

**TEMPERING GLASS ARMOR: A DEMAND FOR
IMPROVED ANTI-DISCRIMINATION HOUSING LAWS**

ABSTRACT¹

Homelessness is a nationwide problem that affects hundreds of thousands of people a year. Lesbian, gay, bisexual, transgender, and queer individuals face unique, additional issues in their day-to-day lives that heterosexual and cisgender individuals do not. Homeless shelters across the country are full of transgender youth and adults who are subject to more sexual violence, criminal acts, and discrimination than other homeless individuals in the same shelters.

people in shelters is in danger. In essence, Housing Secretary Ben

higher risk of discrimination. Agency interpretations of federal statutes have taken on drastically different interpretations between the last administration and this one. Rules and regulations are not enough to protect transgender people, particularly at-risk youth, from discrimination. Clinging onto varying federal statutory interpretations -term, and recent Supreme Court cases like Bostock v. Clayton County show just how tenuous of a position that is.

Arguments opposing discrimination protections based on gender identity include the potential curtailing of parental rights and the

amendments to the Civil Rights Act of 1964, highlight why the issues that transgender people face in housing, health, employment, and other public sectors are so prevalent that each affect one another. This Note retracted and recognizes that interpretation of protections for transgender people is not something that should be easily swayed each time the political pendulum swings from red to blue, or vice versa. Additionally, this Note waxes on how a sweeping amendment to all anti-discrimination laws would benefit transgender individuals.

1. Dear Reader: This Note was written during the latter half of the Trump administration. Although the administration has since changed, the issues discussed herein remain salient. Although President Biden's administration has rolled back some of President Trump's harmful anti-LGBTQ policies, there is much work to do. Thus, this Note still presents the issues as originally described in 2019.

I. INTRODUCTION

As the political pendulum swings from party to party, so to do interpretations of the powers granted to each branch of government by the United States Constitution. Under Housing Secretary Ben Carson,

proposed a new rule in 2019 that would roll back Obama-era protections of transgender² people in federally-funded homeless shelters.³

Secretary, his department finalized The Equal Access in Accordance

increased protections for people from discrimination based on their gender identity in federally-funded Community Planning and

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allow federally-funded homeless shelters to discriminate against transgender individuals if their gender identity or expression conflicts

as a surprise to many; just days before, Secretary Carson asserted that he would not attempt to rescind any protections for LGBTQ while in office.⁵ The proposed rule came

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Opportunity Act. It then discusses several agency interpretations of Part II ends with a discussion on the most recent Supreme Court cases *Bostock v. Clayton County*, *Altitude Express, Inc. v. Zarda*, and *R.G. & G.R. Funeral Homes v. EEOC*

A. The Civil Rights Act of 1964, Title VII

sparse at best, leaving the interpretation of the word up to lower courts and agencies.²³ While some states provide protections in the areas mentioned above, there is considerable resistance to including gender

1964 established that companies that employ fifteen or more persons could not discriminate on the basis of sex, religion, national origin, color, or race.²⁴

last moment, which Chief Justice Rehnquist noted during a subsequent case regarding sexual harassment.²⁵ In *Meritor Savings Bank v. Vinson*, the Supreme Court had to parse through failed amendments and arguments to determine whether sexual harassment would fit into the

²⁶ It was only after the Court recognized that in some cases, sexual harassment and discrimination could be on par with racial or ethnic discrimination, that it agreed to read protection from sexual

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1. Price Waterhouse v. Hopkins

In 1989, a plurality of Supreme Court justices held in *Price Waterhouse v. Hopkins* that gender stereotyping was a form of sex discrimination protected by Title VII of the Civil Rights Act.²⁸ Ann Hopkins was denied partnership by her employer, Price Waterhouse, on two separate occasions, and when she asked why, at least two of her superiors said she needed to walk, act, and dress more femininely.²⁹

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stated that the Court was not traversing new ground by finding that sex discrimination occurred against Hopkins in her bid for partnership.³¹ However, Brennan did recognize that sex discrimination could be veiled in attempts to coerce others to adhere to certain stereotypes,

