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A Battle Over Statutory Interpretation:
Title VII and Claims of Sexual Orientation and Gender Identity Discrimination

I feel particularly honored to have my name associated with that of United States Senator Robert F. Wagner, Sr., NYLS Class of 1900, a hero of the New Deal whose legislative leadership gave us such important achievements as the National Labor Relations Act – commonly known among labor law practitioners as the Wagner Act – and the Social Security Act -- laws that have shaped our nation for generations. Senator Wagner was an immigrant who made an indelible mark on the United States. I hope that in some small way I have made a contribution that makes this named chair fitting.

I decided to select a topic for this talk that would bring together the two major areas of my teaching and scholarship: labor and employment law, and sexuality law. These intersect in the question whether Title VII of the Civil Rights Act of 1964, which bans employment discrimination against an individual because of his or her sex, will be open to claims by job applicants and workers that they have suffered discrimination because of their sexual orientation or gender identity. We are at a decisive point in the judicial battle over that question, having achieved just weeks ago the breakthrough of our first affirmative appellate ruling on the sexual orientation question, following several years of encouraging developments on the gender identity question.

To understand the significance of this, we have to go back more than half a century, to the period after World War II when the modern American gay rights movement began stirring with the protests of recent military veterans against unequal benefits treatment, with the formation of pioneering organizations like the Mattachine Society in Los Angeles and New York and The Daughters of Bilitis in San Francisco, and with the vital behind-the-scenes work undertaken by gay scholars as the great law reform effort of the Model Penal Code was being launched by the American Law Institute. That postwar period of the late 1940s and 1950s played out alongside the rise of the Civil Rights Movement, for which the passage of the Civil Rights Act of 1964 was a signal achievement.

The early gay rights advocacy groups had their lists of goals, and some kind of protection against discrimination was prominent among them, but that task seemed monumental, at a time when there was no federal statute prohibiting employment discrimination of any kind. Until Illinois adopted the Model Penal Code in 1960, which effectively repealed criminal sanctions for private consensual gay sex, it was a crime in every state; a serious felony with long prison sentences in many. President Dwight Eisenhower issued an executive order shortly after taking office banning the employment of “homosexuals” and “sexual perverts” in the federal civil service. A major immigration law passed during the 1950s for the first time barred homosexuals from immigrating to the U.S. and qualifying for citizenship by labeling us as being “afflicted by psychopathic personality,” making us excludable on medical grounds. The military barred gay people from serving on similar grounds, and many lines of work that required state licensing and

determinations of moral fitness systematically excluded LGBT people. To be an ‘openly gay’ lawyer or doctor was virtually unthinkable in the 1950s and on into the 1960s.

When Congress was considering the landmark civil rights bill, first introduced during the Kennedy Administration and shepherded into law by Lyndon Johnson, the idea that lesbians, gay men, bisexuals and transgender people might seek or obtain assistance rather than condemnation from Congress seemed a pipe dream. None of the legislators involved with the bill proposed protecting members of these groups from discrimination. Title VII, the provision of the bill dealing with employment discrimination, was limited in its original form to discrimination because of race or color, religion, or national origin. A floor amendment, introduced by Howard Smith of Virginia, a conservative Southern Democrat who was opposed to the bill, proposed to add “sex” to the prohibited grounds for discrimination. The amendment carried, the bill passed, and it went to the Senate where it was held up by one of the longest filibusters in history – at a time when filibusters involved unbroken floor debate by the opponents of a pending measure, with no vote on the merits until the Chamber was thoroughly exhausted and no opponent could be found to continue speaking. The leadership of the Senate, trying to avoid having the bill bottled up in committees headed by conservative senior Southern senators, had sent the bill direct to the floor with a tight limit on amendments. Thus committee reports that would have provided a source of legislative history on the meaning of “sex” in the bill are missing. The only floor amendment relating to the addition of “sex” to Title VII was to clarify that pay practices that were authorized under the Equal Pay Act, which had been passed the year before, would not be held to violate Title VII. The statute contained no definition of “sex,” and in the early years after its passage, the general view, held by the courts and the Equal Employment Opportunity Commission, was that the ban on sex discrimination simply prohibited employers from treating women worse than men – with little agreement about what that meant. In fact, in an early interpretive foray, the Supreme Court decided that Title VII did not prohibit discrimination against women because they became pregnant. The resulting public outcry inspired Congress to amend the statute to make clear that discrimination against a woman because of pregnancy or childbirth was considered to be discrimination because of sex.

