STRAIGHT ACTORS IN LGBT ROLES: CREATIVE CASTING OR EMPLOYMENT DISCRIMINATION?

Erica Ruff

Table of Contents

I. INTRODUCTION

In the entertainment industry there is a growing trend of casting straight actors in roles depicting LGBT[1] characters. The rationales behind this practice of "gay face"[2] include ensuring commercial success[3] and

[1] In this article, I will use "LGBT" to reference the spectrums of sexuality and gender that include individuals who identify as lesbian, gay, bisexual, transgender, questioning, intersex and queer.

[2] J. Bryan Lowder, "The Curious Case of Gayface," SLATE.COM (June 6, 2013) http://www.slate.com/articles/arts/culturebox/2013/06/straight_actors_in_gay_roles_is_gayface_ok.html. *See also* Christopher Kelly, "Are Straight Actors in Gay Roles the New Blackface?" WWW.SALON.COM (June 12, 2013, 4:15 PM), https://www.salon.com/2013/06/12/stop_praising_straight_actors_for_playing_gay_roles/.

[3] Ben Freeman, "'Call Me By Your Name' And the Problem with Gay Roles Going to Straight Actors" JUNKEE.COM (January 4, 2018) http://junkee.com/gay-roles-straight-actors/143890. ("The last few years have proved that LGBTIQ+ movies can garner accolades and rake in big bucks at the box office, just not when the roles are given to queer people.")

"gaining attention and acclaim."[4] The trend is perhaps most evident in film, where examples include the same-sex partners in Call Me By Your Name (Armie Hammer and Timothée Chalamet (who was nominated for Best Actor in the 2018 Golden Globe and Academy Awards)[5]), Jared Leto in the role of Rayon, a transwoman, in *Dallas Buyers Club* (for which Leto won the Academy Award for Best Actor in a Supporting Role)[6], Sean Penn in the role of real-life California activist and politician Harvey Milk in *Milk* (for which Penn won the Academy Award for Best Actor)[7], and Charlize Theron playing the real-life serial killer Aileen Wuornos in *Monster* (for which Theron won the Oscar and Golden Globe for Best Actress)[8]. In television, comedic sitcoms exemplify the trend: Eric McCormack playing the title-character gay lawyer in *Will and Grace*[9], and Eric Stonestreet in the flamboyant "out-and-proud" role of Cam in *Modern Family*.[10] In the world of theatre, examples of the trend include Darren Criss's turn in the lead role of a trans rocker in *Hedwig and the Angry Inch* (Criss played the role for twelve weeks on Broadway and then launched the U.S. national tour in the role)[11], Christian Borle playing the lead character of Marvin in the recent Broadway revival of *Falsettos*[12] (for which Borle was nominated for a 2017 Tony Award)[13], and the Broadway revival of *Angels in America* starring straight actor Andrew Garfield in the leading role of Prior Walter, a young homosexual

4 Daniel Reynolds, "'Call Me By Your Name's' Straight Casting Stirs Controversy" ADVOCATE.COM (November 29, 2017, 6:48 PM) https://www.advocate.com/film/2017/11/29/call-me-your-names-straight-casting-stirs-controversy. ("[A] straight actor portraying an LGBT character is a time-tested practice of gaining attention and acclaim.")

5 Timothée Chalamet, "Awards" IMDB.COM (last visited March 6, 2018) http://www.imdb.com/name/nm3154303/awards?ref_=nm_awd.

6 Cavan Sieczkowski "Jared Leto's Oscar Win for 'Dallas Buyers Club' Criticized by Transgender Community," HUFFINGTONPOST.COM (Last Updated February 2, 2016) https://www.huffingtonpost.com/2014/03/03/jared-leto-oscar-transgender_n_4890061.html.

7 Matt Bagwell, "LOUD & PROUD: 23 Straight Actors Who Have Played Gay On the Big Screen" HUFFINGTON POST UK (April 26, 2016) http://www.huffingtonpost.co.uk/entry/straight-actors-who-played-gay-roles-loud-and-proud_uk_571f5f73e4b06bf544e0ba67.

8 "Charlize Theron: The Making of A Monster" ADVOCATE.COM (Feb. 17, 2004). https://www.advocate.com/news/2004/02/17/charlize-theron-making-monster.

9 Kevin Fallon, "Eric McCormack on 'Will & Grace' Revival Rumors," THEDAILYBEAST.COM (Dec 22, 2016) https://www.thedailybeast.com/eric-mccormack-on-will-and-grace-revival-rumors-the-state-of-gay-tv-and-time-traveling-spies.

10 Amanda Michelle Steiner, "*Modern Family's* Eric Stonestreet Reveals How Playing a Gay Character Has Changed His Life," PEOPLE.COM (May 21, 2015) http://people.com/tv/modern-family-eric-stonestreet-on-how-playing-gay-changed-his-life/.

11 Gordon Cox, "Darren Criss to Star in National Tour of 'Hedwig and the Angry Inch'" VARIETY (May 9, 2016) http://variety.com/2016/legit/news/darren-criss-hedwig-tour-1201769110/.

12 Jeremey Gerard, "Andrew Rannells and Christian Borle Are Tender, if Unlikely, Lovers in 'Falsettos' Revival" DEADLINE (Oct. 27, 2016) http://deadline.com/2016/10/falsettos-review-andrew-rannells-christian-borle-1201843953/.

13 Falsettos, "Awards" IMDB.COM (last visited March 12, 2018) https://www.ibdb.com/broadway-production/falsettos-505384/#awards.

man who contracts the AIDS virus, for which Mr. Garfield received the 2018 Tony Award for Best Performance by an Actor in a Leading Role in a Play[14].

The effect on society of casting straight actors in LGBT roles is widespread. While the entertainment industry appears to be correcting, albeit slowly, racial diversity in casting (best evidenced by the recent hit musical Hamilton – where the Founding Fathers of America are portrayed by multiracial, ethnically ambiguous actors) it has yet to acknowledge the inappropriateness of straight actors playing gay characters.[15] The lack of sexually diverse actors gracing our screens greatly limits the ability of the younger generation, especially in LGBT communities, to identify with aspirational role models: "Everyone should be able to find characters they relate to on screen, and when marginalized communities are underrepresented, filmmakers perpetuate a loneliness felt by people who often don't have a voice."[16] In addition, and at the heart of this article, is the recognition that this trend in entertainment evidences the larger issue of sexual orientation harassment in the entertainment industry's workplace. A 2013 survey conducted by The Guardian "found more than half of LGBT performers had overheard homophobic comments on set and felt that studios found it harder to market LGBT performers."[17]

Employment discrimination in the entertainment sector sits at a crossroads between equal rights of individuals in employment, as provided by the Civil Rights Act of 1964[18], and the industry's right to free speech and expression, as guaranteed by the First Amendment[19]. The tension between these two legal frameworks has consistently resulted in one-sided judicial decisions where First Amendment rights trump the majority of employment discrimination claims brought by individuals against the entertainment industry[20] pertaining to casting decisions on theatrical productions, movies, or television shows.[21] Before highlighting

[14] Angels in America: Millennium Approaches, "Awards" IMDB.COM (last visited January 4, 2019) https://www.ibdb.com/broadway-production/angels-in-america-millennium-approaches-515873/#awards.

[15] Steve Rose, "Straight to the Heart: Hollywood's Hetero Approach to Casting Gay Cinema" THEGUARDIAN.COM (October 16, 2017, 5:00pm) https://www.theguardian.com/film/2017/oct/16/hollywood-hetero-approach-casting-gay-cinema.

[16] Ben Freeman, "'Call Me By Your Name' And the Problem with Gay Roles Going to Straight Actors" JUNKEE.COM (January 4, 2018) http://junkee.com/gay-roles-straight-actors/143890.

[17] Steve Rose, "Straight to the Heart: Hollywood's Hetero Approach to Casting Gay Cinema" TheGuardian.com (October 16, 2017, 5:00pm) https://www.theguardian.com/film/2017/oct/16/hollywood-hetero-approach-casting-gay-cinema.

[18] Pub. L. No. 88-352, 78 Stat. 241, 253-266 (codified as amended at 42 U.S.C. §2000e-2a (2012)).

[19] U.S.C.A. Const. Amend. 1.

[20] *See e.g., Claybrooks v. American Broadcasting Companies*, 898 F.Supp.2d 986 (M.D. Tenn. 2012).

