

**Seeing Straight in the Workplace: An Examination of Sexual
Orientation Discrimination in Public Employment in the Aftermath
of *Lawrence v. Texas***

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TABLE OF CONTENTS

I. Introduction.....1

II. Background.....5

 A. Homosexual Employees Generally Claim Their Employers Violated Their Constitutional Rights5

 B. Courts Analyze Homosexual Employees’ Constitutional Claims Using A Rational Basis Test7

 1. First Amendment Claims.....7

 2. Equal Protection And Substantive Due Process Claims.10

 C. The Supreme Court Extended Its Notion Of An Individual’s Right To Privacy To Protect Private, Homosexual Conduct 16

 D. Congress’ Attempts to Enact The Employment Non-Discrimination Act22

III. Analysis.....23

 A. The Court’s Analysis in *Lawrence* Forces Future Courts To Question The Reasonableness Of The Employer’s Traditional Rational Bases23

 1. Criminality.....26

 2. Workplace Unity.....31

 3. Public Image And Credibility.....33

 4. National Security Risks.....35

 B. The *Lawrence* Decision Opened The Door For A Future Court to Declare Homosexuals To Be A Suspect Class, and Private, Homosexual Conduct To Be A Fundamental Right .39

 1. Creating A Fundamental Right To Privacy.....41

 2. Granting Heightened Scrutiny To Homosexuals’ Equal Protection Claims.....46

C. Congress Should Enact The Employment Non-Discrimination Act45

1. Current Federal And State Legislation Neither Effectively Nor Consistently Protects Employees From Sexual Orientation Discrimination.....50

2. ENDA's Narrow Drafting And The Court's Reasoning In *Lawrence* Debunk ENDA's Opposition's Arguments.....56

IV. Conclusion.....69

I. Introduction

Dwayne Simonton worked for the United States Postal Service, and when his co-workers and supervisors discovered he was gay, they harassed him so severely that he suffered a heart attack.¹ However, the Second Circuit dismissed his suit for sexual orientation discrimination because Title VII of the Civil Rights Act of 1964 does not provide a cause of action for sexual orientation discrimination.²

In public employment,³ courts generally have allowed

¹ See *Simonton v. Runyon*, 232 F.3d 33, 34-35 (2d Cir. 2000) (showing how Simonton's co-workers and supervisors threatened him, yelled obscenities and anti-gay epithets at him, placed notes on the bathroom walls with his name and the names of celebrities who had died of AIDS, and physically assaulted him).

² See *id.* at 35 (rejecting Simonton's argument that harassment based on one's sexual orientation is the same as discrimination based on one's sex); see also 42 U.S.C. § 2000e-2(a)(1) (2005) (prohibiting employers from discriminating against employees on the basis of race, color, religion, sex, or national origin).

³ "Employment" refers to public employment and "employers" refers to public employers, unless specified otherwise because victims of sexual orientation discrimination, absent a state statutory cause of action, must make constitutional claims, which requires

employers to discriminate against gay, lesbian, and bisexual employees and applicants under the guise of a rational basis test, without affording them protection under Title VII.⁴ This seemingly contradicts the Supreme Court's history of steadily extending a fundamental right of privacy, which demands strict scrutiny review by courts if the state interferes with individuals' intimate, sexual relations.⁵ The Supreme Court in *Lawrence v. Texas* attempted to reconcile this contradiction by decriminalizing private homosexual conduct and by recognizing that gays, lesbians, and bisexuals hold a liberty interest in their private, homosexual activities.⁶ However, the Court

state action.

⁴ See, e.g., *Pickering v. Bd. of Ed. of Township H.S. Dist. 205*, 391 U.S. 563, 568 (1968) (applying a rational basis test, which balances the employee's constitutional rights against the employer's legitimate business purposes).

⁵ See, e.g., *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 850 (1992) (framing the Court's obligation as defining the liberty of all individuals, rather than mandating its own moral code by limiting liberty to only some).

⁶ See 539 U.S. 558, 577-78 (2003) (extending married persons' liberty interests in their individual decisions concerning the intimacies of their physical relationship to unmarried persons,

focused on homosexuals' liberty interests in their private homosexual conduct, rather than explicitly categorizing gays, lesbians, and bisexuals as a suspect class.⁷ The Court also refrained from explicitly defining private homosexual conduct to be a fundamental right.⁸

This Comment argues that while the *Lawrence* Court did not change the applicability of the rational basis test, it makes it more difficult for employers to rationally relate their employees' homosexuality to legitimate business purposes, and opens the door for future courts and legislatures to protect homosexual employees. Part IIA discusses the constitutional claims that homosexual employees typically make against their employers.⁹ Part IIB demonstrates how the courts use a rational basis test to analyze these claims, which typically favors the

including homosexuals).

⁷ See *id.* (focusing on cases in which the Court has recognized a fundamental right to privacy in individuals' intimate sexual relationships).

⁸ See *id.* (defining homosexual intimacy as a liberty interest, but not as a fundamental right).

⁹ See *infra* part IIA (explaining why homosexual employees typically make constitutional claims rather than Title VII claims).

employers' actions.¹⁰ Part IIC shows how the Supreme Court expanded its notion of privacy rights to protect homosexual conduct.¹¹ Part IID examines Congress' proposed Employment Non-Discrimination Act of 2003 ("ENDA"), which prohibits employers from discriminating against employees on the basis of sexual orientation.¹² Part IIIA argues that *Lawrence's* holding changes the way future courts will analyze employers' rational basis explanations, significantly diluting employers' rational basis defenses.¹³ Part IIIB advocates that the *Lawrence* Court opened

¹⁰ See *infra* part IIB (showing how public employers rationally relate their adverse employment actions against their homosexual employees to legitimate business purposes, thus escaping liability).

¹¹ See *infra* part IIC (summarizing how the Court extended personal privacy rights to married couples, unmarried individuals, minors, and homosexuals).

¹² See *infra* part IID (exploring Congress' attempt at creating federal legislation that explicitly protects both public and private sector employees from sexual orientation discrimination).

