

Chair Eklund, Vice Chair Manning, Ranking Minority Member Thomas, and the members of the Senate Judiciary Committee:

My name is Matthew William Green Jr., and I am an Associate Professor of Law at Cleveland Marshall College of Law. I received my LL.M. from Columbia University School of Law and my J.D. from the University of Baltimore School of Law. I have focused my writing and research in the area of employment discrimination. Specifically, I teach and write on the subject of sexual orientation and gender identity employment discrimination. My most recent article discusses the intersection between *Obergefell v. Hodges* and federal employment anti-discrimination laws.¹ I also authored a chapter in 2017 for e-Langdell Press on the topic of sexual orientation and gender identity employment discrimination. In addition I teach an employment law seminar that focuses on these issues. It is a privilege to attend today's hearing in support of the Ohio Fairness Act, which would modernize Ohio's nondiscrimination statutes to protect against discrimination based on "sexual orientation" and "gender identity or expression."

In *Obergefell v. Hodges*, the U.S. Supreme Court held that couples, regardless of their gender, could marry in all fifty states. Yet, despite that historic decision, in a majority of states, including Ohio, LGBT individuals who exercise their rights under the U.S. and Ohio constitutions can be fired from their jobs, tossed out of their homes and denied service in places of public accommodation. Currently, 22 states and the District of Columbia prohibit employment discrimination in private and government employment on the basis of sexual orientation and of those jurisdictions, 21 states and the District of Columbia also protect employees on the basis of gender identity. In light of those numbers, an oft-cited quote uttered shortly after *Obergefell* was decided unfortunately still holds true in Ohio and in too many other states as well:

“[A] couple who gets married at 10 a.m. remain at risk of being fired from their jobs by noon and evicted from their home by 2 p.m. simply for posting their wedding photos on Facebook.”²

The Ohio Fairness Act would close this gap in protection by amending the Ohio Civil Rights Act to include “sexual orientation” and “gender identity or

¹ *Same-Sex Sex and Immutable Traits: Why Obergefell v. Hodges Clears a Path to Protecting Gay and Lesbian Employees from Workplace Discrimination Under Title VII*, 20 J. Gen. Race & Just. 1 (2017).

² See *Historic Marriage Equality Ruling Generates Momentum for New Non-Discrimination Law*, <http://www.hrc.org/blog/entry/historic-marriage-equality-ruling-generates-momentum-for-new-non-discrimina>.

expression” to the other protected classes now protected by the law, which include, but are not limited to, race, color, religion, sex, age and national origin. The bill would add these protections for LGBT people in all areas for which nondiscrimination protections exist, including in housing, credit, public accommodations, and employment. My area of expertise is in federal employment discrimination law and my testimony focuses on that area of the law.

Most people are often surprised to learn that LGBT people are not currently covered by anti-discrimination laws. The surprise is reasonable considering the momentous changes in LGBT rights in recent years. It stands to reason that if LGBT people have the right to marry the person they love, they should not then lose their job for exercising that right. Yet, that is exactly what Ohio law now permits.

LGBT individuals, like those in Ohio, who do not reside in a state that affords express protection from discrimination must look to federal law for redress. Title VII of the Civil Rights Act of 1964 is the federal anti-discrimination statute that protects individuals from discrimination on grounds similar to the Ohio Civil Rights Act, including on the ground of sex. Several courts interpreting Title VII have recognized that discrimination based on “sex” is inclusive of sexual orientation and gender identity although that position is far from being uniform. The U.S. Supreme Court recently granted *certiorari* in several cases in an effort to resolve these issues.³ For anyone who studies this area of the law, it is no surprise that the Supreme Court granted *certiorari* in these cases. The lower courts are divided, and the law in this area is in flux.

I would like to take a few moments to provide a brief overview of where federal law stands in the employment context. The snapshot is not an exhaustive explication of the law in this area. However, the discussion demonstrates the precariousness with which LGBT individuals relying on federal law for protection against employment discrimination must live their lives and therefore why the Ohio Fairness Act is urgently needed.