[21] Employment discrimination claims deriving from interactions "behind the scenes" such as the hiring of stage managers, line producers, etc. have little relationship to the First Amendment

and discussing the major judicial decisions that aim to balance the competing interests of freedom of expression and employment discrimination protection, this note will consider the emergence of sexual orientation discrimination claims under the various administrative and statutory legal frameworks, and discuss the enforceability of sexual orientation employment discrimination in the entertainment world. The objective here is to identify the strongest possible arguments that favor the protection of artists, as against the threat of employment discrimination, over and above an entertainment decision-maker's right to freedom of expression. Ultimately, these arguments represent the only chance of rectifying employment discrimination in casting through the judicial system.

In an effort to introduce the emergence of sexual orientation employment discrimination protection, Section One will discuss several significant court decisions, including *Price Waterhouse v. Hopkins*[22]*, Hamm v. Weyauwega Milk Products Incorporated*[23]*, Oncale v. Sundowner Offshore Services Incorporated*[24]*,* and *Barrett v. Pennsylvania Steel Company Incorporated*[25]. Despite the judicial expansion of the Civil Rights Act of 1964[26], Title VII's protection of discrimination on the basis of sex does not include protection against sexual orientation discrimination.[27] The impact of the 2015 administrative proceedings of the Equal Employment Opportunity Commission, which held that "sexual orientation is inherently a 'sex-based consideration,' and an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII [of the Civil Rights Act of 1964]."[28] Legislative efforts to clarify protections for sexual orientation discrimination have recently come up at various levels of government, including local, state and federal.[29] In New York, SONDA is actively attempting to thwart employment discrimination based on sexual orientation and stereotyping, however, as will be discussed, the effect of SONDA is greatly limited due to its

defenses present in claims associated with the outward manifestation of the resulting work.

22 *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

23 *Hamm v. Weyauwega Milk Prods., Inc*. 332 F.3d 1058, 1068 (7th Circ. 2003) (Posner, J., concurrence).

24 *Oncale v. Sundowner Offshore Servs., Inc*., 523 U.S. 75 (1998).

25 *Barrett v. Pa. Steel Co., Inc*., No. 2:14-CV-01103, 2014 WL 3572888, at *2-3 (E.D. Pa. Jul. 21, 2014).

26 Pub. L. No. 88-352, 78 Stat. 241, 253-266 (codified as amended at 42 U.S.C. §2000e-2a (2012)).

27 Luke A. Boso, *Acting Gay, Acting Straight: Sexual Orientation Stereotyping,* 83 TENN. L. REV. 575 (2015).

28 *Baldwin v. Foxx*, No. 0120133080, 2015 WL 4397641, at *5 (E.E.O.C. July 15, 2015).

29 *See e.g.,* Employment Non-Discrimination Act of 2013 S.815 113th Congress (2013-2014) sponsored by Senator Jeff Merkley (Dem-OR); "SONDA" (Sexual Orientation Non-Discrimination Act) of New York State.

jurisdictional limitations – especially against freedoms granted by the federal government. On a federal level, the Employment Non-Discrimination Act, initially proposed to the U.S. Congress in 2013, has the potential to greatly impact the protections afforded to employees experiencing discrimination; however, this important piece of legislation has yet to receive the supportive power of enaction into law. The role of the Executive Branch in the future of employment discrimination law cannot be understated. We are currently experiencing a significant detour from the Obama Administration's approach to sexual orientation discrimination.[30] It appeared the Obama Administration appeared to be heading in the direction of appealing to a wide variety of Americans who seek to protect all forms of employment discrimination. It is clear that the Trump Administration does not share the same aspiration, especially considering recent declarations by President Trump himself that transsexual individuals are no longer welcome in the U.S. military, nor do transsexual Americans have the freedom to use the bathroom facilities with which they most identify. The approach taken thus far by the new Trump administration is best evidenced by a recent amicus brief filing by the Department of Justice.[31] Without adequate protection against sexual orientation discrimination in a workplace, hiring decision-makers are free to continue making obvious and controversial decisions.

In Section Two, I will consider the efficacy of legal safeguards protecting against sexual orientation employment discrimination and apply it to the entertainment industry to see if the ever-increasing problem of straight actors in LGBT roles can legally be thwarted. This discussion will begin with the ability, or lack thereof, of the relevant actor unions in the entertainment industry to protect their constituents, in the context of casting, against employment discrimination. Alongside the enactment of actor union policies, societal encouragement of protecting employment discrimination in the entertainment sector has proved impactful. Among the empirical evidence included here will be the most recent Comprehensive Annenberg Report on Diversity in Entertainment as put together by the University of Southern California.[32] To highlight the dramatic increase in social recognition of the issue of "gay face," I will discuss numerous press articles[33], law school journal articles[34], and

30 Executive Order 13672 (July 21, 2014).

31 *Zarda v. Altitude Express, Inc*., Amicus Brief for the United States 15-3775 (July 26, 2017).

32 Stacy L. Smith, Marc Choueiti, Katherine Pieper, "Inclusion or Invisibility: Comprehensive Annenberg Report on Diversity in Entertainment" USC ANNENBERG (Feb. 22, 2016).

33 *See e.g.,* J. Brian Lowder, "The Curious Case of Gayface" SLATE (June 2013); Christopher Kelly, "Are Straight Actors in Gay Roles the New Blackface?" SALON (June 12, 2013); Tyler Coates, "The Problem with Celebrating Straight Actors in Gay Roles" FLAVORWIRE (May 29, 2013).

34 *See e.g.,* Erin A. Shackelford, *An Immovable Object and an Unstoppable Force*, 17 VAND. J. ENT. & TECH. L. 781, (Spring 2015), Kathleen A. Tarr, *Bias and the Business of Show*

legislative commentary[35].

Finally, in Section Three, I will consolidate notable judicial decisions where courts overlooked employment discrimination claims in favor of granting First Amendment protections. Most recently, the issue of sexual orientation employment discrimination was judicially contemplated in *Claybrooks v. American Broadcast Companies*, which represented the first time a federal court examined how to reconcile First Amendment rights and antidiscrimination laws in the context of entertainment casting decisions.[36] The ACLU recently published an adjudicatory decision where two primary principles were identified as being imperative factors for courts to consider when presented with a challenge to the right of artistic expression: content neutrality and direct and imminent harm.[37] This section will identify arguments that have historically succeeded to win over these principles.

By way of conclusion, the ability of employees to seek reparations from discriminating employers greatly depends on the strength of legal protections afforded employees, especially when considering the immense security granted to employers in the entertainment industry by the First Amendment. The fact that the U.S. Supreme Court has not yet had the opportunity to assert an opinion on whether discrimination based on sexual stereotyping, as interpreted by the Court in *Price Waterhouse v. Hopkins in 1989*[38]*,* extends to sexual orientation means that the issue remains governed by a four-way circuit split in the federal court system. To date, the view of the Third[39] Circuit is that the line between where sex stereotypes are protected by the Civil Rights Act of 1964 and where the discrimination is based on sexual orientation stereotypes, which is not protected by the Civil Rights Act of 1964, is too difficult to distinguish to the point that these courts neglect to rule that claims seeking damages for employment discrimination can succeed. Meanwhile, the Second[40], Seventh[41] and Sixth Circuits[42] have entertained the idea that an individual's sexual orientation is necessarily related to sex such that discrimination based on orientation may be covered by the Civil Rights Act of 1964[43]; however, no relief has been granted to plaintiffs seeking

Employment Discrimination in the 'Entertainment' Industry, 51 U.S.F. L. REV. F. 1 (2016).

35 *See e.g.,* "Your Rights Sexual Orientation Discrimination" Workplace Fairness (last visited Oct. 1, 2017); "The Sexual Orientation Non-Discrimination Act ('SONDA')" New York State Attorney General

36 *Claybrooks v. Am. Broad. Cos.,* 898 F. Supp. 2d 986 (M.D. Tenn 2012).

37 *Freedom of Expression in the Arts and Entertainment*, AM. CIVIL LIBERTIES UNION (Feb. 27, 2002), https://www.aclu.org/free-speech/freedom-expression-arts-and-entertainment.

38 *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

39 *Kay v. Indep. Blue Cross*, 142 Fed. Appx. 48, 51 (3d Cir. Jul. 19, 2005).

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

41 *Hively v. Ivy Tech Community College of Indiana*, 853 F.3d 339 (7th Cir. 2017).

42 *Gilbert v. Country Music Ass'n., Inc.*, 432 Fed. App'x. 516 (6th Cir. 2011).

43 Pub. L. No. 88-352, 78 Stat. 241, 253-266 (codified as amended at 42 U.S.C. §2000e-2a

redress for sexual orientation employment discrimination[44].