¹³ See *infra* part IIIA (demonstrating how the Court's holding in *Lawrence* dictates to future courts how to apply the rational basis test through its focus on individual privacy rights).

the door for a future Court to recognize gays, lesbians, and bisexuals as a suspect class, consider homosexual conduct to be a fundamental right, and give homosexual employees' constitutional claims heightened or strict scrutiny.¹⁴ Lastly, Part IIIC alleges that a narrow drafting of ENDA, plus the Court's decision in *Lawrence*, should enable Congress to finally enact ENDA.¹⁵

II. Background

A. Homosexual Employees Generally Claim Their Employers Violated Their Constitutional Rights

Employment relationships, absent employment contracts or statutes that state otherwise, are generally terminable at-will by either party.¹⁶ However, Title VII of the Civil Rights Act of

¹⁴ See *infra* part IIIB (arguing that the *Lawrence* Court's focus on its prior fundamental privacy rights case law and European jurisprudence lay the foundation for the Court, in the future, to recognize homosexuals to be a suspect class and private homosexual conduct to be a fundamental right).

¹⁵ See *infra* part IIIC (recognizing how current federal and state legislation provide inadequate protection, how the Federal Government is traditionally responsible in protecting its citizens' civil rights, and how the *Lawrence* decision opens the door for such federal legislation).

¹⁶ See MARK A. ROTHSTEIN, *EMPLOYMENT LAW* 671 (West Group 1999) (1994)

1964 prohibits employers from discharging, refusing to hire, and discriminating against employees with respect to compensation, terms, conditions, or privileges of employment, based on the employee's race, color, religion, sex, or national origin.¹⁷

While Title VII claims are the most common employment discrimination claims that employees make, Title VII does not expressly prohibit employers from discriminating against employees based on the employees' sexual orientation.¹⁸

Therefore, homosexual employees and applicants must rely on other constitutional rights by making their claims under 42 U.S.C. § 1983.¹⁹

Homosexual employees often claim that their employers have violated their First Amendment rights of free speech and

(explaining that in an at-will employment relationship, the employer may fire the employee for any or no reason).

¹⁷ See 42 U.S.C. § 2000e-2(a)(1) (2005) (prohibiting both public and private sector employers from engaging in the enumerated types of discrimination).

¹⁸ See generally *id.* (omitting "sexual orientation" as a type of prohibited discrimination).

¹⁹ See 42 U.S.C. § 1983 (2005) (allowing public employees to make discrimination claims against their employers for violating their constitutional and other statutory rights).

association.²⁰ Additionally, homosexual employees often allege that their employers violated their Fifth and Fourteenth Amendment Equal Protection and Due Process rights.²¹

B. Courts Analyze Homosexual Employees' Constitutional Claims Using A Rational Basis Test

1. First Amendment Claims

The Supreme Court established that a rational basis test

²⁰ See, e.g., *Shahar v. Bowers*, 114 F.3d 1097, 1101 (1997)

(citing a lesbian job applicant's claim that Georgia's attorney general violated her First Amendment rights of association when he revoked an employment offer after finding out she publicly claimed she was "married" to, and therefore associated with another lesbian).

²¹ See, e.g., *Glover v. Williamsburg Local Sch. Dist. Bd. of Educ.*, 20 F. Supp. 2d 1160, 1168-69 (S.D. Ohio 1998) (showing how a homosexual teacher complained that his employer violated his Fourteenth Amendment Equal Protection rights when it did not renew his contract solely because he was gay); *Soc'y for Individual Rights, Inc. v. Hampton*, 63 F.R.D. 399, 400 (N.D. Cal. 1973), *aff'd on other grounds*, 528 F.2d 905 (9th Cir. 1975) (claiming that the United States Civil Service Commission violated a homosexual supply clerk's due process rights when the Commission fired the clerk solely because the Commission feared "public contempt" in employing a homosexual).

applies to employees' claims that employers violated their First Amendment rights.²² This rational basis test balances the employees' First Amendment rights to free speech and association against the employers' interests in promoting legitimate business purposes.²³ While the Court did not enumerate specifically what factors courts should weigh, it alluded to some general considerations that might show impairment of a governmental interest sufficient to trigger the balancing test.²⁴ By holding employers' views of facts, circumstances, and predictions to a mere reasonableness standard, the Court has granted employers substantial deference.²⁵ Additionally, the

²² See *Pickering*, 391 U.S. at 568 (requiring courts to balance the employer's and employee's interests).

²³ See *id.* (balancing a public school teacher's interest in commenting upon matters of public concern and a public school's interest in promoting workplace efficiency).

²⁴ See *id.* at 569-70 (establishing the employer's interests as removing incompetent employees, maintaining discipline by immediate superiors, preserving harmony among coworkers, and maintaining personal loyalty and confidence when necessary to a particular working relationship).

²⁵ See *Waters v. Churchill*, 511 U.S. 661, 673-81 (1994) (applying a reasonableness standard to a manager's investigation of the

Court has granted a wide degree of deference to employers' judgments when their employees have close working relationships essential to fulfilling public responsibilities.²⁶ The Court has also granted greater significance to the government's interests when it acts as an employer rather than as a sovereign.²⁷ The courts have generally granted employers great deference, denying homosexual employees' First Amendment claims when their employers rationally alleged that employing homosexual employees would affect the employers' public credibility, interfere with the employers' abilities to handle controversial matters, appear to conflict with states' sodomy laws, create difficulties maintaining supportive working relationships, present conflicts of interest in prosecuting homosexual-related crimes, and

facts that led him to fire the employee).

²⁶ See *Connick v. Myers*, 461 U.S. 138, 151-52 (1983) (noting that the close working relationship involved in a district attorney's office granted the employer a wide degree of deference).

²⁷ See *Waters*, 511 U.S. at 675 (finding that when the government acts in its capacity as an employer, its interests in effectively and efficiently achieving its goals are greater than when the government acts as sovereign because the Framers of the Constitution intended the First Amendment to protect citizens from the government, not employees from their employer).

present a contrary image to community values.²⁸

2. Equal Protection And Substantive Due Process Claims

The courts have applied the same rational basis test to analyze homosexual employees' claims that their employers violated their Equal Protection and Substantive Due Process rights.²⁹ The Equal Protection Clause of the Fourteenth

²⁸ See, e.g., *Shahar*, 114 F.3d at 1101 (allowing Georgia's Attorney General to revoke an employment offer to a lesbian attorney, legitimizing his concerns about workplace unity, public credibility, and the attorney's questionable commitment to upholding the state's sodomy laws); *Childers v. Dallas Police Dep't*, 513 F. Supp. 134, 142 (N.D. Tex. 1981) (noting that an employer could discharge a homosexual employee because employing him would undermine the police department's legitimate needs for obedience and discipline, could damage the department's public image, and could interfere with the homosexual officer's duties to handle evidence of offenses involving homosexual conduct); *Acanfora v. Bd. of Educ.*, 491 F.2d 498, 499 (4th Cir. 1974) (claiming that a public school teacher's public interviews about his homosexuality would substantially disrupt his ability to effectively teach).