The U.S. Supreme Court laid the ground work for recognizing Title VII claims alleging sexual orientation and gender identity discrimination almost 30 years ago

³ The cases the Supreme Court has agreed to hear are *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018) (*en banc*), *cert granted by Altitude Express, Inc. v. Zarda*, 2019 WL 1756678 (U.S. Ap. 22, 2019) (No. 17-1623); *Bostock v. Clayton County*, 723 Fed.Appx. 964 (11th Cir. 2018), *cert granted*, 2019 WL 1756677 (U.S. Ap. 22, 2019) (No. 17-1618); and *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018), *cert granted in part*, 2019 WL 1756679 (U.S. Ap. 22, 2019) (No. 18-107).

in the seminal case of *Price Waterhouse v. Hopkins*.⁴ The Court in that case recognized that discrimination because of sex also encompasses discrimination because of gender as well. In this context, sex refers to biology while gender has been described as socially constructed roles, behaviors and activities that society considers appropriate for one sex or the other.⁵ The federal courts have all read *Price Waterhouse* as forbidding employers from discriminating against employees based on “sex stereotypes,” i.e., the belief that an employee fails to match the gender roles and expectations associated with his or her biological sex.

Some (but by no means all) courts as well as the Equal Employment Opportunity Commission, the federal agency that administers Title VII, have extended the logic of *Price Waterhouse* to protect individuals from discrimination because of sexual orientation and gender identity. The extension is logical. For instance, courts have extended protection to transgender individuals who are assigned the sex of male at birth but identify as female and consistent with their gender identity, express feminine mannerisms or appearance. Title VII protects such individuals because the discrimination is based on their failure to conform to societal expectations or stereotypes—e.g., individuals assigned the sex of male at birth should or must be “masculine.” Indeed, in *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*,⁶ the Sixth Circuit (which covers Ohio) recently clarified that discrimination on the basis of sex encompasses claims of gender identity discrimination, basing its conclusion on various rationales, including the theory of sex stereotyping. *Harris Funeral Homes* is one of the cases for which the Supreme Court has granted *certiorari*. It is of course anyone's guess how the Court will resolve this issue, contributing to the precariousness transgender employees continue to face.

Other courts also have relied on sex stereotyping to bring sexual orientation discrimination within the scope of Title VII's protections. Courts, the EEOC and numerous scholars have recognized that one of the prime motivations for discrimination against gays and lesbians is discomfort with the manner in which homosexuality departs from traditional gender roles: in short, “real” men and

⁴ 490 U.S. 228 (1989).

⁵ See generally *What is the Difference Between Sex and Gender*, American Psychological Association, www.apa.org/topics/lgbt/transgender.aspx (“Sex is assigned at birth, refers to one’s biological status as either male or female, and is associated primarily with physical attributes . . . [g]ender refers to socially constructed roles, behaviors, activities and attributes that a given society considers appropriate for boys and men or girls and women.”).

⁶ 884 F.3d 560 (6th Cir. 2018), *cert granted in part*, 2019 WL 1756679 (2019) (No. 18-107).

“real” women should not be attracted to a member of the same sex. If an employer, therefore, discriminates against a woman because she is not sexually attracted to men, although “real” women should be, then the employer has acted on the basis of a sex stereotype, a violation of Title VII.