At least in the near future, it is extremely unlikely that employment discrimination claims by LGBT actors will be judicially enforced such that an individual plaintiff may recover from the decision-maker. For one thing, these decision-makers in the entertainment realm benefit heavily as a result of the First Amendment's right to freedom of speech and artistic expression. Even if a claim could succeed in outweighing First Amendment interests, which has not yet occurred in the judicial system of America, the claim would then need to be assessed as to whether the employment discrimination is protected by the Civil Rights Act of 1964, under which sexual orientation discrimination has not been included as yet. Notwithstanding the strength of the First Amendment rebuttal, two intervening factors that could alter the ability of discriminated individuals to recover in the judicial system: 1) federal or local governments could pass legislation that extends employment discrimination protection to sexual orientation; 2) the Supreme Court could resolve the circuit splits of the federal courts and decide in favor of including sexual orientation discrimination as within the bounds of protections in the Civil Rights Act of 1964.

II. THE EMERGENCE OF STEREOTYPE AND SEXUAL ORIENTATION PROTECTION IN EMPLOYMENT DISCRIMINATION LAW

The Supreme Court holding in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, which ruled that a statute prohibiting the use of gender-classification in employment ads was not a violation of the newspaper's First Amendment rights, introduces the next section of this article that now turns to the emergence of employment discrimination law in the areas of stereotyping and sexual orientation as potential ways to combat casting decisions that value straight actors in LGBT roles in the entertainment industry. Of particular note are the judicially-created inclusion of sex-based stereotyping as protected under Title VII of the Civil Rights Act of 1964,[45] the recent ruling of the Equal Employment Opportunity Commission ("EEOC") declaring that "an allegation of discrimination based on sexual orientation is necessarily an allegation of

(2012)).

44 *See e.g., Hively* at 351-352 ("We hold only that a person who alleges that she experienced employment discrimination on the basis of her sexual orientation has put forth a case of sex discrimination for Title VII purposes. It was therefore wrong to dismiss Hively's complaint for failure to state a claim."); *Zarda* at 37 ("Thus, we hold that Zarda is entitled to bring a Title VII claim for discrimination based on sexual orientation.").

45 *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

sex discrimination under Title VII,"[46] recent attempts of protecting against sexual orientation discrimination in federal and local governments[47], and the influence of official comments from the White House[48]. While the United States is still evolving in terms of adequately protecting against employment discrimination related to sex and sexual orientation, these examples provide the development of a trend in the direction of recognizing and mitigating discriminatory behavior in a variety of industries. However, even proposed measures to defend against sex and sexual orientation employment discrimination frequently fall short of adequately protecting the LGBT population, and any forward momentum has recently reversed in the wake of the Trump Administration.

Recently, several pieces of proposed legislation at various levels of American government have suggested the necessity of explicit inclusion of sexual orientation discrimination protection. Most notably, during the 113th Federal Congress (2013-2014), Democratic Senator Jeff Merkley (of Oregon) sponsored the bill titled "Employment Non-Discrimination Act of 2013"[49] An amended version of the bill passed the Senate in November 2013 but has yet to be introduced in the House of Representatives.[50] The amended version declares it unlawful for an employer, "because of an individual's actual or perceived sexual orientation or gender identity, to (1) fail or refuse to hire, to discharge, or to otherwise discriminate with respect to the compensation, terms, conditions, or privileges of employment of such individual; or (2) limit, segregate, or classify employees or applicants in any way that would deprive any individual of employment or adversely affect an individual's status as an employee."[51] The bill provides that the burden of proof is on "the complaining party to establish such an unlawful employment practice by demonstrating that sexual orientation or gender identity was a motivating factor for any employment practice . . . ."[52] and specifically

46 *Baldwin v. Foxx*, No. 0120133080, 2015 WL 4397641, at *5 (E.E.O.C. July 15, 2015).

47 *See* S.815 - Employment Non-Discrimination Act of 2013, 113th Congress (2013-2014) sponsored by Senator Jeff Merkley (Dem-OR); "SONDA" (Sexual Orientation Non-Discrimination Act) of New York State Executive Order 13672 (July 21, 2014); Prohibited Discrimination - 2017 Florida Senate Bill No. 666, Florida One Hundred Nineteenth Regular Session (filed Feb. 2, 2017).

48 *See* Executive Order 13672 (July 21, 2014); *Zarda v. Altitude Express*, No. 15-3775, amicus brief filed, 2017 WL 2730281 (2d Cir. June 23, 2017).

49 S.815 Employment Non-Discrimination Act of 2013, 113th Congress (2013-2014) sponsored by Senator Jeff Merkley (Dem-OR) https://www.congress.gov/bill/113th-congress/senate-bill/815.

50 S.815 Employment Non-Discrimination Act of 2013, 113th Congress (2013-2014) sponsored by Senator Jeff Merkley (Dem-OR) https://www.congress.gov/bill/113th-congress/senate-bill/815.

51 S.815 Employment Non-Discrimination Act of 2013, 113th Congress (2013-2014) sponsored by Senator Jeff Merkley (Dem-OR), Section 4 https://www.congress.gov/bill/113th-congress/senate-bill/815.

52 S.815 Employment Non-Discrimination Act of 2013, 113th Congress (2013-2014)

states that administration and enforcement of the Act be the same as "under specified provisions of the Civil Rights Act of 1964," which includes giving administration and enforcement power to the EEOC, Librarian of Congress, Attorney General of the DOJ and courts.[53] While this bill does include protections for volunteers who receive no compensation, it expressly mentions that such protections are not applicable "to the relationship between the United States and members of the Armed Forces" and declares that the provisions cannot "repeal or modify any federal, state, territorial, or local law creating a special right or preference concerning employment of a veteran."[54] Perhaps the most problematic issue of this bill is that it excludes protections "construed to: (1) prohibit an employer from requiring an employee to adhere to reasonable dress or grooming standards, or (2) require the construction of new or additional facilities."[55] As has become apparent in the last couple of years, one of the largest issues faced by the transgender community has been inappropriate restroom facilities that are gender nonspecific; therefore the exclusion of any requirement for new or additional facilities related to sexual orientation discrimination eliminates redress for a significant portion of the current employment discrimination faced by the LGBT population.[56]

One of the more successful measures enacted to prohibit employment discrimination against the LGBT community is the Sexual Orientation Non-Discrimination Act ("SONDA"), enacted into law on January 16, 2003.[57] The main purpose of SONDA was to add to the list of specifically protected characteristics in various State laws the term "sexual orientation," which the law defines as "heterosexuality, homosexuality, bisexuality, or asexuality, whether actual or perceived."[58] The sweeping statute provides discrimination and harassment protections in various areas including employment, housing, education, the right to

sponsored by Senator Jeff Merkley (Dem-OR), Section 4 https://www.congress.gov/bill/113th-congress/senate-bill/815.

[53] S.815 Employment Non-Discrimination Act of 2013, 113th Congress (2013-2014) sponsored by Senator Jeff Merkley (Dem-OR), Section 10 https://www.congress.gov/bill/113th-congress/senate-bill/815.

[54] S.815 Employment Non-Discrimination Act of 2013, 113th Congress (2013-2014) sponsored by Senator Jeff Merkley (Dem-OR), Section 7 https://www.congress.gov/bill/113th-congress/senate-bill/815.

[55] S.815 Employment Non-Discrimination Act of 2013, 113th Congress (2013-2014) sponsored by Senator Jeff Merkley (Dem-OR), Section 8 https://www.congress.gov/bill/113th-congress/senate-bill/815.

[56] *See e.g.* "Understanding Transgender Access Laws" THE NEW YORK TIMES (Feb. 24, 2017) https://www.nytimes.com/2017/02/24/us/transgender-bathroom-law.html?_r=0.

[57] "SONDA" (Sexual Orientation Non-Discrimination Act) of New York State https://ag.ny.gov/civil-rights/sonda-brochure.