²⁹ See *Glover*, 20 F. Supp. 2d at 1169 (applying a rational basis test to a homosexual teacher's claim that his employer violated

Amendment requires public employers to treat all similarly situated employees alike.³⁰ When employers treat similarly situated employees differently, courts determine whether the employment action deserves strict scrutiny, heightened scrutiny, or rational basis scrutiny, depending on if the employee is part of a suspect class, quasi-suspect class, or non-suspect class, respectively.³¹

The Supreme Court defined a suspect class as one that deserves extraordinary protection from the majority because a history of purposeful unequal treatment has disabled it, and the class is in a position of political powerlessness.³² The Court

his Equal Protection rights when it failed to renew his contract after discovering he was gay).

³⁰ See U.S. CONST. amend. XIV § 1 (stating that no State shall "deny to any person within its jurisdiction the equal protection of the laws").

³¹ See, e.g., *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 573-74 (9th Cir. 1990) (declaring homosexuals to be a non-suspect class because homosexuality is a behavior and not an immutable characteristic).

³² See *San Antonio Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973) (finding that a large, diverse, amorphous class, unified only by the fact that they live in a district with a lower tax base,

has also focused on the immutability of the group's identifying trait when determining if someone is part of a suspect class.³³

However, the Supreme Court has recognized only three classifications as suspect: race,³⁴ alienage,³⁵ and national origin.³⁶ The Court has recognized gender as a quasi-suspect class.³⁷ Most courts have not considered homosexuals to be a

does not exhibit suspect class characteristics).

³³ See *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (recognizing sex, race, and national origin as immutable characteristics because they are determined solely by birth).

³⁴ See *Loving*, 388 U.S. at 11 (finding that Virginia's miscegenation statute banning interracial marriage was not necessary to accomplish a compelling state interest).

³⁵ See *Graham v. Richardson*, 403 U.S. 365, 372 (1971) (declaring alienage as an inherently suspect class, subject to strict judicial scrutiny). *But see* *Ambach v. Norwick*, 441 U.S. 68, 72-75 (1979) (recognizing scenarios where discrimination based on alienage did not demand strict scrutiny).

³⁶ See *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (finding that an order excluding all persons of Japanese ancestry from an area drew strict scrutiny).

³⁷ See *Craig v. Boren*, 429 U.S. 190, 197 (1976) (reaffirming that classifications based on gender must be substantially related to

suspect class because they consider homosexuality to be behavioral and not an immutable characteristic.³⁸ Because the

serving important governmental objectives for a court to render a classification constitutional).

³⁸ See *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 573-74 (9th Cir. 1990) (comparing homosexuality to race, gender, and national origin, which are suspect classes whose conduct is irrelevant to their identifications). *But see* *Able v. United States*, 968 F. Supp. 850, 863-64 (E.D.N.Y. 1997), *rev'd on other grounds*, 155 F.3d 628 (2d Cir. 1998) (granting homosexuals heightened scrutiny because of historic prejudice against homosexuals as a minority group that makes it difficult to protect them politically). The court also noted how sexual orientation forms a significant part of a person's identity and is resistant to change or treatment, despite widespread discrimination and social pressure against homosexuals. *Id.*; *Tanner v. Oregon Health Sciences Univ.*, 971 P.2d 435, 446 (Or. Ct. App. 1998) (changing the court's focus of suspect class definition from the immutability of the characteristic to the fact that societies have historically regarded such characteristics as defining distinct groups that have faced adverse social or political stereotyping or prejudice). Also, the court recognized that individuals may change other suspect

Supreme Court has yet to recognize homosexuals as a suspect or quasi-suspect class, employers must merely rationally relate their employment decisions based on sexual orientation classifications to a legitimate business purpose.³⁹ Regardless of the level of scrutiny, employers only violate the Equal Protection Clause when they intentionally and purposefully discriminate.⁴⁰ The courts have typically denied homosexual employees' Equal Protection claims where employers rationally claimed that employing homosexual employees would jeopardize the employers' security, legitimacy, efficiency, workplace obedience and discipline and the employers needed to protect their public

class characteristics at will, such as alienage and religious affiliation. *Id.*

³⁹ See *Glover*, 20 F. Supp. 2d at 1169 (ruling that a rational basis test applies to a homosexual teacher's claim that his employer violated his Equal Protection rights when it failed to renew his contract, but renewed a contract of a similarly situated heterosexual employee).

⁴⁰ See *Washington v. Davis*, 426 U.S. 229, 242 (1976) (stating that the employees must show more than a disparate impact to demonstrate the employer violated their Equal Protection rights).

images and avoid ridicule and embarrassment.⁴¹

For Substantive Due Process claims, courts require that employers' adverse employment actions pass strict scrutiny, if they have interfered with employees' fundamental rights.⁴² While the Supreme Court has extended a fundamental right to privacy to protect individuals' private, sexual relations, the Supreme

⁴¹ See, e.g., *Padula v. Webster*, 822 F.2d 97, 104 (D.C. Cir. 1987) (agreeing that the FBI's hiring of a homosexual agent would undermine the Bureau's law enforcement credibility and pose a security risk); *Doe v. Gates*, 981 F.2d 1316, 1324 (D.C. Cir. 1993) (finding that the government's security interest in collecting foreign intelligence and protecting the nation's secrets justified its discharge of a homosexual federal intelligence agent); *Childers*, 513 F. Supp. at 146-47 (stating that the government's interest in maintaining department discipline and the government's concern about the homosexual employee's ability to gain the trust and respect of co-workers outweighed the employee's interest in constitutional protection for his homosexual behavior).

⁴² See, e.g., *Griswold v. Conn.*, 381 U.S. 479, 485 (1965) (finding that the government cannot interfere with married couples' fundamental rights to privacy in their marital relationships).