Early attempts by gay or transgender people to pursue discrimination claims under Title VII all failed. The EEOC and the courts agreed that protecting people from discrimination because of their sexual orientation or transgender status was not intended by Congress. They embraced a literalistic “plain language” interpretation of Title VII, including a narrow biological understanding of sex.

But something began to happen as the courts considered a wider variety of sex discrimination claims. It became clear that a simplistic concept of sex would not be adequate to achieve the goal of equality of opportunity in the workplace. Legal theorists had been advancing the concept of a “hostile environment” as a form of discrimination, first focusing on the open hostility that many white workers showed to black, Latino and Asian workers in newly-integrated workplaces. During the 1970s the courts began to expand that concept to women who experienced hostility in formerly all-male workplaces as well. Lower federal courts were divided about whether such “atmospherics” of the workplace could be considered terms or conditions of employment when they didn’t directly involve refusals to hire or differences in pay or work assignments. Finally the Supreme Court broke that deadlock in 1986, holding in *Meritor Savings Bank v. Vinson* that

a woman who experienced workplace hostility so severe that it could be said to affect her terms and conditions of employment would have a sex discrimination claim under Title VII, and subsequent cases clarified that the plaintiff did not have to show a tangible injury, although a finding that working conditions were so intolerable that a reasonable person would quit would clearly meet the test of a hostile environment. Some courts began to extend this reasoning to complaints by men, in situations where male co-workers subjected them to verbal and even physical harassment.

The Court also began to grapple with the problem of sex stereotypes, and how easily employers and co-workers could fall into stereotyped thinking to the disadvantage of minorities and women. Stereotypes about young mothers' ability to balance work and home obligations, stereotypes about the ability of women to do physically challenging working, stereotypes about female longevity and the costs of retirement plans – all of these issues came before the Court and ultimately led it to expand the concept of sex discrimination more broadly than legislators of the mid-1960s might have imagined.

The key stereotyping case for building a theory of protection for sexual minorities was decided in 1989 – *Price Waterhouse v. Hopkins*. Ann Hopkins' bid for partnership was denied because some partners of the firm considered her inadequately feminine. They embraced a stereotype about how a woman partner was supposed to look and behave. Hopkins, with her loud and abrasive manner and appearance, failed to conform to that stereotype. Communicating the firm's decision to pass over her partnership application, the head of her office told her she could improve her chances for the next round by dressing more femininely, walking more femininely, toning down her speech, wearing make-up and jewelry, having her hair styled. Her substantial contributions to the firm and her leadership in generating new business counted for little, when decision-makers decided she was inadequately feminine to meet their expectations. In an opinion by Justice William J. Brennan, Jr., the Court accepted Hopkins' argument that allowing such considerations to affect the partnership decision could be evidence of a prohibited discriminatory motivation under Title VII. The Court's opinion embraced the idea that discrimination because of "gender," not just discrimination because of biological sex, came within the scope of Title VII's prohibition. The statutory policy included wiping away gender stereotypes that created barriers to equal opportunity for women in the workplace.

Although Ann Hopkins was not a lesbian and nothing was said about homosexuality in her case, the implications of the ruling became obvious over time as federal courts dealt with a variety of stereotyping claims. A person who suffered discrimination because she did not appear or act the way people expected a woman to appear or act was protected, and that sounded to lots of people like a description of discrimination against transgender people and some – but perhaps not all – lesbians, gay men and bisexuals. The argument seemed particularly strong when an employer discriminated against a person who was hired appearing and acting as a man and then began to transition to living life as a woman.

At the same time, legal academics had begun to publish theoretical arguments supporting the idea that discrimination against gay people was a form of sex discrimination. Among the earliest were Professor Sylvia Law of New York University, whose 1988 article in the *Wisconsin Law Review*, titled "Homosexuality and the Social Meaning of Gender," suggested that anti-gay

discrimination was about “preserving traditional concepts of masculinity and femininity. Law’s pioneering work was quickly followed by the first of many articles by Andrew Koppelman, first in a student note he published in the Yale Law Journal in 1988 titled “The Miscegenation Analogy: Sodomy Law as Sex Discrimination,” later in his 1994 article in the New York University Law Review titled “Why Discrimination Against Lesbians and Gay Men is Sex Discrimination.” Both Koppelman, now a professor at Northwestern University, and Law proposed theoretical arguments for treating anti-gay discrimination as sex discrimination.