[58] "SONDA" (Sexual Orientation Non-Discrimination Act) of New York State https://ag.ny.gov/civil-rights/sonda-brochure.

vote, and jury selection.[59] Depending on the desired consequences, discrimination recipients can file a complaint either with the New York State Division of Human Services (within one year of the most recent act of discrimination) or in a State court (within three years of the most recent act of discrimination.).[60] Additionally in New York State, the New York Hate Crimes Act of 2000 provides criminal penalties for "perpetrators who commit specific crimes against individuals because of various protected characteristics, including sexual orientation."[61]

As of 2016, the US Federal Government looked as if it was embracing the emergence of protections against LGBT employment discrimination. Most notably, President Obama's 2014 Executive Order, amending the Executive Orders of President Johnson (1965)[62] and President Nixon (1969)[63], substituted the phrase "sex, sexual orientation, gender identity, or national origin" for each and every instance of the phrase "sex or national origin" in implementing regulations.[64] Prior to EO 13672, Federal contractors and subcontractors were prohibited only from discrimination on the bases of "race, color, religion, sex, and national origin" and were merely required "to take affirmative measures to prevent discrimination on those bases from occurring." [65] As enforced by the Office of Federal Contract Compliance Programs (OFCCP), which is a civil rights and worker protection agency, EO 13672 requires that Government agencies "insert into all covered contracts" and prime contractors "insert into covered subcontracts" the "Equal Opportunity Clause" that includes the addition of sexual orientation and gender identity to the prohibited bases of discrimination.[66]

However, the advancement exhibited by President Obama's Executive Order was short-lived. Within his first few months in office, President Donald J. Trump's administration actively reversed any progress made by issuing a rare Executive Department amicus brief in support of the Defendant employer in *Zarda v. Altitude Express* who was being sued by a gay skydiving ex-employee alleging sexual orientation

[59] "SONDA" (Sexual Orientation Non-Discrimination Act) of New York State https://ag.ny.gov/civil-rights/sonda-brochure.

[60] "SONDA" (Sexual Orientation Non-Discrimination Act) of New York State https://ag.ny.gov/civil-rights/sonda-brochure.

[61] "SONDA" (Sexual Orientation Non-Discrimination Act) of New York State https://ag.ny.gov/civil-rights/sonda-brochure.

[62] Exec. Order No. 11246, 30 F.R. 12319 (Sept. 28, 1965).

[63] Richard Nixon: "Executive Order 11478 – Equal Employment Opportunity in the Federal Government," Aug. 8, 1969. Online by Gerhard Peters and John T. Woolley, The American Presidency Project. http://www.presidency.ucsb.edu/ws/?pid=59072.

[64] Exec. Order No. 13672, 79 F.R. 42,971 (July 23, 2014).

[65] Exec. Order No. 11246, 30 F.R. 12319 (Sept. 28, 1965).

[66] Implementation of Executive Order 13672 Prohibiting Discrimination Based on Sexual Orientation and Gender Identity by Contractors and Subcontractors, codified at 41 C.F.R. pts. 60-1, 60-2, 60-4, 60-50 (2014).

discrimination.[67] As best summarized by *The New York Times*: "The department's move to insert itself into a federal case in New York was an unusual example of top officials in Washington intervening in court in what is an important but essentially private dispute between a worker and his boss over gay rights issues."[68] In its brief, Trump's DOJ declared that "sex discrimination does not encompass bias based only on sexual orientation."[69] To support its argument, Trump's DOJ included an attachment to the brief providing a list of "Proposed Legislation from 1974 To Present That Would Ban Employment Discrimination Based On Sexual Orientation."[70] The response published by the Obama Administration's Attorney General, Eric Holder, gained wide dissemination via Twitter.[71] Equally strong was the response of the American Civil Liberties Union to the DOJ brief.[72] As evidence of the impact of the amicus brief, Westlaw's Tricia Gorman quoted Shannon Farmer, a partner at a prominent Philadelphia law firm representing employers, as saying the move by Trump's DOJ "'could impact both the Supreme Court's willingness to weigh in on the issue and the Supreme Court's ultimate view of the cases, assuming it takes up the issue.'"[73]

The EEOC, first-referenced above, is the administrative agency responsible for the enforcement of federal laws making it illegal to discriminate against a job applicant, or employee, on the basis of "race, color, religion, sex (including pregnancy, gender identity, and sexual orientation), national origin, age (40 or older), disability or genetic information."[74] In 2015, the EEOC announced its 3-2 decision in *Baldwin v. Foxx*[75], holding that "sexual orientation is inherently a 'sex-based consideration,'" and an allegation of discrimination based on sexual

67 *Zarda v. Altitude Express*, No. 15-3775, *amicus brief filed*, 2017 WL 2730281 (2d Cir. June 23, 2017).

68 Alan Feuer, "Justice Department Says Rights Law Doesn't Protect Gays," THE NEW YORK TIMES (July 27, 2017), *available at* https://www.nytimes.com/2017/07/27/nyregion/justice-department-gays-workplace.html.

69 *Zarda v. Altitude Express*, No. 15-3775, *amicus brief filed*, 2017 WL 2730281 (2d Cir. June 23, 2017).

70 *Id*. at Attachment A.

71 Eric Holder (EricHolder), TWITTER (July 26, 2017, 12:30 PM), https://twitter.com/EricHolder/status/890655533216092160. ("Trump team within 24 hours reverses Obama DOJ positions for gays seeking employment and trans people seeking to serve. This is 2017 not 1617.").

72 Alan Feuer, "Justice Department Says Rights Law Doesn't Protect Gays," THE NEW YORK TIMES (July 27, 2017), *available at* https://www.nytimes.com/2017/07/27/nyregion/justice-department-gays-workplace.html. ("The American Civil Liberties Union called the brief 'a gratuitous and extraordinary attack on L.G.B.T. people's civil rights.'").

73 Tricia Gorman, "DOJ brief opposing Title VII protection for gay workers is significant, attorneys say," WESTLAW JOURNAL EMPLOYMENT (August 15, 2017), *available at* https://www.littler.com/files/wlj_emp3202_dojarticle.pdf.

74 Equal Employment Opportunity Commission, *Overview*, WWW.EOC.GOV (last visited February 1, 2018) https://www.eeoc.gov/eeoc/.

75 *Baldwin v. Foxx*, No. 0120133080, 2015 WL 4397641 (E.E.O.C. July 15, 2015).

orientation is necessarily an allegation of sex discrimination under the Civil Rights Act of 1964, Title VII.[76] The scope of the Baldwin decision is universal in the world of sexual orientation discrimination, as the EEOC approved per se, associational, and stereotyping theories of sexual orientation-based sexual discrimination.[77] In terms of per se sexual orientation discrimination, the EEOC in Baldwin explained that "sexual orientation as a concept cannot be defined or understood without reference to sex."[78] In approving sexual orientation discrimination as associational sex discrimination, the EEOC was referring to when an employee is fired for being gay, the employer necessarily considered the sex of the persons with whom the plaintiff associated or dated.[79] The EEOC approved stereotyping theories of sexual orientation as constituting illegal sexual discrimination under Title VII in Baldwin, referring to the pioneering analytical approach of Professor Sylvia Law[80]:

> "Homosexual relationships challenge dichotomous concepts of gender. These relationships challenge the notion that social traits, such as dominance and nurturance, are naturally linked to one sex or the other. Moreover, those involved in homosexual relations implicitly reject the social institutions of family, economic and political life that are premised on gender inequality and differentiation."

While EEOC decisions are not binding on federal courts, the highly persuasive nature of this holding in federal courts cannot be overstated.[81] Since its announcement in July 2015, federal courts have cited Baldwin extensively for the proposition that Title VII's prohibition of sex discrimination includes a prohibition on sexual orientation discrimination.[82] In addition, another federal court in December 2015 cited Baldwin when reasoning that, under Title IX, the distinction between sex and sexual orientation "is illusory and artificial, and that sexual orientation discrimination is not a category distinct from sex or gender discrimination."[83] Defined as treating someone differently based solely on his or her real or perceived sexual orientation, sexual orientation discrimination may occur because of "others' perception of someone's orientation, whether that perception is correct or not" or "based on an

76 *Id*. at 5.

77 *Id*.

78 *Baldwin v. Foxx*, No. 0120133080, 2015 WL 4397641, at *5 (E.E.O.C. July 15, 2015).

79 Victoria Schwartz, "Title VII: A Shift from Sex to Relationship" 35 HARV. J.L. & GENDER 209, 212 (2012).

80 Sylvia A. Law, "Homosexuality and the Social Meaning of Gender" 1988 WIS. L. REV. 187, 196 (1988).

81 *See, e.g., Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)

82 *See, e.g., Roberts v. United Parcel Serv., Inc*., 115 F. Supp. 3d 344, 363 (E.D.N.Y. 2015).