Court has never expressly declared private, consensual homosexual conduct to be part of one's fundamental right to privacy, and thus courts routinely deny homosexual employees' Substantive Due Process claims under a rational basis test.⁴³

C. The Supreme Court Extended Its Notion Of An Individual's Right To Privacy To Protect Private Homosexual Conduct

While the courts primarily used a rational basis test to decide whether employers discriminated against employees based on the employees' sexual orientations, the Supreme Court expanded its view on a homosexual's right to privacy in *Lawrence v. Texas*.⁴⁴ The case grew from a steady line of Supreme Court cases that extended privacy rights to individuals engaged in certain intimate, private behaviors.⁴⁵

⁴³ See, e.g., *Childers*, 513 F. Supp. at 146-147 (denying a homosexual police officer's Substantive Due Process claim where the police department fired the officer, finding that the department acted neither arbitrarily nor capriciously, but rather rationally related the employment action to legitimate employment concerns).

⁴⁴ See 539 U.S. at 578 (finding that Texas had no legitimate state interest to justify invading homosexuals' private lives via its criminal sodomy statute).

⁴⁵ See, e.g., *Roe v. Wade*, 410 U.S. 113, 152 (1973) (including a

First, in *Griswold v. Connecticut*, the Court invalidated a state law that prohibited married couples' use of drugs or contraception devices and counseling or aiding and abetting the use of contraceptives.⁴⁶ The Court described the protected interest as a right to privacy and placed emphasis on the marital relationship.⁴⁷

The Court next extended the right to privacy it granted in *Griswold* beyond the marital relationship by invalidating a law that prohibited the distribution of contraceptives to unmarried persons.⁴⁸ The Court stressed that the law impaired the exercise

woman's right to have an abortion in a guaranteed zone of privacy). *But see* *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) (denying homosexuals' privacy rights to their private, homosexual conduct by upholding Georgia's criminal sodomy statute).

⁴⁶ See 381 U.S. at 485 (finding that the law invaded the privacy of the marital relationship).

⁴⁷ See *id.* (emphasizing the marital bedroom as a protected, private space).

⁴⁸ See *Eisenstadt v. Baird*, 405 U.S. 438, 454-55 (1972) (recognizing that unmarried persons enjoyed the same right to privacy as married persons).

of personal rights.⁴⁹

Next, the Court expanded a woman's right to privacy, under the Fourteenth Amendment's Due Process Clause, to include having an abortion.⁵⁰ Again, the Court recognized a more general right to privacy rather than enumerating specific areas in which one can expect privacy.⁵¹

The Court then extended to minors certain privacy rights it had already granted to adults.⁵² The Court invalidated a New York law forbidding the sale or distribution of contraceptive devices to persons under sixteen years old.⁵³ The combination of

⁴⁹ See *id.* at 443, 448 (holding that the statute violated the rights of single persons and that the statute's purpose of deterring premarital sex was not legitimate).

⁵⁰ See *Roe*, 410 U.S. at 154 (concluding that the government may not prevent a woman from having an abortion, except for certain enumerated circumstances where the state has compelling interests).

⁵¹ See *id.* at 152 (describing the privacy interest as an individual's "zone of privacy").

⁵² See *Carey v. Population Services Int'l*, 431 U.S. 678, 693 (1977) (extending to minors the right to privacy in connection with decisions affecting procreation).

⁵³ See *id.* at 694 (finding that minors have the same right to

Eisenstadt, *Roe*, and *Carey* acted to extend privacy rights beyond married adults.

However, in *Bowers v. Hardwick*, the Court took an anomalous step and upheld Georgia's criminal sodomy statute.⁵⁴ The Court's analysis focused on the United States' history of condemning homosexual conduct.⁵⁵ The Court also found no connection between homosexual conduct and other fundamental rights that the Court had recognized in previous decisions.⁵⁶ Following this purported history and lack of connection, the *Bowers* Court held that homosexuals did not have a fundamental right to engage in homosexual activity.⁵⁷

privacy as adults regarding procreation).

⁵⁴ See 478 U.S. at 196 (allowing the state to impose on homosexuals its moral disapproval of homosexual conduct).

⁵⁵ See *id.* at 192-94 (focusing on the frequency of criminal sodomy statutes in effect when the states ratified the Bill of Rights as well as when Congress enacted the Fourteenth Amendment).

⁵⁶ See *id.* at 191 (noting no connection between the personal rights of family, marriage, and procreation to homosexuality).

⁵⁷ See *id.* at 192-94 (reasoning that a fundamental right is one that is deeply rooted in this Nation's history and tradition). Because this Nation historically has proscribed homosexual

Ten years later, in *Romer v. Evans*, the Court invalidated an amendment to Colorado's Constitution that prohibited all legislative, executive, or judicial action designed to protect homosexual persons from discrimination.⁵⁸ The Court stated that class-based legislation, legislation that imposes a disability on a single named group, was invalid.⁵⁹

Finally, the Court relied on these cases when it decided, in *Lawrence v. Texas*, to strike down Texas' criminal sodomy statute and overrule *Bowers*.⁶⁰ For the first time, the Court recognized that homosexuals held a right to privacy in their private, consensual homosexual activities under the Due Process Clause of the Fourteenth Amendment.⁶¹ The *Lawrence* Court focused

conduct, the Court was unwilling to declare it a fundamental right. *Id.*

⁵⁸ See 517 U.S. 620, 623 (1996) (stating that Colorado's Amendment was based on pure animus and bigotry).

⁵⁹ See *id.* at 634 (recognizing that animosity toward the class of persons affected cannot be a legitimate governmental interest).

⁶⁰ See 539 U.S. at 577-78 (finding that society's standards of morality cannot be a rational basis for condemning what it views to be an immoral practice).

⁶¹ See *id.* (analogizing homosexuals' liberty interests in their private, consensual, homosexual conduct to married and non-

on the demeaning effects criminal sodomy statutes created, regardless of whether or not the state actually enforced them, when applicable against private, consenting, homosexual adults.⁶² Additionally, the *Lawrence* Court rebutted its *Bowers* analysis of this Nation's history of condemning homosexual conduct.⁶³ Instead, the *Lawrence* Court recognized that states created early sodomy laws in order to prohibit non-procreative sexual activity.⁶⁴ Moreover, the *Lawrence* Court noted that early state sodomy laws acted as a catch-all to prosecute sexual predators

married persons' liberty interests in their individual decisions concerning the intimacies of their physical relationships).