⁴⁰ While working at a bulk mail facility in Michigan, Dillon was taunted with homophobic insults from coworkers who intended to cause Dillon to quit.⁴¹ While Dillon was discriminated against for being gay, the statutory interpretation is similar to other Title VII cases—he argued that per *Price Waterhouse*, he was being sexually harassed for not adhering to the standard male societal expectations.⁴² The *Dillon* court determined that homosexuality is a different function entirely than being male or female, as opposed to being a function of it.⁴³ The court admitted that despite Dillon not having protections under Title VII, he could still pursue other legal avenues for a remedy, such as suing for tortious interference with contract, or assault.⁴⁴

Other courts have disagreed about expanding the definition of sex to include transgender people or varying forms of gender expression.⁴⁵ The Tenth Circuit Court of Appeals tackled this issue in *Etsitty v. Utah Transit Authority* and found that the Equal Protection Clause of the Fourteenth Amendment and Title VII of the Civil Rights Act did not protect against discrimination for transgender people.⁴⁶ Etsitty, although male-

3. Equal Credit Opportunity Act

The Equal Credit Opportunity Act provides that, as long as someone can legally contract for credit or other financial services, creditors are not allowed to discriminate against giving credit to applicants on the basis of the same protected classes outlined in the Civil Rights Act.⁵¹ In *Rosa v. Park West Bank*, the First Circuit Court

ank loan for the way he dressed.⁵² Rosa applied for a bank loan at Park West Bank and presented three forms of identification that showed he was born male, and the loan officer argued that she could not recognize him in his typically female attire.⁵³ By in sex with the Equal Credit Opportunity Act, the court found that disparate treatment arose and that the banker discriminated against Rosa based on her appearance.⁵⁴ Disparate treatment is one of the most common and identifiable forms of discrimination and occurs when an employer treats someone less favorably than others because of sex.⁵⁵

B. The Equal Protection Clause

The Equal Protection Clause of the Fourteenth Amendment to the Constitution has also provided a legal backbone for expanding the definition of sex.⁵⁶ In *Craig v. Boren*, the Supreme Court recognized that statutory classifications distinguishing men from women are constitutional only if they pass strict scrutiny.⁵⁷ To withstand strict scrutiny constitutional challenges, a statute must serve an important government interest and must be narrowly tailored to achieve that interest.⁵⁸ Summarizing Equal Protection Clause jurisprudence, the

women in particular acted or *should* act were unconstitutional, stating that a statute would be unconstitutional if it used gender discrimination⁵⁹ One

51. *Equal Credit Opportunity Act*, BOUVIER LAW DICTIONARY (8th ed. 2012).

52. *Rosa v. Park W. Bank & Trust*, 214 F.3d 213, 214 (1st Cir. 2000).

53. *Id.* at 215.

54. *Id.*

55. *Id.*

56. *See, e.g., Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011).

57. *Craig v. Boren*, 429 U.S. 190, 198 (1976).

58. *Id.*

59. *Id.* at 199.

expand the definition of sex⁶⁰

In 2011, the Eleventh Circuit Court of Appeals tackled the issue of expanding the definition of sex in *Glenn v. Brumby*.⁶¹ Glenn was fired by her employer, Brumby, when she expressed that she suffered from gender identity disorder, a psychological condition associated with gender dysphoria.⁶² Glenn filed two separate claims against her employer, alleging both discrimination based on her gender identity and discrimination based on her medical condition.⁶³ The *Brumby* court reasoned that the Equal Protection Clause protected gender identity and non-conforming behavior, and gave several affirmative examples from case law where employers wrongfully terminated cisgender employees because they did not conform to sex-based stereotypes.⁶⁴ Using standard constitutional methods of interpretation, the Eleventh Circuit found that because the Equal Protection Clause should protect everyone, it cannot serve to deny protections to transgender people.⁶⁵

Perhaps it bodes well that the Eleventh Circuit maintained this position in 2020 in *Travis v. Lyle*.⁶⁶ Here, the court stated that, based on its own interpretation in *Glenn* and the

⁶⁶ there was even more proof that the
⁶⁷ Citing the

2020 Trio, the Eleventh Circuit saw fit to expand anti-discrimination protections outside of Title VII and Equal Protection Claims into Title IX claims.

60. *Id.*

61. *Glenn*, 663 F.3d at 1312.

62. *Id.* at 1313-14.