83 *Videckis v. Pepperdine University*, No. CV 15-00298 DDP (JCx), 2015 WL 8916764, at *5 (C.D. Cal. Dec. 15, 2015).

individuals' association with someone of a different sexual orientation."[84] Despite the adherence of some federal courts to the Baldwin holding, some courts have explicitly declined to follow the EEOC ruling "until the Supreme Court recognizes the opinion expressed in the EEOC's decision as the prevailing legal opinion."[85]

A recent Seventh Circuit decision, analyzing a pivotal line of sex discrimination cases including *Baldwin*[86]*, Price Waterhouse*[87]*,* and *Oncale*[88], held that an individual may assert a claim of sexual harassment,[89] The case arose from a homosexual female Highway Technician in Ohio who experienced discrimination against her on the basis of gender and sexual orientation when she was repeatedly referred to as the "bathroom bitch" as a result of raising concerns about the cleanliness of the company lavatories, demeaned and criticized by male coworkers when she worked with a chainsaw, and ostracized and isolated after returning from administrative leave forced upon her after she filed a claim with the EEO.[90] The court recognized the Supreme Court's *Price Waterhouse* decision that discrimination on the basis of sex stereotyping or gender-non-conforming behavior constitutes a viable Title VII claim.[91] In disagreeing with the argument that *Baldwin* should not distract from binding circuit precedent declining to recognize sexual orientation as a protected class, the Spellman court noted that the only Seventh Circuit case that has considered the *Baldwin* decision vacated at the time the defendant in Spellman filed a motion for summary judgment.[92] As a result, the *Spellman* court found no reason not to consider *Baldwin* as persuasive.[93] Finally, the court in *Spellman* settled on *Oncale* as being particularly relevant and especially persuasive "in the context of a sexual harassment claim" because of Justice Scalia's explanation that "discrimination is usually easiest to infer in the male-female context because 'the challenged conduct typically involves explicit or implicit proposals . . . [that] reasonabl[y]… would not have been made to someone of the same sex.'"[94]

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84 "Your Rights Sexual Orientation Discrimination" Workplace Fairness (last visited Oct. 1, 2017) https://www.workplacefairness.org/sexual-orientation-discrimination#2.

85 Trudy Ring,"EEOC Files First Suits Challenging Sexual Orientation Discrimination" ADVOCATE (Mar. 1, 2016, 5:24 PM), *available at* https://www.advocate.com/business/2016/3/01/eeoc-files-first-suits-challenging-sexual-orientation-discrimination.

86 *Baldwin v. Foxx*, No. 0120133080, 2015 WL 4397641 (E.E.O.C. July 15, 2015).

87 *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

88 *Oncale v. Sundowner Offshore Servs*., Inc., 523 U.S. 75 (1998).

89 *Spellman v. Ohio Dept. of Trans*., 244 F. Supp. 3d 686, 698-699 (S.D. Ohio 2017).

90 *Spellman v. Ohio Dept. of Trans*., 244 F. Supp. 3d 686, 691-697 (S.D. Ohio 2017).

91 *Id*. at 698.

92 *Id*. at 698-699.

93 *Id*.

94 *Id*. at 699 (quoting Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998)).

The Seventh Circuit case referred to in Spellman, *Hively v. Ivy Tech Community College*, ultimately held that the 1964 Civil Rights Act protects gays from workplace discrimination.[95] This landmark decision took a fresh look at the federal prohibition against sex discrimination to determine whether it excludes or includes discrimination on the basis of a person's sexual orientation, considering that the Supreme Court has yet to speak to that question.[96] The Seventh Circuit Court of Appeals in Hively noted that the panel of the Seventh Circuit sensed the demise of precedents holding against the inclusion of sexual orientation to Title VII's sexual discrimination, and felt the panel "did not feel empowered to translate that message into a holding. 'Until the writing comes in the form of a Supreme Court opinion or new legislation.'"[97] The *Hively* Court of Appeals, "in light of the importance of the issue" recognized "the power of the full court to overrule earlier decisions and to bring our law into conformity with the Supreme Court's teachings . . . "[98] Impactful on the *Hively* court's decision was the Supreme Court's analysis in *Oncale*, where "[t]he Court could not have been clearer: 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."[99] The *Hively* court considered *Baldwin* persuasive because the EEOC is "the agency most closely associated with this law," and "the Commission's position may have caused some in Congress to think that legislation is needed to carve sexual orientation out of the statute, not to put it in."[100]

The modern interpretations of courts like the Seventh Circuit that the Civil Rights Act of 1964 includes protection against sexual orientation discrimination may conflict with the current Executive administration's viewpoint on this issue, but as the relevance and importance of combating sexual orientation discrimination continues to emerge, the Supreme Court is primed to resolve the dispute regarding the scope of Title VII. Should the inclusion of sexual orientation discrimination within the boundaries of Title VII become more concrete, employers will be forced to more adequately confront harassment claims resulting from this kind of discrimination. Within the entertainment industry, employers facing these discrimination claims may find that their First Amendment rebuttals now require stronger arguments to outweigh an individual's right to be protected against sexual orientation

95 *Hively v. Ivy Tech Community College*, 853 F.3d 339 (7th Cir. 2017).

96 *Id*. at 341.

97 *Id*. at 343 (quoting *Hively v. Ivy Tech Community College*, South Bend, 830 F.3d 698, 718 (7th Cir. 2016)(*en banc rehearing, opinion vacated*)).

98 *Hively v. Ivy Tech Community College*, 853 F.3d 339, 343 (7th Cir. 2017).

99 *Hively v. Ivy Tech Community College*, 853 F.3d 339, 345 (7th Cir. 2017).

100 *Id*. at 344 (emphasis in original).

discrimination.

III. OPTIONS TO COMBAT SEXUAL ORIENTATION AND STEREOTYPING DISCRIMINATION IN THE ENTERTAINMENT INDUSTRY

A corollary issue related to sexual orientation discrimination in the entertainment industry is the gross underrepresentation of the LGBT community in media programming. In an effort to measure this underrepresentation of LGBT characters the Comprehensive Annenberg Report on Diversity in Entertainment ("CARD") analyzes the quantity and quality of sexual diversity in entertainment.[101] The CARD report "assesses inclusion on screen and behind the camera in fictional films, TV shows, and digital series distributed by 10 major media companies."[102] For the year 2014, "the sample included 414 stories or 109 motion pictures and 305 broadcast, cable, and digital series."[103] CARD reported "only 2% of all speaking characters across the 414 movies, television shows, and digital series evaluated were coded LGB," compared to "3.5% of the U.S. population that identifies as Lesbian, Gay, or Bisexual."[104] Included among the shocking statistics was that there were "[o]nly seven speaking or named characters identified as transgender," out of "the 11,194 characters that could be evaluated for apparent sexuality."[105] Notably, "[a]ll but one of the transgender characters appeared on streaming series" not available for public consumption without a subscription.[106] The conclusion of the 2016 CARD Report continues to be an accurate assessment of the lack of sexual diversity portrayed in the entertainment industry: "LGBT individuals are still underrepresented when it comes to film, television, and digital series."[107]

Not only are there an inadequate number of LGBT characters in entertainment mediums, but the few that exist are more often than not portrayed by straight actors. A recent effort to influence popular opinion of straight actors playing LGBT characters occurred in 2013 on *Salon*'s

101 Stacy L. Smith, Marc Choueiti, Katherine Pieper, "Inclusion or Invisibility: Comprehensive Annenberg Report on Diversity in Entertainment" USC ANNENBERG (Feb. 22, 2016), *available at* http://annenberg.usc.edu/sites/default/files/2017/04/07/MDSCI_CARD_Report_FINAL_Exec_Summary.pdf.

102 *Id*.

103 *Id*.

104 *Id*. at 11.

105 *Id*. at 11.

106 *Id*. at 11.

107 *Id*. at 11.

website: "Are straight actors in gay roles the new blackface?"[108] Christopher Kelly's article sums up the cultural landscape by stating,

> "[T]hese days 'gay-themed entertainment' can range from lowbrow face like 'The New Normal,' to middlebrow Oscar bait like 'Milk,' to highbrow art cinema like the recent Cannes Film Festival winner 'Blue Is the Warmest Color.'"[109]

The article notably points out the "goggle-eyed attention to queer stereotype (flowing fur coats! bejeweled jockstraps!) and prurient detail . . . "[110] In reference to Sean Penn's role at Harvey Milk and Colin Firth's portrayal of a closeted professor in *A Single Man*, Mr. Kelly articulates that "[t]hese actors capture the looks, sounds and movements of their gay characters, but barely seem to scratch the surface of the depths of anguish, self-hatred and fear these men must have known in their lifetimes."[111] Mr. Kelly analogizes the standards of "gay face" to "blackface" by saying, "Instead of extolling straight artists for taking creative risks by going gay, we need to be holding them to higher-than-normal standards – the way, say, we do when contemporary white actors employ black face, a la Robert Downey, Jr. in "Tropic Thunder."[112] Kelly goes on to specify: "If you are going to go there, you better have a good reason, and your execution can leave little room for insensitivity of caricature."[113] The article ends with the hope for "a world where gay actors are considered first and foremost for parts."[114]

Advocates of the LGBT community have turned to the press to attempt to assert pressure to cast more LGBT actors in LGBT roles by pointing out to the public the numerous instances where actors portrayed "gay face" and providing explanations as to why this trend is problematic. One explanation offered by *Flavorwire*'s Tyler Coates, who put together a list of 20 roles representing only 12 movies and two television shows, is that "roles for LGBT characters tend to be grouped together . . . [with] so many popular, award-winning gay roles for straight actors and so few for gay actors" and that "Hollywood doesn't offer much variety for strong, believable, or sympathetic gay characters . . . unless they are dead by the end of the film, as in Philadelphia, Milk, Behind the Candelabra, Boys Don't Cry, and Brokeback Mountain."[115]

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[108] Christopher Kelly, "Are Straight Actors in Gay Roles the New Blackface?" WWW.SALON.COM (June 12, 2013, 4:15 PM), https://www.salon.com/2013/06/12/stop_praising_straight_actors_for_playing_gay_roles/.