⁶² See *id.* at 575-76 (recognizing that criminal offenses impose stigmas on convicts, which range from recording convictions on one's history of criminal convictions, subjecting convicts to the registration laws of at least four states, and noting convictions on job application forms).

⁶³ See *id.* at 568 (refuting the notion that this country has a longstanding history of criminalizing homosexual conduct as opposed to sodomy).

⁶⁴ See *id.* (explaining that the states' early criminal sodomy laws did not focus on homosexuals as a distinct class for enforcement).

whose actions did not fall into the category of rape.⁶⁵

The *Lawrence* Court justified declaring criminal sodomy statutes unconstitutional by focusing on the Court's more recent history of extending the sphere of privacy rights; ultimately including private, consensual, homosexual activity in that sphere.⁶⁶

However, the Court stopped short of recognizing gays, lesbians, and bisexuals as a suspect class or their private homosexual conduct as a fundamental right.⁶⁷

D. Congress' Attempts To Enact The Employment Non-Discrimination Act

In 2003, Congress, recognizing the problem of sexual orientation discrimination in employment, reintroduced ENDA, which prohibits employers from discharging, refusing to hire, and discriminating against employees with respect to compensation, terms, conditions, or privileges of employment,

⁶⁵ See *id.* at 569 (noting that states mainly enforced state sodomy laws against predatory sexual acts of an adult man against a child, rather than against consenting adults).

⁶⁶ See *id.* at 571-72 (demonstrating the Court's more recent trend of granting liberty rights that protect adults' decisions about private matters pertaining to sex).

⁶⁷ See *id.* (reserving judgment on whether to grant homosexuals heightened scrutiny).

based on the employee's sexual orientation.⁶⁸ Congress first introduced ENDA in 1994, but has failed to enact ENDA since its original proposition.⁶⁹ In 1996, the last time ENDA came to a vote, the Senate rejected it.⁷⁰

III. Analysis

A. The Court's Analysis In *Lawrence* Forces Future Courts To Question The Reasonableness Of The Employers' Traditional Rational Bases

At one end of the spectrum, states can no longer condemn private, consensual, homosexual conduct as criminal activity.⁷¹ However, at the other end of the spectrum, the *Lawrence* Court

⁶⁸ See Employment Non-Discrimination Act of 2003, S.1705, 108th Cong. § 4 (2003) (stating ENDA's purposes as providing federal protection and remedies against employment discrimination based on sexual orientation).

⁶⁹ See *Price Waterhouse, Sex Stereotyping, and Gender Non-Conformity Bias*, THE U.S. LAW WEEK, Oct. 19, 2004, at 2211 n.7 (demonstrating how Congress has rejected ENDA seven times since it first introduced ENDA in 1994).

⁷⁰ See 142 CONG.REC. D912-02 (1996) (showing how the Senate rejected ENDA by one vote).

⁷¹ See *Lawrence*, 539 U.S. at 578 (decriminalizing homosexual activity because one's homosexuality is a private liberty interest).

did not explicitly declare homosexuals to be a suspect class of citizenry, worthy of strict scrutiny, nor did the Court recognize their private, consensual, homosexual conduct to be a fundamental right.⁷² The Court, thus, has to determine where to place homosexual activity on their analytical spectrum.

While the Court in *Lawrence* did not change the applicability of the rational basis test, its focus will cause future courts to question the reasonableness of employers' rational bases for their adverse employment actions against their homosexual employees.⁷³ In declaring criminal sodomy statutes unconstitutional, the Court attempted to overcome the stigma it recognized criminal sodomy laws created.⁷⁴ Under the

⁷² See *id.* at 586 (Scalia, J., dissenting) (pointing out that the *Lawrence* majority does not explicitly recognize homosexuals as a suspect class and does not expressly consider homosexual conduct a fundamental right, but rather ambiguously declares homosexual conduct to be a liberty interest without further definition).

⁷³ See *Waters*, 511 U.S. at 675-76 (showing the Court's willingness to grant greater deference to employers' rationales when employers merely prove that their rationales are reasonable).

⁷⁴ See *Lawrence*, 539 U.S. at 575-76 (focusing on how homosexuals convicted of sex crimes must disclose convictions on job

Court's reasoning in *Bowers*, the courts generally found employers' rationales reasonably related to legitimate business purposes because the employers' legitimate business purposes reflected the Court's recognition of society's moral and criminal condemnation of homosexual activity.⁷⁵ After *Lawrence*, the courts must apply the rational basis test such that the employers' legitimate business purposes reflect the Court's recognition of homosexuals' liberty interests in their own private, consensual, homosexual activity.⁷⁶ More specifically, *Lawrence* significantly dilutes the employers' traditional rational basis defenses by forcing future courts to question the reasonableness of employers' claims that homosexual employees are not fit for employment because they are engaged in criminal activity, and that hiring homosexual employees destroys

applications and are subject to some states' registration laws).

⁷⁵ See *Bowers*, 478 U.S. at 196 (declaring that society's moral judgment of homosexual activity is rationally related to condemning such activity as criminal).

⁷⁶ See *Lawrence*, 539 U.S. at 577-78 (stating that society's moral judgment of homosexual activity cannot justify condemning such activity as criminal and override homosexuals' individual liberty rights in their private, consensual, homosexual activity).

workplace unity, is contrary to the employers' public images and credibility, and poses risks to national security.

1. Criminality

The *Lawrence* decision eliminates employers' common tactic of claiming that homosexual employees are engaged in criminal activity and therefore unfit for employment.⁷⁷ By extending constitutional protections to homosexual conduct, the *Lawrence* decision stops employers from facially discriminating against their homosexual employees simply due to their employees' private homosexual conduct because employers cannot condition employment on the relinquishment of a legal right.⁷⁸

For example, applying the argument to the field of law enforcement, employers cannot reasonably question homosexual employees' commitments to upholding and enforcing state sodomy

⁷⁷ See, e.g., *Childers*, 513 F. Supp. at 142 (showing a pre-*Lawrence* case where a police department claimed that a homosexual officer was unfit for service because the officer had engaged in criminal activity, namely homosexual sodomy).

