem itself.

Florida has the chance to change the way the world perceives it. Adopting legislation that would afford Title VII caliber protection to its LGBTQ citizens would put the world on notice that Florida has its own voice, and it is not afraid to use it. Waiting for the Federal Government could take a lifetime, and there is no guarantee as to what will happen. The LGBTQ community of Florida has endured enough and the time to act is now. There is no magic eraser for the past, nor is there a one-size fix-all solution for the future. Adopting the FCWA or similar legislation could be the perfect stepping stone for bridging the gap between the state of Florida and its LGBTQ citizens. The time to honor LGBTQ citizens with action in the legislature is now.

¹⁷² FLA. STAT. ANN. § 760.01 (West 2015).

¹⁷³ Bollinger, *supra* note 75 (discussing the difficulty Florida's LGBTQ community has faced passing the FCWA bill for nearly a decade).

¹⁷⁴ *See generally* The Florida Senate, <https://www.flsenate.gov/Session/Bill/2016/0120>, (last visited Jan. 19, 2019), *archived at* <https://perma.cc/4UUN-AX2W> (outlining proposed Senate Bill 120 which would have created the Florida Competitive Workforce Act).

¹⁷⁵ *See generally* The Florida Senate, <https://www.flsenate.gov/Session/Bill/2016/0120>, (last visited Jan. 19, 2019), *archived at* <https://perma.cc/7ZSM-CXE6> (proposed Senate Bill 69).

¹⁷⁶ *See generally* The Florida Senate, <https://www.flsenate.gov/Session/Bill/2016/0120>, (last visited Jan. 19, 2019), *archived at* <https://perma.cc/KWZ5-WAYH> (proposed Senate Bill 66).

¹⁷⁷ Michael Auslen, *LGBT discrimination ban dies in Florida Senate*, TAMPA BAY TIMES (Feb. 9, 2016), <https://www.tampabay.com/news/politics/stateroundup/lgbt-discrimination-ban-dies-in-florida-senate/2264755>, *archived at* <https://perma.cc/R5L2-MPKS>.

¹⁷⁸ *Id.*

¹⁷⁹ *See* Florida Competes, *supra* note 14.

¹⁸⁰ Joseph Patrick McCormick, *Disney World joins coalition of Florida businesses supporting anti-discrimination law*, PINK NEWS (Jan. 13, 2014), <https://www.pinknews.co.uk/2014/01/13/disney-world-joins-coalition-of-florida-businesses-supporting-anti-discrimination-law/>, *archived at* <https://perma.cc/TVQ8-XC89>.