[109] *Id.*

[110] *Id.*

[111] *Id.*

[112] *Id.*

[113] *Id.*

[114] *Id.*

[115] Tyler Coates, "The Problem with Celebrating Straight Actors in Gay Roles" FLAVORWIRE.COM (May 29, 2013) http://flavorwire.com/394372/the-problem-with-celebrating-

In 2015, *Nylon* Magazine asked: "Why are there so many straight actors playing gay characters? And is it ok?"[116] The *Nylon* article recognized an effort by GLAAD to "hold studios accountable for what their films depict" by creating the Studio Responsibility Index (SRI) in 2013, which "track[s] the quality and quantity of lesbian, gay, bisexual, and transgender (LGBT) representations in mainstream Hollywood film." In considering the 114 films tracked in 2015, "only 20 (17.5%) included depictions of LGBT characters."[117] Most relevant to the issue of sexual orientation discrimination, the *Nylon* article points out that[118]:

> "[t]he fact that stereotypes of what is means to look or sound gay are unreliable, yet still relied upon by straight and queer people alike, speaks subtly to the double standard that exists in Hollywood, wherein straight actors playing queer . . . insist that an actor's personal life and sexuality are irrelevant to the roles they play, and easily get cast as queer characters, but queer actors often feel anxious about revealing their sexuality, let is negatively influence their job opportunities."

This statement adds strength to the argument that the act of hiring straight actors in LGBT roles is sexual orientation stereotyping in itself – straight actors are conforming themselves to stereotypical attributes popularly thought of as "gay." That said, even in the event legislation passes explicitly making clear that sexual orientation stereotyping constitutes employment discrimination, claims cannot be brought by LGBT actors who were not cast. Instead, and improbably, such claims must be brought by straight actors alleging that the duties asked of them by their employers improperly forced them to conform to stereotyping. It is nearly impossible to think of a straight actor, who receives money, and frequently accolades, to play an LGBT character, bringing a claim of employment discrimination into the court system.

Within the last few years, a couple high-profile theatrical productions featuring LGBT characters faced external pressure to include LGBT actors among their casts. Southern Comfort, a musical produced Off-Broadway by the world-renowned Public Theater (originators of *A Chorus Line*, and more recently *Hamilton*), told the true-life story of Robert Eads, who was a transgender man who died of ovarian cancer because he could not find a doctor willing to treat him. After embarking on a nationwide casting call, The Public Theater announced it had found two transgender actors "out of 130 submissions."[119] However, those two

straight-actors-in-gay-roles.

116 Vanessa Friedman, "Why Are There So Many Straight Actors Playing Gay Characters?" NYLON MAGAZINE (Nov. 23, 2015), *available at* https://nylon.com/articles/is-playing-gay-ok.

117 *Id.*

118 *Id.*

119 Diep Tran, "Trending Now: The Trans* Experience," American Theatre (Feb. 4, 2016), *available at* https://www.americantheatre.org/2016/02/04/trending-now-the-trans-experience/.

trans actors played smaller supporting roles in a cast featuring five trans characters.[120] Upon learning of the makeup of the cast of Southern Comfort, trans performer Taylor Edelhart released an open letter condemning The Public Theater for adding "fuel [to the] damaging notion that trans people aren't competent enough to tell their own community's stories."[121] The letter "garnered more than 300 signatures" and led The Public Theater to amend some institutional policies including training front-of-house staff to avoid gendered language, changing bathroom signs to open them up to non-gender-conforming individuals, and no longer labeling actors' costumes as "Mr." or "Miss."[122] Notably, none of the policy changes made by The Public Theater involved casting LGBT actors in LGBT roles.

The semi-biographical play Hir, by genderqueer performing artist Taylor Mac, features a character named Max who transitions into a male during the play. From the onset of the first production of *Hir* at Playwrights Horizons in New York, Mac was adamant that "the role of Max – a teenage transgender man . . . - be cast authentically."[123] Casting directors at Playwrights Horizons held open auditions looking for a young transgender male performer, but "only one person showed up."[124] Because of the playwright's insistence, the casting directors "took to Facebook and reached out to LGBT organizations."[125] When they attempted to post a casting notice on the widely-referenced *Backstage*, they hit a roadblock because *Backstage* did not provide a non-binary option to select the gender of a character. The staff at Playwrights Horizons teamed up with Taylor Mac to run a social media campaign that compelled *Backstage* to change its policies so that users "can now identify themselves as transgender (in all its configurations) or as 'unspecified,' and casting agents can now search for (and tag breakdowns with) transgender or 'unspecified' options."[126] Despite the casting process taking longer than normal and being more labor-intensive, the team was "ultimately able to bring in 25 actors to read for the part of Max."[127] The process was highlighted in *American Theatre Magazine*: "For the theatre it was a valuable exercise in flexibility and not being dependent on the traditional casting routes; it also expanded their acting pool."[128]

The LGBT community, and its advocates, appear to be amassing

120 *Id.*
121 *Id.*
122 *Id.*
123 *Id.*
124 *Id.*
125 *Id.*
126 *Id.*
127 *Id.*
128 *Id.*

small victories when it comes to increasing the number of LGBT characters in media programming and having those characters portrayed by LGBT actors. In the bigger picture, identifying the prevalence of "gay face" in the entertainment industry may be helpful to increase the general public's awareness of its negative societal impact. It remains to be seen whether this awareness will lead to increased pressure on media executives to amend their practices.

IV. HISTORICAL LOOK AT INTERSECTION OF PROTECTION FROM EMPLOYMENT DISCRIMINATION AND FIRST AMENDMENT CONSIDERATIONS

In its entirety, the First Amendment to the U.S. Constitution reads: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[129] (emphasis added). The First Amendment safeguards protected speech and expression from "private litigation, as well as from statutory restrictions and criminal penalties."[130] Included among the protected forms of expression are entertainment, television programs, and dramatic works.[131] As a result, various aspects of the entertainment industry receive protection from the First Amendment against restrictions found in statutes like the Civil Rights Act of 1964. To determine whether First Amendment protection of an expression trumps federal law, a court must engage in a test "scrutiniz[ing] the governmental interests furthered by the regulation" and the narrowness of the regulation "to avoid an unnecessary intrusion on freedom of expression."[132] This test is frequently referred to by federal courts as the strict scrutiny test and is used primarily when there is a fundamental right being regulated by government and when certain suspect classifications are involved, such as race.

Over the course of the nation's history, the Supreme Court has provided significant, yet incomplete, guidance regarding the extent to which the First Amendment protects the freedom of expression. A 1974 decision expanded the protection of free speech provided by the First Amendment to include expressive conduct that contains "an intent to

129 U.S.C.A. Const. Amend. 1.

130 *Claybrooks v. Am. Broad. Cos., Inc.*, 898 F. Supp. 2d 986, 992-93 (M.D. Tenn. 2012) (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 277-78 (1964); NAACP v. Claiborne Hardware Co., 458 U.S. 886, 916 n. 51 (1982)).

131 *Claybrooks v. Am. Broad. Cos., Inc.*, 898 F. Supp. 2d 986, 993 (M.D. Tenn. 2012) (*citing Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981)).

132 *United States v. O'Brien*, 391 U.S. 367, 367-77 (1968).

convey a particularized message present, and . . . [a] great [likelihood] that the message would be understood by those who viewed it."[133] The 1981 Supreme Court decision in *Schad v. Borough of Mount Ephraim* cited principles that further clarify the protection of the entertainment industry: "entertainment, as well as political and ideological speech, is protected" by the First Amendment; and "motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works fall within the First Amendment guarantee."[134] These legal principles made clear that the work product of the entertainment industry contains constitutionally protected forms of expression. For purposes of this article, it is necessary to understand how courts interpret the interaction between protected forms of expression and statutory regulations at various levels, which, as applied to speech or expression, could be in violation of First Amendment rights.