63. *Id.*

64. *Id.* at 1318-19 (All persons, whether transgender or not, are protected from discrimination on the basis of gender stereotype).

facilities designated for male students, and the school complied.⁷⁴ After

the Gloucester County School Board aware of this, hoping to propose a resolution that would ban transgender students from accessing the facilities of the gender they identify with.⁷⁵ The resolution gained traction within the School Board and the community, and so G.G. sought help from the courts.⁷⁶ Using *Auer* deference, the Fourth Circuit while

transgender individuals.⁷⁷ The court refused to adhere to a strict

applied to transgender people provided G.G. Title IX protection.⁷⁸

Similarly, in *Whitaker v. Kenosha Unified School District*, the

there is a circuit split on what protections (if any) Title VII may provide transgender people in the workplace, the Supreme Court held in 1998 that same-sex harassment could be sex discrimination.⁸⁴ Writing for a unanimous Court in *Oncale v. Sundowner Offshore Services*, Justice Antonin Scalia stated:

Assuredly [this is] not the principal evil Congress was concerned with when it enacted Title VII . . . statutory prohibitions often go beyond the principal evil [they were passed to combat] to cover reasonably comparable evils, and it is ultimately the provisions of our

to his religious beliefs.⁹⁰ The Federal Contract Compliance Programs condition employment based on whether or not an employee adheres

discrimination in housing against groups of people at the highest risk.⁹⁶ Several classes, such as families and people with disabilities, used to be excluded from protection, but subsequent amendments included them.⁹⁷ In its current capacity, the FHA prohibits discriminatory practices in the buying, selling, renting, or advertising of private and public property, on the basis of sex, religion, handicap, race, national origin, color, age, and familial status.⁹⁸

Courts have interpreted the FHA to show that legal intent, rather than any passive or active malice, is all that is required to prove a discriminatory claim.⁹⁹

FHA to include transgender people, but the Equal Access Rule bans receivers of federal housing funds from discriminating against transgender people.¹⁰⁰ The FHA arms HUD with the ability to

communities in the country.¹¹³ The Obama administration understood that transgender people are subject to discrimination in housing, healthcare, employment, and schooling, and made it a goal to align all of the related agencies on the same level and allow for the same protections.¹¹⁴ Young and black transgender people are at even more of a risk of discrimination in housing, and enacting the Equal Access Rule was seen as a big step forward in eradicating that issue.¹¹⁵ The Obama-era HUD reiterated its position on including gender identity as a protected class, citing the logic of *Price Waterhouse* as outcome determinative.¹¹⁶

E. The 2020 Trio

Three cases recently argued in front of the Supreme Court could shape what the future holds for federal protection for transgender people: *Altitude Express, Inc. v. Zarda, R.G. & G.R. Funeral Homes v. EEOC*, and *Bostock v. Clayton County*.¹¹⁷ All three plaintiffs alleged that their employers terminated them because of being either transgender or homosexual.¹¹⁸ While on its face there is quite a difference between workplace discrimination and housing discrimination, the root of the issue is still the same: there was a circuit

addressed in order to determine if LGBTQ people could be discriminated against.¹¹⁹ The need for a singular, far-reaching

In an opinion authored by Justice Gorsuch, the Supreme Court protection for people based on their sexual orientation or gender identity.¹²¹ Finding the answer relatively clear cut, Justice Gorsuch noted that when an employer fires someone because of their sexual or actions it would not have questioned in members of a different fires that person for traits

¹²² Using a traditional but-for causation analysis, the majority

sex and gender identity and expression to show that the term was, in fact, ambiguous.¹²⁹ Because of this, Justice Alito argued that the Court should have deferred to the original meaning using standard statutory interpretation.¹³⁰

In a separate dissent, Justice Kavanaugh wrote that the argument

rationale may be imputed to his dissents in the Supreme Court cases discussed in this Note.

Now that the Senate has confirmed Amy Coney Barrett to the Supreme Court, seminal cases like *Bostock*, *Obergefell*, *Price Waterhouse*, and *Glenn* may hang in the balance even more.¹³⁸ Indeed,

¹³⁹ At a Jacksonville University lecture in 2016, then Judge

¹⁴⁰ It is worth noting that even when the Court had a conservative majority and denied

in his discussion of *Obergefell*.¹⁴¹ While we may never know their reasoning, it is interesting and important to note that Chief Justice Roberts, Justice Gorsuch, and Justice Kavanaugh did not join in Justice

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As previously stated, the Civil Rights Act, the FHA, and other relevant statutes and rules echo each other in laying out which classes of people receive discrimination protection.¹⁴³ Just as the DE did a bait-and-switch with Title IX once Secretary DeVos got her hands on it, so too could other federal agencies with their interpretations of anti-discrimination statutes.¹⁴⁴ For these reasons, sweeping legislation that does not allow room for either federal agency or court interpretations to reject discrimination protections for transgender people is necessary.