Seizing upon the Price Waterhouse precedent, transgender people and gay people began to succeed in court during the 1990s by arguing that their failure to conform to gender stereotypes was the reason they were denied hiring or continued employment, desirable assignments or promotions. A strange dynamic began to grow in the courts, as judges repeated, over and over again, that Title VII did not prohibit discrimination because of sexual orientation or gender identity, as such, but that it did prohibit discrimination against a person because of his or her failure to conform to gender stereotypes and expectations, regardless of the plaintiff’s sexual orientation. Many of the courts insisted, however, that there was one gender stereotype that could not be the basis of a Title VII claim – that men should be attracted only to women, and women should be attracted only to men. To allow a plaintiff to assert such a claim would dissolve the line that courts were trying to preserve between sex stereotyping claims and sexual orientation or gender identity discrimination claims. Decades of past precedents stood in the way of acknowledging the unworkability of that line.

Ten years after the Price Waterhouse decision, the Supreme Court decided another sex discrimination case, *Oncale v. Sundowner Offshore Services*, with an opinion by Justice Antonin Scalia that helped to fuel the broadening interpretation of Title VII. The 5th Circuit Court of Appeals had ruled that a man who is subjected to workplace harassment of a sexual nature by other men could not bring a hostile environment sex discrimination claim under Title VII. The court of appeals reasoned that Congress intended in 1964 to prohibit discrimination against women because they were women or men because they were men, and that such a limited intent could not encompass claims of same-sex harassment, which would be beyond the expectations of the legislators who passed that law. In reversing this ruling, Justice Scalia, who was generally skeptical about the use of legislative history to interpret statutes, wrote for the Court that the interpretation of Title VII was not restricted to the intentions of the 1964 Congress. While conceding that same-sex harassment was not one of the “evils” that Congress intended to attack by passing Title VII, he wrote:

“Statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed. Title VII prohibits discrimination because of sex in employment. This must extend to sex-based discrimination of any kind that meets the statutory requirements.”

Thus, as our collective, societal understanding of sex, gender, sexuality, identity and orientation broadens, our concept of sex discrimination as prohibited by Title VII also broadens. With the combined force of Price Waterhouse and *Oncale*, some federal courts began to push the boundaries even further during the first decade of the 21st century.

By the time the Equal Employment Opportunity Commission ruled in 2012 in *Macy v. Holder*, a federal sector sex discrimination case, that a transgender plaintiff could pursue a Title VII claim against a division of the Justice Department, its opinion could cite a multitude of federal court decisions in support of that conclusion, including two Title VII decisions by the 6th Circuit Court of Appeals involving public safety workers who were transitioning, and a 2011 ruling by the 11th Circuit Court of Appeals that a Georgia state agency's discrimination against an employee because she was transitioning violated the Equal Protection Clause as sex discrimination. There were also federal appellate rulings to similar effect under the Equal Credit Opportunity Act and the Violence against Women Act, as well as numerous trial court rulings under Title VII. So the EEOC was following the trend, not necessarily leading the parade, when it found that discrimination against a person because of their gender identity was a form of sex discrimination.

After the Supreme Court's landmark ruling in *Lawrence v. Texas* in 2003, striking down a state sodomy law under the 14th Amendment, and further rulings in 2013 and 2015 in the *Windsor* and *Obergefell* cases, leading to a national right to marry for same-sex couples, the persistence by many courts in asserting that Title VII did not prohibit sexual orientation discrimination appeared increasingly archaic. Just weeks after the *Obergefell* decision, the EEOC issued another landmark ruling in July 2015, *David Baldwin v. Anthony Foxx*, reversing half a century of EEOC precedent and holding that sexual orientation discrimination claims were "necessarily" sex discrimination claims covered by Title VII. The Commission ruled that a gay air traffic controller could bring a Title VII claim against the Department of Transportation, challenging its refusal to hire him for a full-time position at the Miami air traffic control center because of his sexual orientation.

Building on the *Price Waterhouse*, *Oncale* and *Macy* decisions, the EEOC embraced several alternative theories to support this ruling. One was the now well-established proposition that an employer may not rely on "sex-based considerations" or "take gender into account" when making employment decisions, unless sex was a bona fide occupational qualification – a narrow statutory exception that is rarely relevant to a sexual orientation or gender identity case.