The jurisprudence of the Supreme Court provides conflicting viewpoints on the appropriate interpretation of this interaction. In 1973, the Court determined that a newspaper publisher's claim that a regional regulation violated the publisher's First Amendment rights by requiring employment ads to have no reference to sex was without merit.[135] In this instance, the Court found that the regulation was properly justified by legitimate governmental interests, and was written with sufficient narrowness, to appropriately restrict the publisher from including employment ads that expressly preferred a certain sex. This decision is particularly relevant when considering whether casting notices may include among its qualifications race and sex – as was analyzed at great length in a recent article by Kathleen A. Tarr, which highlighted employment discrimination in the hiring practices of the entertainment industry.[136]

In *FCC v. WNCN Listeners Guild* (1981), the Court considered the First Amendment implications of an FCC policy statement that advocated that promoting diversity in entertainment is a goal best served through market forces and competition, and not through programming changes, which would make diversity a consideration in ruling on applications for license renewal/transfer.[137] SCOTUS decided that such a statement was consistent with the Communications Act and, moreover, does not conflict

133 *Spence v. Washington*, 418 U.S. 405, 410-11 (1974).

134 *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981) (*citing Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952); *Schacht v. United States*, 398 U.S. 58 (1970); *Southeastern Productions, Ltd. V. Conrad*, 420 U.S. 546 (1975); *Jenkins v. Georgia*, 418 U.S. 153 (1974); *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975); *Doran v. Salem Inn, Inc*., 422 U.S. 922 (1975).

135 *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973).

136 Kathleen A. Tarr, "Bias and the Business of Show Employment Discrimination in the 'Entertainment' Industry," 51 U.S.F. L. REV. F. 1 (2016).

137 *FCC v. WNCN Listeners Guild*, 450 U.S. 582 (1981).

with the First Amendment.[138] What is most intriguing about this decision is that the Court ultimately enables the entertainment industry to continue having wide latitude in not creating programming that promotes diversity. Rather, in ruling for the FCC, the Court encourages the notion that governmental regulation should not, in any way, restrict the creative process for the entertainment industry; instead such restriction will have to come from market forces and competition, which can only use its ratings power once a program has already come to fruition. Popular consumption cannot affirmatively dictate what they see on television or movies – they can only advocate what they do not wish to view in light of the available programming options. Should the entertainment industry never put forth diversity values in its programming, viewers can never voice their approval of the inclusion of diversity.

As of 2012, stare decisis dictated that determining the validity of an intersection of governmental regulation and First Amendment rights require one of two inquiries. If the court deems the expression to fall into the category of incitement speech, it will apply a speech-protective test first put forth in *Brandenburg v. Ohio*[139], under which "[s]ubversive speech is protected regardless of whether the restriction is narrowly tailored to a compelling interest."[140] Outside of cases involving incitement language, the most stringent level of review is strict scrutiny and applies when the expression is evidence of a fundamental, inherent right protected explicitly by the Constitution, which includes the categories of political and religious speech.[141] Applying strict scrutiny review necessarily requires that any infringing statute must be a result of a legitimate governmental interest and must be narrowly written to restrict the least amount of expression protected by the First Amendment. If the court deems the expression to be of lesser value – either merely loosely protected or not protected at all (including obscenity) – the court will apply a rational basis standard of review for the applicable governmental regulation, which requires only that the statute be reasonably related to a governmental interest.[142] Alternatively, in determining whether a statute that generally restricts speech violates the First Amendment's right to free expression, the Supreme Court advocates for the use of an "intermediate scrutiny" standard.[143] As explained in the 2012 Supreme Court case of *United States v. Alvarez*, the intermediate test examines the fit between statutory ends and means, taking into

138 *FCC v. WNCN Listeners Guild*, 450 U.S. 582 (1981).

139 *Brandenburg v. Ohio*, 395 U.S. 444, 447-48 (1969).

140 Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417, 2445 (1996)

141 Neel Sukhatme, *Making Sense of Commercial Speech*, 118 HAR. L. REV. 2836 (2005).

142 *See* Frederick Shauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1775-76 (2004).

143 *United States v. Alvarez*, 132 S. Ct. 2537, 2552 (2012).

account "the seriousness of the speech-related harm the provision will likely cause, the nature and importance of the provision's countervailing objects, the extent to which the provision will tend to achieve those objectives, and whether there are other, less restrictive ways of doing so."[144]

The second inquiry that courts have applied to claims resulting from the intersection of governmental regulation and rights protected by the First Amendment is the "time, place, or manner" test. Initially developed for evaluating restrictions on expression taking place on public property,[145] SCOTUS has once applied test to conduct occurring on private property. [146] The test, as originally established in *Cox v. New Hampshire* in 1941, provides that although the government cannot regulate the contents of speech, it can place reasonable time, place and manner restrictions on speech for public convenience.[147] For purposes of this article, the "time, place, or manner" test has not yet been applied to cases arising from the entertainment industry. Given the reliance of the test on evaluations on public property, it is unclear how courts would interpret the test as applied to media outlets, which are not necessarily strictly reserved to the public or private arenas.

The final option available to courts when analyzing the legality of a governmental regulation that restricts rights guaranteed by the First Amendment is the Four-Part O'Brien test created by the Supreme Court in 1968.[148] The case arose as a result of O'Brien burning his draft card on the steps of a courthouse, which violated a federal regulation that made the destruction of draft cards a criminal prohibition.[149] The Court held that the criminal legislation's restriction on the burning of draft cards, an exercise of free expression, did not violate the First Amendment based on a four-part test analyzing the legitimacy of the governmental regulation.[150] This test deems a governmental regulation as sufficiently justified if: (1) it is within the constitutional power of the U.S. Government; 2) it furthers an important and substantial governmental interest; 3) the governmental interest is unrelated to suppression of free expression; 4) any incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[151] To date, the Court has never had the opportunity to apply this test to a federal statute like the Civil Rights Act of 1964[152] that, in some

144 *United States v. Alvarez*, 132 S. Ct. 2537, 2552 (2012).
145 *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).
146 *Renton v. Playtime Theatres, Inc*., 475 U.S. 41 (1986).
147 *Cox v. New Hampshire*, 312 U.S. 569, 576 (1941).
148 *United States v. O'Brien*, 391 U.S. 367 (1968).
149 *United States v. O'Brien*, 391 U.S. 367 (1968).
150 *United States v. O'Brien*, 391 U.S. 367 (1968).
151 *United States v. O'Brien*, 391 U.S. 367, 367-77 (1968).
152 Pub. L. No. 88-352, 78 Stat. 241, 253-266 (codified as amended at 42 U.S.C. §2000e-2a

instances, infringes on an individual's right to freedom of expression, as exemplified by the creation of entertainment programming.

The most relevant judicial interpretation of the intersection between First Amendment considerations and casting decisions in the entertainment industry occurred in 2012 in a state federal court in Tennessee.[153] *Claybrooks v. Am. Broad. Cos., Inc* signified the first time a federal court examined how to resolve First Amendment rights and antidiscrimination laws in the context of casting decisions, and more specifically, dealt with casting decisions in reality television programming. At issue in *Claybrooks* is the tension between two competing federal interests: (1) "federal statutory interest in preventing racial discrimination in the formation of contracts (as embodied in 42 U.S.C. §1981)[154]; and (2) federal constitutional First Amendment right to freedom of speech.[155]"[156] Two African-American actors brought the action, on behalf of a collection of racially diverse actors, alleging that the casting directors of two hit shows *The Bachelor* and *The Bachelorette*, produced by the American Broadcasting Companies ("ABC"), engaged in racial discrimination as evidenced by the extreme disparity of diverse actors in the franchise's long history.[157] Specifically, the actors described the actions of ABC as "examples of purposeful segregation in the media that perpetuates racial stereotypes and denies persons of color of opportunities in the entertainment industry."[158]

The court's reasoning provides important implications for the future of this area of law. For one, the court declared that §1981 "regulates speech based on its content – i.e., the race(s) of the Shows' respective cast members – which implicates strict scrutiny," for which the court cites two instructive cases: *United States v. Playboy Entm't Grp., Inc* and *Netherland v. City of Zachary, La*.[159] As a result of the determination that the actions of the defendants constitute expression protected by the First Amendment, the court justifies the use of strict scrutiny review, which triggers the requirement that plaintiffs show that "applying §1981 here would (1) advance a compelling government interest; and (2) is narrowly tailored to serve that interest."[160] The purposely insurmountable task of proving that a statute should survive strict scrutiny review ultimately led to the court holding that the First Amendment rights of ABC trump the rights of plaintiffs under §1981. Using the Supreme Court case of *Hurley*

(2012)).