III. HEPHAESTUS SHRUGGED: BROKEN EXECUTIVE P

a transgender person what identity they have is troubling, in part because not everyone has the same idea of what gender expression or gender identity is or should be. On its face, this proposed rule may be neutral; in its application, there is likely to be a disparate impact on the transgender community, especially in states with traditionally conservative values. As it stands now, with no federal statutory protections for transgender people in housing, transgender people do not have any legal claim to show discrimination based on actual malice or disparate impact.

B. Ultra Vires

The campaign trail is full of grandiose promises and bright ideas to remedy severe problems. Once the elections are over, however, the sword of change is sheathed, and the pen of action is drawn. In his first run for office, President Trump made a lot of promises to the LGBTQ community while campaigning; the image of him brandishing a gay pride flag during a speaking event comes to mind almost immediately.¹⁵² Since his election, however, he has acted both openly and behind closed doors to slash through many Obama-era protections for LGBTQ people.¹⁵³ As soon as President Trump was inaugurated, the White House removed any mention of LGBTQ individuals or issues from its website.¹⁵⁴ The day after Jeff Sessions was sworn in as Attorney General of the United States, the Department of Justice announced its refusal to enforce the Obama-era guidance for protecting transgender students under Title IX.¹⁵⁵ That March, President Trump signed an executive order allowing Attorney General Sessions discretion in doling out licenses to discriminate to federal agencies.¹⁵⁶ The people President Trump has nominated for positions of power in

152. Gwynn Guilford, *Donald Trump's support of LGBT communities in one image*, QUARTZ (Oct. 31, 2016), <https://qz.com/823649/donald-trump-unfurled-a-rainbow-flag-with-lgbt-written-on-it-at-a-rally-in-greeley-colorado-to-express-his-so-called-support/>.

153. *How Trump is rolling back Obama's legacy*, WASH. POST, https://www.washingtonpost.com/graphics/politics/trump-rolling-back-obama-rules/?utm_term=.d36b45cd8bbb (last visited Feb. 29, 2020).

154. @HRC, TWITTER (Jan. 20, 2017), <https://twitter.com/HRC/status/822545849901346819>.

155. Chris Johnson, *DOJ nixes request to halt order against trans student protections*, WASH. BLADE (Feb. 10, 2017, 9:05 pm EST), <https://www.washingtonblade.com/2017/02/10/doj-withdraws-request-halt-order-trans-student-protections/>.

156. *Trump Lays Groundwork for #LicenseToDiscriminate*, HRC (May 4, 2017), <https://www.hrc.org/news/president-donald-trump-lays-groundwork-for-licensetodiscriminate>.

of executive authority. *Chevron U.S.A. v. National Resources Defense Council, Inc.* established a two-step test for courts to determine whether

of a statute.¹⁶³ e
 agency has the effect of law.¹⁶⁴ HUD has enacted rules and regulations based on the FHA since the bill became law, so it would be difficult to argue that the agency does not have the effect of law here.¹⁶⁵
 step, then, is to ask if Congress has spoken to the question at issue.¹⁶⁶ Here, the answer may be no. While Congress has a few bills in the pipeline that would protect homeless transgender people from discrimination, there are no current laws that do so.¹⁶⁷
 to a precise issue is difficult to pinpoint. If we were to include

could be argued that Congress *has* spoken to the precise issue. The proposed rule would be dead in the water here. But, based on the inherent conflict between Gender Identity

Congress has, in fact, not spoken to the precise issue of transgender

the final step of Chevron deference interpretation of the statute was permissible.¹⁶⁸ While case law has provided an interpretation of both Acts, there is nothing to say that the

constructions. If American courts follow a similar thought process, this could be disastrous for transgender people trying to escape homelessness, because protection from discrimination based on gender identity could easily sway back and forth as new administrations come into power. This Note takes the position that courts would be doing transgender people a disservice if they continued to allow agencies like

expand or contract the definition. Courts should not give the executive transgender people.

163. *Chevron U.S.A. v. NRDC*, 467 U.S. 837, 842-43 (1984).