"Discrimination on the basis of sexual orientation is premised on sex-based preferences, assumptions, expectations, stereotypes, or norms," wrote the EEOC. "Sexual orientation as a concept cannot be defined or understood without reference to sex. Sexual orientation is inseparable from and inescapably linked to sex and, therefore, allegations of sexual orientation discrimination involve sex-based considerations." By the summer of 2015, the agency was able to cite several federal trial court decisions applying these concepts in particular cases.

Another theory was based on the associational discrimination theory. Courts had increasingly accepted the argument that discrimination against a person because he or she was in an interracial relationship was discrimination because of race. The analogy was irresistible: Discriminating against somebody because they are in a same-sex relationship must be sex discrimination, because it involved taking the employee's sex into account. Denying a job because a man is partnered with a man rather than with a woman means that his sex, as well as his partner's sex, was taken into account by the employer in making the decision.

Finally, the Commission embraced the stereotyping theory that some courts had refused to fully embrace: that sexual orientation discrimination is sex discrimination because it necessarily involves discrimination based on gender stereotypes, not just those involving appearance, mannerisms, grooming, or speech, but also stereotypes about appropriate sexual attractions. Quoting a Massachusetts federal trial court ruling, the agency wrote, “Sexual orientation discrimination and harassment are often, if not always, motivated by a desire to enforce heterosexually defined gender norms. . . . The harasser may discriminate against an openly gay co-worker, or a co-worker that he perceives to be gay, whether effeminate or not, because he thinks, ‘real’ men should date women, and not other men.” Professor Law’s theoretical proposition of 1988 was now surfacing in court and agency rulings a quarter century later.

The EEOC also rejected the view that adopting this expanded definition of sex discrimination required new congressional action, pointing out that the courts had been expanding the definition of sex discrimination under Title VII continually since the 1970s, with minimal intervention or assistance from Congress.

Since 2015 the issue of sexual orientation discrimination under Title VII has risen to the level of the circuit courts of appeals. In most of the circuits, there are precedents dating back decades holding that sexual orientation claims may not be litigated under Title VII. These precedents are softened in some circuits that have accepted discrimination claims from gay men or lesbians who plausibly asserted that their visible departure from gender stereotypes provoked discrimination against them. But many of these appeals courts have strained to draw a line between the former and the latter, and have rejected stereotyping claims where they perceived them as attempts to “bootstrap” a sexual orientation claim into Title VII territory.

Ironically, one judge who emphatically rejected such a case several years ago with the bootstrapping objection, Richard Posner of the 7th Circuit, is the author of a concurring opinion in this new round of circuit court rulings in which he argues that it is legitimate for federal courts to “update” statutes without waiting for Congress in order to bring them into line with current social trends. This was part of the 7th Circuit’s en banc ruling in *Kimberly Hively v. Ivy Tech Community College*, the April 4, 2017, decision that is the first by a federal appeals court to embrace all aspects of the EEOC’s Baldwin decision and hold that a lesbian could pursue a sexual orientation claim under Title VII. Posner’s argument echoes one made decades ago by Guido Calabresi, then a professor at Yale, now a judge on the 2nd Circuit, in a series of lectures published as a book titled “A Common Law for the Age of Statutes,” in which he argued that legislative inertia would justify courts in updating old statutes to meet contemporary needs. Although Posner did not cite Calabresi’s book, his argument is much the same. He quoted both Justice Scalia’s statement from *Oncale* and an earlier iteration of similar sentiments in an opinion by Justice Oliver Wendell Holmes from 1920, in which Holmes wrote: “The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.”

The federal circuit courts follow the rule that when a three-judge panel of the circuit interprets a statute, it creates a binding circuit precedent which can be reversed only by the full bench of the court in an en banc ruling, or by the Supreme Court, or by Congress changing the statute. The *Hively* ruling reversed a three-judge panel decision that had rejected the plaintiff’s Title VII

claim based on prior circuit precedents. The vote was 8-3. Incidentally, 5 of the judges in the 8-member majority were appointees of Republican presidents. The employer in that case quickly announced that it would not seek Supreme Court review, but this ruling creates a split among the circuit courts, so it is only a matter of time before the Supreme Court receives a petition asking for a definitive interpretation of Title VII on this question.