153 *Claybrooks v. Am. Broad. Cos.*, 898 F. Supp. 2d 986 (M.D. Tenn 2012).

154 42 U.S.C. §1981(a) (2012).

155 U.S.C.A. Const. Amend. 14.

156 *Claybrooks v. Am. Broad. Cos.,* 898 F. Supp. 2d 986, 992 (M.D. Tenn 2012).

157 *Claybrooks v. Am. Broad. Cos*., 898 F. Supp. 2d 986 (M.D. Tenn 2012).

158 *Claybrooks v. Am. Broad. Cos*., 898 F. Supp. 2d 986, 990 (M.D. Tenn 2012).

159 *Claybrooks v. Am. Broad. Cos*., 898 F. Supp. 2d 986, 993 (M.D. Tenn 2012).

160 *Claybrooks v. Am. Broad. Cos*., 898 F. Supp. 2d 986, 993 (M.D. Tenn 2012).

v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston[161], the *Claybrooks* court applied the general principle articulated in *Hurley* that "under appropriate circumstances, anti-discrimination statutes of general applicability must yield to the First Amendment."[162]

The assertion of the court, that casting decisions constitute protected expression to the point of invoking strict scrutiny review, resulted from a lengthy discussion grappling with the scope of First Amendment expression rights in the entertainment industry, in light of the absence of precedent applying the First Amendment to casting decisions.[163] In utilizing analysis of first impression, the court discussed whether casting decisions are within the protective boundaries of the First Amendment, based on relevant First Amendment principles.[164] Most impactful were the conflicting ideas presented by two Supreme Court cases: (1) that conduct constitutes protected speech if it is "sufficiently imbued with elements of communication to fall within [the First Amendment's] scope;"[165] and (2) that "it is possible to find some kernel of expression in almost every activity a person undertakes . . . but such a kernel is not sufficient to bring the activity within the protection of the First Amendment."[166] The court ultimately finds that the role of casting decisions in creating the final work product is such that First Amendment protection is warranted to ensure that "rather like a composer, the defendants are entitled to select the elements (here, cast members) that support whatever expressive message the Shows convey or are intended to convey."[167] The final statement by the court asserts a rather divisive view of the relationship between the promotion of diversity, "to eradicate outdated racial taboos," and the strength of the First Amendment in "prevent[ing] the plaintiffs from effectuating these goals by forcing the defendants to employ race-neutral criteria in their casting decisions . . . "[168]

A comprehensive article from the *Vanderbilt Journal of Entertainment and Technology Law* discussed this case in great detail and ultimately focuses on the likelihood that the court would have come to a different decision had the status of actors being considered for entertainment programs been as employees, instead of independent contractors.[169] As previously mentioned in reference to the article by

161 *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557 (1995).
162 *Claybrooks v. Am. Broad. Cos*., 898 F. Supp. 2d 986, 995 (M.D. Tenn 2012).
163 *Claybrooks v. Am. Broad. Cos*., 898 F. Supp. 2d 986 (M.D. Tenn 2012).
164 *Claybrooks v. Am. Broad. Cos*., 898 F. Supp. 2d 986, 996 (M.D. Tenn 2012).
165 *Spence v. Washington*, 418 U.S. 405, 409-10 (1974).
166 *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989).
167 *Claybrooks v. Am. Broad. Cos*., 898 F. Supp. 2d 986, 999 (M.D. Tenn 2012) (*citing Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 574 (1995)).
168 *Claybrooks v. Am. Broad. Cos*., 898 F. Supp. 2d 986, 1000 (M.D. Tenn 2012).
169 Erin A. Shackelford, *An Immovable Object and an Unstoppable Force*, 17 VAND. J. ENT. &

Kathleen Tarr, considering actors as employees would force courts to re-evaluate the interaction of employment discrimination laws and freedom of expression protections.[170] The new analysis may lead courts to determine that the power of the First Amendment to protect expression in the entertainment industry cannot usurp the protective power of legislation aimed at preventing discriminating practices of employers.[171]

The inability of employment discrimination claims to survive judicial review against First Amendment protections is best-identified in a 2002 American Civil Liberties Union article on *Freedom of Expression in the Arts and Entertainment*.[172] The article summarized the issue as follows[173]:

> "SCOTUS requires a strong justification before the government may interfere with or regulate the content of artistic expression. Historically, the right to freedom of speech and artistic expression has been given wide latitude by the courts and has been interpreted quite broadly, with a few choice exceptions. Two principles come into play when courts deal with a challenge to the right of artistic expression – content neutrality and direct and imminent harm."

As exemplified by the jurisprudence discussed in this section, the only exceptions to the deference given to the right to freedom of expression has occurred in the instance of overt sex-based discrimination in the publishing of employment ads[174], when safety is jeopardized on public property[175], and in pursuit of protecting against public indecency[176].

V. CONCLUSION

The issue of sexual orientation discrimination in employment settings currently resides on the periphery of the general public's conscious despite its significant pervasiveness. Even though the Civil Rights Act of 1964's Title VII protects against discrimination "because

TECH. L. 781 (Spring 2015).

170 Kathleen A. Tarr, "Bias and the Business of Show Employment Discrimination in the 'Entertainment' Industry," 51 U.S.F. L. REV. F. 1 (2016).

171 Erin A. Shackelford, *An Immovable Object and an Unstoppable Force*, 17 VAND. J. ENT. & TECH. L. 781 (Spring 2015)(This article considers the creation of an exception to protection under the First Amendment, created for casting decisions in race- and gender-neutral reality television programming).

172 *Freedom of Expression in the Arts and Entertainment*, AM. CIVIL LIBERTIES UNION (Feb. 27, 2002), https://www.aclu.org/free-speech/freedom-expression-arts-and-entertainment

173 *Freedom of Expression in the Arts and Entertainment*, AM. CIVIL LIBERTIES UNION (Feb. 27, 2002), https://www.aclu.org/free-speech/freedom-expression-arts-and-entertainment

174 *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973).

175 *Renton v. Playtime Theatres, Inc*., 475 U.S. 41 (1986).

176 *Barnes v. Glen Theatre, Inc*., 501 U.S. 560 (1991).

of sex,"[177] various governmental bodies interpret Title VII as not extending to discrimination because of sexual orientation. Evidenced by the Trump administration's amicus brief for an employment discrimination case,[178] the current stance of the Executive branch is that the protection of the LGBT community from harassment is not a priority of the federal government. Despite the advancement of New York's SONDA[179], the *Hively*[180] and *Zarda*[181] court cases, and the EEOC's ruling in Baldwin,[182] there is no firm precedent in existence adequately protecting against sexual orientation discrimination. Until the U.S. Supreme Court takes up the issue, the court system will continue to be divided as to whether to include sexual orientation under Title VII protections.

When it comes to sexual orientation discrimination in the entertainment industry, the LGBT community is entirely dependent on the inclusion of protection from the federal government. Without the backing of the nation's top decisionmakers, there is absolutely no chance that LGBT actors could succeed on a discrimination claim in the court system considering how deferential the courts are to the First Amendment's freedom of expression rights asserted by producers and directors who make casting decisions. Even if a harassed employee has the support of federal law on their side, the *Claybrooks* federal court showed that, in the context of casting decisions, First Amendment rights prevail.[183] In the current culture, the most effective tool for the LGBT community in the entertainment sector is social campaigns aimed at asserting pressure and providing concrete policy concerns associated with the practice of casting straight actors in LGBT roles.

177 Pub. L. No. 88-352, 78 Stat. 241, 253-266 (codified as amended at 42 U.S.C. §2000e-2a (2012)).

178 *Zarda v. Altitude Express*, No. 15-3775, *amicus brief filed*, 2017 WL 2730281 (2d Cir. June 23, 2017).

179 "SONDA" (Sexual Orientation Non-Discrimination Act) of New York State https://ag.ny.gov/civil-rights/sonda-brochure.

180 *Hively v. Ivy Tech Community College*, 853 F.3d 339, 345 (7th Cir. 2017).

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

182 *Baldwin v. Foxx*, No. 0120133080, 2015 WL 4397641 (E.E.O.C. July 15, 2015).

183 *Claybrooks v. Am. Broad. Cos*., 898 F. Supp. 2d 986 (M.D. Tenn. 2012). (Considered race-specific casting decisions in race- and gender-neutral reality television programming.)