While I believe courts that have interpreted Title VII in this manner have a firm legal basis for doing so, not all courts have taken this approach when interpreting the statute. For instance, some courts have gone out of their way to limit the scope of sex stereotyping theory so that it does not reach sexual orientation discrimination and may leave many transgender persons without protection as well. According to these courts, *Price Waterhouse* only extends to gender nonconforming behavior, appearance and mannerisms observable in the workplace. What that means, for example, is that a woman who may be lesbian but does not exhibit gender nonconforming (i.e., masculine) behavior in the workplace is not protected from discrimination because of her sexual orientation alone. Likewise, while a gender nonconforming (i.e., feminine) gay male may be protected from discrimination because of his effeminacy, a gender conforming gay male would receive no such protection for discrimination because of his sexual orientation.⁷ Despite the Sixth Circuit's recent *Harris Funeral Homes* decision, which rejected the observable-at-work standard when it comes to gender identity discrimination, some lower federal courts within the Sixth Circuit continue to adhere to that standard when it comes to sexual orientation.⁸ Moreover, transgender individuals may face similar hurdles depending on the courts in which they pursue their claims. One court, for instance, recently interpreted Title VII in a

⁷ See e.g., *Evans v. Georgia Reg. Hosp.*, 850 F.3d 1248, 1253-54 (11th Cir. 2017) (rejecting claim of sexual orientation discrimination under Title VII but permitting plaintiff leave to amend her complaint to set forth facts to show the alleged discrimination she endured stemmed from her carrying herself in a masculine manner); *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 763 (6th Cir. 2006) (theory of sex stereotyping under *Price Waterhouse* must be based on characteristics readily demonstrable in the workplace).

⁸ Federal district courts within the Sixth Circuit are at odds about whether the *Harris Funeral Homes* case affects earlier circuit precedent, which holds that Title VII does not reach discrimination claims based on actual or perceived sexual orientation. See *Underwood v. Dynamic Security, Inc.*, 2018 WL 3029257, at *4 (W.D. Ky. 2018) (holding that the court in *Harris Funeral Homes* addressed whether Title VII protects individuals because of their transgender or transitioning status, an issue that is distinguishable from whether sexual orientation is covered by the statute; adhering to circuit precedent rejecting such claims); *Lindsey v. Mgmt. & Training Corp.*, 2018 WL 2943454, at *2 (W.D. Ky. 2018) (holding that despite the *Harris Funeral Homes* decision, plaintiff's sexual orientation claim is foreclosed by prior circuit precedent, which held that sexual orientation claims are not actionable under Title VII). But see *Varnier v. APG Media of Ohio*, 2019 WL 145542, at *5 (S.D. Ohio 2019) (explaining in case involving sexual orientation discrimination that *Harris Funeral Homes* disregarded the limitations of the observable-at-work requirement as being at odds with prior circuit case law; actionable claim of discrimination may be based on “gender nonconformance that is expressed outside of work”).

manner that may well protect transgender individuals only if they act in gender non-conforming ways and are discriminated against on that basis.⁹ Accordingly, in some jurisdictions it might be perfectly lawful for an employer who hears that an employee is transgender to fire that employee because the employer's adverse action is not based on what the employer saw—i.e., the employee's observable gender nonconforming conduct—but only what the employer heard about the employee.

The legal landscape described above is troubling for several reasons. First, if an employer discriminates against an employee for his or her gender nonconforming behavior, it should not matter for purposes of anti-discrimination law where the behavior occurs, on or off-site. For instance, a person is defined as transgender precisely because of the *perception* that his or her behavior transgresses gender stereotypes. Whether that actual behavior is observable at any given moment should be irrelevant. Moreover, traditionally, anti-discrimination law has not recognized such on-work, off-work distinctions when determining whether an employee has an actionable Title VII claim.¹⁰ Second, and equally troubling, is that this interpretation of Title VII's prohibition of sex discrimination *privileges how one looks over who one is* by forbidding discrimination on the basis of the former but not the latter. Again, this is contrary to the manner in which Title VII has been interpreted in other contexts.¹¹ The Ohio Fairness Act would alleviate these issues. LGBT individuals would not be forced to rely for protection against discrimination on inconsistent and uncertain judicial interpretations of federal law. It would bring much-needed clarity to the issue of LGBT rights in Ohio and afford LGBT persons the freedom to live their lives without the fear of being discriminated against simply for being who they are.