⁷⁸ See, e.g., *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (noting that although the Constitution does not guarantee public employment, conditioning employment on the relinquishment of one's First Amendment rights would undermine one's constitutional freedoms of speech and association).

laws because the Court in *Lawrence* declared the laws unconstitutional and therefore unenforceable.⁷⁹ Prior to *Lawrence*, courts gave credence to employers' concerns about hiring homosexual law enforcement officers, finding that the officers had an inherent conflict of interest with enforcing homosexual sodomy crimes that they themselves violated.⁸⁰ The *Lawrence* decision, however distinguished private, consensual, homosexual conduct from other valid criminal sodomy laws, therefore calling into question employers' concerns about homosexual officers' commitments to enforcing valid homosexual sodomy crimes.⁸¹ By decriminalizing private, consensual,

⁷⁹ See *Shahar*, 114 F.3d at 1101 (demonstrating a pre-*Lawrence* case in which the court decided that the Attorney General could reasonably believe that hiring a lesbian attorney would inhibit his office from prosecuting Georgia's criminal sodomy statute).

⁸⁰ See, e.g., *Childers*, 513 F. Supp. at 137 (demonstrating a pre-*Lawrence* case that gave deference to a police department's concern that hiring a homosexual officer for its property division would jeopardize the evidence's authenticity because the officer had an inherent conflict of interest in preserving evidence of a homosexual crime).

⁸¹ See *Lawrence*, 539 U.S. at 578 (narrowing the *Lawrence* Court's holding so that criminal sodomy laws aimed at protecting minors,

homosexual conduct, the *Lawrence* Court eliminated homosexual law enforcement officers' conflicts of interest as well as the employers' rational bases for denying employment, because the officers will no longer enforce the invalid laws that they previously violated.⁸²

The *Lawrence* Court did uphold the validity of certain criminal sodomy laws, and employers might still claim that homosexual law enforcement officers have a conflict of interest in enforcing these remaining valid laws.⁸³ However, these claims will likely fail in the same way as a police department's claim that a female law enforcement officer presents a conflict of interest in enforcing prostitution laws. Homosexual law

protecting persons whom the conduct would injure or coerce, prohibiting non-consensual relationships, and prohibiting public conduct or prostitution remained valid, as well as holding that the government does not have to recognize homosexual relationships).

⁸² See *id.* (finding that the state cannot criminalize private sexual conduct).

⁸³ See, e.g., *Childers*, 513 F. Supp. at 137 (noting a pre-*Lawrence* case that legitimized a police department's concern that a homosexual officer might destroy homosexual mail order materials or tip off homosexual groups about police raids).

enforcement officers, who engage solely in constitutionally protected, private, consensual, homosexual activity, do not have a conflict of interest in enforcing valid criminal laws, which their conduct does not violate.⁸⁴

The *Lawrence* holding also vastly affects how courts will apply state statutes that allow public schools to fire homosexual teachers for engaging in immoral or criminal conduct.⁸⁵ For example, a public school in Alaska merely had to show sufficient evidence that a homosexual teacher committed a crime of moral turpitude in order to dismiss the teacher.⁸⁶

⁸⁴ See *id.* at 137-38 (disclosing how a homosexual officer belonged to a Christian church with a special outreach to the gay community, had marched in two Gay Pride Parades, and had participated in picketing to protest a television program that portrayed homosexual males as child molesters, but was not part of a homosexual or male prostitution group).

⁸⁵ See, e.g., ALASKA STAT. § 14.20.170(a)(2) (2004) (defining immorality as "the commission of an act that, under the laws of the state, constitutes a crime involving moral turpitude").

⁸⁶ See *Kenai Peninsula Borough Bd. of Educ. v. Brown*, 691 P.2d 1034, 1040 (Alaska 1984) (stating that a public school may fire a teacher for engaging in a crime of moral turpitude, even when the state has not convicted the teacher).

Lawrence makes it more difficult for a school to dismiss the teacher whether the school considers homosexuality to be a crime in the traditional sense or figuratively. First, by removing the criminality of homosexual sodomy, *Lawrence* makes it more difficult for a public school to show any evidence that a teacher who engaged in private, consensual homosexual conduct was therefore engaged in a crime of moral turpitude.⁸⁷ Further, even if the definition of immorality did not require that teachers commit a criminal act of moral turpitude before a school could fire them, but rather just required a school to make moral judgments based on community standards, *Lawrence* requires public schools to protect homosexual teachers' liberty rights instead of imposing society's moral values on teachers' homosexual conduct.⁸⁸ By removing the criminality of homosexual

⁸⁷ See *Lawrence*, 539 U.S. at 578 (holding that the state may not demean homosexuals' existence by criminalizing their private sexual conduct).

⁸⁸ See *Ross v. Springfield Sch. Dist. No. 19*, 641 P.2d 600, 608 (Or. Ct. App. 1982) *review allowed*, 648 P.2d 852 (Or. 1982), *rev'd on other grounds*, 657 P.2d 188 (Or. 1982) (demonstrating a pre-*Lawrence* case, which held that a public school properly discharged a teacher because the public nature of the teacher's homosexual conduct was immoral, not necessarily the conduct

activity, the Court in *Lawrence* removed a major weapon from the employer's arsenal.

2. Workplace Unity

Lawrence also forces the courts to question employers' claims that employing homosexual employees will disrupt workplace unity.⁸⁹ Again, using law enforcement as an example, when the Court decriminalized homosexual conduct, it removed the only legitimate, actionable source of tension between employees, namely having to decide whether or not to arrest and prosecute their homosexual colleagues for engaging in the criminal conduct of homosexual sodomy.⁹⁰ The *Lawrence* decision prohibits employers from acting on any remaining sources of tension between employees and their homosexual colleagues, such as individual employee disagreements about the morality of homosexual conduct, because under *Lawrence* employers must

itself).

⁸⁹ See, e.g., *Shahar*, 114 F.3d at 1101 (recognizing staff cohesiveness as a legitimate business concern).