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IV. EQUAL RIGHTS VERSUS SPECIAL RIGHTS

Secretary Carson has opined, on more than one occasion, that the

expression.¹⁹¹ The *amici* point out a compelling legal and logical loophole presented in *Price Waterhouse*. If Price Waterhouse had fired Hopkins because her employers perceived her to be a lesbian based on her gender expression instead of finding that she did not comport with societal expectations of how a woman should act, she would have had no legal recourse available to her.¹⁹²

gender expression and they were fired or denied opportunities because of it, they may not have protection under federal law.¹⁹³ Courts would apply this law irregularly expectation of gender expression would have a lower likelihood of being fired because of it, transgender or not.¹⁹⁴ This is damaging to

gender.¹⁹⁵ Those who did not conform, both cisgender and transgender people, would not have the same opportunities. In essence, a law that can be irregularly applied in such a way should not exist at all, especially when it has such a negative impact on people of different minority communities.¹⁹⁶

Since the FHA was drafted to follow the Civil

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would likely have a domino effect on other anti-discrimination statutes.

ally would hinder, rather than help, cisgender women that the statutes are designed to protect. Others argue that expanding the definition of sex to include transgender people would be a bad policy move. They argue it would have a direct and cognizable effect on women who have been subjected to sexual violence seeing

191. See *Brief of the National Women's Law Center and Other Women's Rights Groups as Amici Curiae Supporting the Employees*, *Bostock v. Clayton Cty., R.G. & G.R. Funeral Homes v. EEOC, and Altitude Express, Inc., v. Zarda* No. 17-1618, 17-1623, 18-107 (2019) (SupremeCourt.gov) [hereinafter *Women's Rights Amici*].

192. *Id.* at 27.

193. *Id.*

194. *Id.* at 26-27.

195. Alecia D. Anderson, et al., *Your Picture Looks the Same as My Picture : An Examination of Passing in Transgender Communities*, 37 *Gender Issues* 44, 48 (July 24, 2019).

196. *Women's Rights Amici*, *supra* 191 at 27.

197. *History of Fair Housing*

male genitalia in a homeless shelter with a single-sex restroom policy

²¹⁸ Super-statutes, though unlike Article V constitutional amendments, are given great deference and respect by lawmakers and the judiciary.²¹⁹ However, legitimate changes to super-

protect a large group of people. The most significant check on the
ing agency rules is for the
legislature to act, just as Representative Cicilline has attempted to do.

To incorporate sexual orientation and gender identity into the

(including sexual orienta

²²² This is both a good choice and a bad one. It is a good

FHA statutory interpretation in future court cases and would not place

guide on drafting legislation. It has a specific section that focuses on
phrasing conventions, and state that using word

language if necessary.²²³

recursive loop ever since, resulting in conflicting legislation and circuit splits, to the detriment of transgender people. While Representative

implementation method, its effect falls short of what adding sexual orientation and gender identity as standalone terms would have. Including gender identity and expression as their own, unique classes of people that statutes must protect would both benefit the LGBTQ community as well as negate any arguments from opponents of expanding the d²²⁶

This Note takes the position that including gender identity and -sighted at best. The rationale of *Price Waterhouse* remains good law, but it is limited in its application. What happens if *Price Waterhouse* is overturned? Sex discrimination, cisgender or otherwise, would not have much of a leg to stand on in American jurisprudence. Enumerating transgender people or gender identity in federal statutes would circumvent this problem and would prevent the executive and judicial branches from interpreting otherwise.

VI. CONCLUSION

rights at the expense of cisgender people. It is the beginning of a long-term effort in equity that transgender people deserve.²²⁷

227. As we move forward, it is worth noting that even though the aforementioned political pendulum has already swung again, the Biden administration has its work cut out for it. Although only confirmed in March 2021, Housing Secretary Marcia Fudge has spent her time working to undo the policies that former Secretary Ben Carson set in place as well as plotting a course to handle the COVID-19 pandemic's effects on housing and homelessness, particularly for people of color. However, the issues discussed in this Note have yet to be addressed in any detail by the Biden administration or by Secretary Fudge. It remains to be seen how the administration will address these important issues. This author is optimistic about the Biden administration's efforts to reduce homelessness and improve fair housing in the future. See April Ryan, *HUD Sec. Fudge meets with civil rights leaders to address pandemic housing challenges*, THE GRIO (Mar. 26, 2021), <https://thegrio.com/2021/03/26/hud-fudge-civil-rights-leaders-pandemic-housing/>.