The 7th Circuit opinion by Chief Judge Diane Wood accepted all of the EEOC's theories from the Baldwin decision. Judge Wood concluded that "it would require considerable calisthenics to remove the 'sex' from 'sexual orientation.'" "We hold 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."

Dissenting Judge Diane Sykes criticized the majority for deploying "a judge-empowering, common-law decision method that leaves a great deal of room for judicial discretion." Here the battle is joined. For the majority, it is appropriate to trace the development of case law over decades, treating the concept of sex discrimination as evolving. For Judge Posner, concurring, it is legitimate for the court to set aside the pretense of ordinary interpretation and to "update" an old statute to reflect contemporary understandings. And for Judge Sykes, these are both illegitimate because it violates the division of authority between the legislature and the courts to adopt an "interpretation" that would be outside the understanding of the legislators who enacted the statute.

Now the scenario is playing out in other circuits. In recent weeks, the Atlanta-based 11th Circuit and the New York-based 2nd Circuit have issued panel rulings refusing to allow sexual orientation discrimination claims under Title VII. The panels did not consider the issue afresh and decided to reaffirm the old rulings on the merits, but rather asserted that they were powerless to do so because of the existing circuit precedents. In both of the cases decided in March, *Evans v. Georgia Regional Hospital* and *Christiansen v. Omnicom Group*, the panels sent the cases back to the trial court to see whether they could be litigated as sex stereotyping cases instead of sexual orientation cases. But one judge dissented in the 11th Circuit, arguing that an old *Price Waterhouse* precedent should not longer be treated as binding. The 2nd Circuit panel rejected the trial judge's conclusion that because the gay plaintiff's complaint included evidence that his treatment was tainted by homophobia he could not assert a sex stereotyping claim, and two members of the panel wrote a concurring opinion virtually accepting the EEOC's view of the matter and suggesting that the circuit should reconsider the issue en banc. In both cases, the panels took the position that sex stereotyping claims could be evaluated without reference to the sexual orientation of the plaintiff. And, in both of these cases, lawyers for the plaintiffs are asking the circuits to convene en banc benches to reconsider the issue, as a preliminary to seeking possible review in the Supreme Court. A different 2nd Circuit panel has also issued a ruling where sex stereotyping of the sort that is actionable in the 2nd Circuit is not part of the case, and counsel in that case is also filing a petition for en banc review.

One or more of these petitions is likely to be granted. While we may see more en banc rulings in favor of allowing sexual orientation discrimination claims, at some point a new circuit split may develop, leading inevitably to the Supreme Court. Or the issue could get to the Supreme Court

by an employer seeking further review, since older rulings in other circuits still present the kind of circuit splits that the Supreme Court tries to resolve.

That leads to the highly speculative game of handicapping potential Supreme Court rulings. Neil Gorsuch's confirmation restores the ideological balance that existed before Justice Scalia's death. The Court as *then* constituted decided the historic same-sex marriage cases, Windsor and Obergefell, with Justice Kennedy, a Republican appointee, writing for the Court in both cases, as well as in earlier gay rights victories, Romer v. Evans and Lawrence v. Texas. These opinions suggest a degree of empathy for gay litigants that might lead Kennedy to embrace an expansive interpretation of Title VII. He is part of a generation of appellate judges appointed by Ronald Reagan during the 1980s who made up half of the majority in the recent 7th Circuit ruling: Richard Posner, Frank Easterbrook, Joel Flaum, and Kenneth Ripple. Another member of that majority, Ilana Rovner, was appointed by Reagan's successor, George H.W. Bush. This line-up underlies optimism that Kennedy might join with the Clinton and Obama appointees on the Supreme Court to produce a five-judge majority to embrace the EEOC's interpretation. Such optimism may also draw on Kennedy's decisive rejection of the argument that legal rules are frozen at the time of their adoption and not susceptible to new interpretations in response to evolving social understandings. This was the underlying theme of his opinions in the four major gay rights decisions.

Since the 1970s supporters of gay rights have introduced bills in Congress to amend the federal civil rights laws to provide explicit protection for LGBT people. None of those attempts has succeeded to date. If the judicial battle reaches a happy conclusion, those efforts might be rendered unnecessary, although there is always a danger in statutory law of Congress overruling through amendment, but that seems unlikely unless the Republicans attain a filibuster-proof majority in the Senate.

On that optimistic note, I conclude with thanks for your attention, and I am happy to answer questions now.