⁹⁰ See *Endsley v. Naes*, 673 F. Supp. 1032, 1035 (D. Kan. 1987) (holding that the police department legitimately fired a homosexual police officer in order to maintain close working relationships both internally and externally with the community).

preserve homosexual employees' liberty rights over imposing other employees' moral judgments of homosexuality.⁹¹ Likewise, employers cannot forbid homosexual employees from engaging in private, consensual homosexual conduct, just to avoid workplace conflict, in the same way that employers cannot forbid employees to advocate religion in the workplace, even though that may cause workplace tension as well.⁹² While courts recognize employers' strong interests in avoiding tension in the workplace, *Lawrence* does not allow the employer to trump homosexual employees' rights to engage in homosexual conduct simply to bolster workplace unity.⁹³

⁹¹ See *Lawrence*, 539 U.S. at 578 (finding that imposing society's moral judgment on homosexuals is not a legitimate interest to criminalize homosexual conduct).

⁹² See *Tucker v. California Dept. of Educ.*, 97 F.3d 1204, 1211 (9th Cir. 1996) (holding that the employer's ban on religious advocacy in the workplace was not necessary to further the employer's interest in workplace efficiency and discipline).

⁹³ See *Shahar*, 114 F.3d at 1101 (demonstrating a pre-*Lawrence* case in which the employer claimed that employing a lesbian attorney would create difficulties in maintaining working relationships in Georgia's Attorney General's office).

3. Public Image And Credibility

By declaring criminal sodomy statutes unconstitutional, the *Lawrence* Court removed the types of criticisms that employers alleged society would make as a result of employing homosexual employees. Again, using the field of law enforcement as an example, *Lawrence* causes future courts to question employers' concerns about the public credibility of their offices because society will not look poorly upon an employer for hiring employees that do not uphold and enforce unconstitutional laws.⁹⁴ Moreover, the *Lawrence* decision makes society's views of an office's credibility irrelevant with respect to hiring homosexual employees that society deems are engaged in immoral conduct.⁹⁵ Because the Court in *Lawrence* reasoned that society

⁹⁴ See *Shahar*, 114 F.3d at 1101 (showing a pre-*Lawrence* case in which the court found that the Georgia Attorney General could reasonably conclude that hiring a lesbian attorney would undermine the office's public credibility because a lesbian attorney might be unwilling to enforce the state's criminal sodomy laws).

⁹⁵ See *id.* (demonstrating a pre-*Lawrence* case where the court upheld the employer's reasoning that hiring a lesbian attorney would send a signal to society that the Attorney General's Office was hypocritical to the Office's prior stance of

cannot criminalize conduct it finds to be immoral, employers cannot impose society's moral judgments of homosexuality on their homosexual employees as that would be tantamount to the state imposing society's morality in criminalizing homosexual conduct.⁹⁶

Moreover, the *Lawrence* decision changes the employers' public messages and images that they must project.⁹⁷ For example, under the *Bowers*' rationale, law enforcement employers denied employment to homosexuals under the guise that this denial was necessary to reflect society's moral condemnation of homosexual activity.⁹⁸ The *Lawrence* Court eliminated this rationale by rejecting the premise that the state can criminalize homosexual conduct as a reflection of society's

upholding Georgia's criminal sodomy statute).

⁹⁶ See *Lawrence*, 539 U.S. at 577-78 (finding that society's morals do not justify criminalizing one's private conduct).

⁹⁷ See *Shahar*, 114 F.3d at 1101 (recognizing the legitimacy of the Georgia Attorney General's concern about his office appearing conflicted about interpretations of Georgia law if he hired a lesbian attorney).

⁹⁸ See *Childers*, 513 F. Supp. at 140-41 (recognizing a strong state interest in its police department reflecting a majority of society's values).

values.⁹⁹ *Lawrence* stands for the reasoning that employers must uphold their homosexual employees' liberty rights, through their public messages and images, even at the risk of conflicting with society's moral condemnation of their employees' homosexual conduct.¹⁰⁰

4. National Security Risks

The Court's *Lawrence* decision also forecloses the return of sexual orientation discrimination based on the government's national security concerns.¹⁰¹ The government's original concern was that Communists, or other anti-American groups, would blackmail homosexual government employees by threatening to expose the employees' homosexuality in order to gain access to confidential materials.¹⁰² As a result, the government subjected

⁹⁹ See *Lawrence*, 539 U.S. at 578 (finding that reflecting society's values is not a legitimate government interest to sustain a state's criminal sodomy statute).

¹⁰⁰ See *id.* (stating that the government may not interfere with homosexuals' personal liberty, simply because a majority of society morally condemns homosexual conduct).

¹⁰¹ See, e.g., *High Tech Gays*, 895 F.2d at 575-76 (validating the Government's concern that hiring homosexual employees would compromise the Government's confidential material).

¹⁰² See David K. Johnson, *Homosexual Citizens: Washington's Gay*

homosexual employees to much more rigorous background checks than their heterosexual colleagues.¹⁰³ The courts found this rationale reasonable under the Court's decision in *Bowers*, because homosexual employees feared exposing their homosexuality where it would likely lead to loss of employment and possible criminal prosecution.¹⁰⁴ However, the Court's decision in

Community Confronts the Civil Service, WASH. HIST., Fall/Winter 1994-95, at 54 (explaining that the United States Civil Service did not necessarily doubt homosexual employees' loyalties, but rather was concerned that homosexuals were at greater risk to blackmail and therefore posed a security risk).

¹⁰³ See, e.g., *High Tech Gays*, 895 F.2d at 575-76 (upholding extensive background checks for homosexual employees on the grounds that they are rationally related to protecting the government's legitimate security interests because homosexual employees present a greater risk for blackmail and coercion).

¹⁰⁴ See *Johnson*, *supra* note 102, at 53-54 (demonstrating how federal employees reasonably feared losing their jobs once Congress raised a suspicion of their individual homosexuality). *But see* Exec. Order No. 12,968, 60 Fed. Reg. 40,245 (Aug. 7, 1995) (prohibiting the government from discriminating on the basis of sexual orientation when granting security clearances by ending the government's practice of subjecting homosexual

Lawrence causes the courts to question this rationale's reasonableness because under *Lawrence*, homosexual employees no longer fear criminal prosecution of their private, homosexual conduct.¹⁰⁵

The *Lawrence* Court's decision also diminishes the government's national security concerns through its focus on the Model Penal Code and the greater social stigma that criminal sodomy statutes had imposed on homosexuals.¹⁰⁶ The Model Penal Code recognized the potential for individuals to blackmail homosexual government employees, and specifically cited that

applicants for clearances to an extensive background investigation on that basis alone).