⁹ See *Evans*, 850 F.3d at 1260 (J. Pryor, concurring) (explaining that under circuit precedent, Title VII would not afford protection to a transgender individual discriminated against because of his or her status but only because of his or her gender nonconforming behavior).

¹⁰ See e.g., Brian Soucek, *Perceived Homosexuals*, 63 Am. U. L. Rev. 715, 743-74 (2014) (contrasting sexual orientation cases arising under *Price Waterhouse* with cases addressing working mothers with young children at home and the sex stereotypes regarding the roles women should play when off-work).

¹¹ See *id.* at 761-62, 770-73. While I have focused on judicial application of sex stereotyping theory for purposes of this testimony, it is worth noting that courts also have relied on other theories in determining that sexual orientation and gender identity discrimination are forms of sex discrimination actionable under Title VII. See e.g., *Harris Funeral Homes*, 884 F.3d at 575 (holding that Title VII protects transgender individuals on the basis of sex stereotyping and for other reasons as well, including that when an employer discriminates against an individual because of her transgender status, the employer's decision is necessarily motivated at least in part by the individual's sex).

Some may ask rather than enacting the Ohio Fairness Act, why not leave the issue of addressing LGBT discrimination to the marketplace? The market, they say, will undoubtedly correct itself, eventually. While I applaud the numerous businesses across Ohio and the country that have enacted LGBT-friendly policies, the reality is that such policies are insufficient. First, neither the U.S. Congress nor the Ohio legislature believed that market forces alone were sufficient to address discrimination against the classes of persons now protected by federal and state law. As you have heard, and I am certain will continue to hear today, just like these other groups, LGBT persons continue to face persistent and pervasive discrimination in employment and other areas. Moreover, while businesses in good faith may enact policies against discrimination, those policies often lack an enforcement mechanism and a right to seek redress. Businesses also have no control over and cannot change housing laws to be inclusive of LGBTQ people.

If enacted, the Ohio Fairness Act would remedy that shortfall in protection for LGBT persons. Ohio's nondiscrimination code provides clear access to the Ohio Civil Rights Commission and its complaint, alternative dispute resolution and adjudication procedures outlined in Chapter 4112 of the Ohio Revised Code. Currently, people who experience discrimination because of their sexual orientation or gender identity and expression are severely limited in what remedies they may pursue through the Commission, which can only adjudicate claims that arise from discrimination based on the traits covered by the Ohio Civil Rights Act. This means that the Commission is constrained in how it may act upon complaints that allege discrimination based upon other, non-protected traits. The Ohio Fairness Act would enable LGBT individuals to access the rights and remedies currently available to other protected classes in the state, which, no matter how laudatory, business policies will not do.

Finally, I would like to end my testimony on a personal note. Ten years ago when I received the offer to join the faculty at Cleveland-Marshall College of Law and to move to Ohio from Maryland, one of the first things I did was to research Ohio's anti-discrimination protections. At that time, Maryland had amended its own anti-discrimination statute to include sexual orientation among the traits the statute covers. I conducted that research because as a gay man I felt that a jurisdiction that protected individuals from discrimination on the basis of sexual orientation signaled that this would be a place that welcomed people like me. Ohio law of course did not afford such protection. However, I moved to Lakewood, Ohio, a suburb of Cleveland that from my research had by then become known for its welcoming and inclusive environment. As you consider the Ohio Fairness Act, I

humbly ask that you consider those individuals who may be in the position I was in and are now contemplating whether to make Ohio their home, or others (like some of my students, for instance) who may be from Ohio and are deciding where to settle down, raise a family and build a career. I believe the Ohio Fairness Act would go a long way to signal to all of those people that Ohio values diversity and welcomes all people, including, if they are LGBT, people like them.

Thank you for granting me the honor of being able to appear before you this morning and thank you for your service to Ohio.