¹⁰⁵ See *Padula*, 822 F.2d at 104 (exemplifying a pre-*Lawrence* case in which the court upheld the FBI's decision not to hire a homosexual agent because it would pose a security risk); *Doe*, 981 F.2d at 1324 (showing a pre-*Lawrence* case where the court found that a homosexual federal intelligence agent infringed on the government's security interest in collecting foreign intelligence and protecting the nation's secrets).

¹⁰⁶ See *Lawrence*, 539 U.S. at 572, 575 (noting how the Model Penal Code's recommendation and the stigma that criminal sodomy statutes created infringed on homosexuals' liberty interests in their private, consensual, homosexual activities).

potential as one of its reasons for not recommending criminal sodomy statutes against private, consenting adults.¹⁰⁷ By recognizing the Model Penal Code's recommendation and by focusing on the stigma attached to criminal sodomy statutes, the *Lawrence* Court's decision to overrule the criminal sodomy statutes as the major cause of the blackmail and social stigma signaled the Court's attempt at overcoming these evils.¹⁰⁸ By removing the possibility of criminal sanctions, the Court removed the effectiveness of attempting to blackmail homosexual employees because in addition to not fearing criminal prosecution, homosexual employees will not feel the same pressure of facing the added social stigma that criminal sanctions would impose if one exposed the homosexual employee's

¹⁰⁷ See MODEL PENAL CODE § 213.2 cmt. 2 at 372 (1980) (justifying its recommendation because criminal sodomy statutes 1) penalize conduct that many people engage in, which undermines respect for the law; 2) punish people for their private actions that do not harm others; and 3) invite the danger of blackmail when the courts arbitrarily enforce them).

¹⁰⁸ See *id.* at 578 (stating that the state cannot demean homosexuals' existence or control their destiny by criminalizing their private sexual conduct).

sexual orientation to the public.¹⁰⁹ The Court's decision in *Lawrence* minimized both the incentive and potential for blackmail, thus questioning employers' national security concerns.¹¹⁰

B. The *Lawrence* Decision Opened The Door For A Future Court To Declare Homosexuals To Be A Suspect Class, And Private, Homosexual Conduct To Be A Fundamental Right

The Court, by declaring gays, lesbians, and bisexuals to be a suspect or quasi-suspect class, and by declaring private, homosexual conduct to be a fundamental right, would provide homosexual employees with greater protection than under a rational basis test because it would require employers to meet the higher standard of at least substantially relating their employment decisions to important business purposes, rather than just rationally relating employment decisions to legitimate

¹⁰⁹ See *Richardson v. Hampton*, 345 F. Supp. 600, 609 (D.D.C. 1972) (citing a pre-*Lawrence* case that found that the government may question a homosexual employee's background extensively out of a legitimate concern in maintaining the security of classified information and the Civil Service's overall efficiency).

¹¹⁰ See *Lawrence*, 539 U.S. at 572 (noticing the potential for blackmail when homosexual employees' private homosexual conduct is criminalized).

business purposes.¹¹¹ While the majority in *Lawrence* did not explicitly declare homosexual a suspect class and did not explicitly grant homosexual conduct fundamental right status, the opinion's reasoning focused on case law whose principles favor such findings.¹¹² Additionally, the Court focused on European jurisprudence that applied strict scrutiny to government actions against private, consensual homosexual conduct in the same manner that the United States Supreme Court has treated other fundamental rights, such as individuals' rights to privacy in their private, intimate conduct.¹¹³

¹¹¹ *Cf.* *Wengler v. Druggist Mut. Ins. Co.*, 446 U.S. 142, 150 (1980) (applying intermediate level scrutiny to gender-based discrimination, gender being a quasi-suspect class, and requiring the discriminatory action to be substantially related to important governmental objectives).

¹¹² *See* 539 U.S. at 572-73 (focusing on cases, such as *Griswold*, *Eisenstadt*, and *Carey*, which have declared individuals' privacy rights in matters pertaining to sex fundamental rights).

¹¹³ *Compare* *Modinos v. Cyprus*, 16 Eur. H.R. Rep. 485, 489 (accepting homosexuality as an integral part of human freedom and holding that government actions had to be 'necessary' towards achieving compelling government interests) *with* *Eisenstadt*, 405 U.S. at 443, 448 (invalidating a state law that

1. Creating A Fundamental Right To Privacy

Justice O'Connor's concurrence, focusing on how Texas' criminal sodomy statute did not pass a rational basis test under the Equal Protection Clause, likely forced the majority to stop short of explicitly finding private, consensual homosexual conduct to be a fundamental right at the risk of losing her support.¹¹⁴ Justice O'Connor joined in the *Bowers* majority, which declared that homosexual conduct was not a fundamental right.¹¹⁵ Therefore, if the *Lawrence* majority explicitly

prohibited the sale of contraceptives to non-married individuals because it invaded individuals' fundamental rights to privacy in their private, sexual conduct and was not a necessary restriction aimed at achieving a compelling government interest).

¹¹⁴ See *Lawrence*, 539 U.S. at 579 (O'Connor, J., concurring) (basing her conclusion on the Equal Protection Clause rather than contradicting the *Bowers* majority by declaring homosexual conduct a fundamental right).

¹¹⁵ See *Bowers*, 478 U.S. at 194-95 (demonstrating the Court's reluctance to expand its definition of a fundamental right to include homosexual conduct because of the Court's belief that doing so would be exercising judge-made constitutional law, bringing the Court closer to illegitimacy).

declared homosexual conduct to be a fundamental right, Justice O'Connor could not have supported the *Lawrence* majority because she would have been forced to overrule her prior decision in *Bowers*.¹¹⁶ However, the majority's focus is more consistent with the Court's jurisprudential direction of expanding fundamental privacy rights to individuals' private, sexual conduct.¹¹⁷

Moreover, the Supreme Court has recognized marriage as one of the "basic civil rights of man."¹¹⁸ If marriage is such an important interest, then as an integral part of marriage, couples' private, intimate conduct should be accorded the same weight.¹¹⁹ The Court in *Lawrence* rationalized overturning state

¹¹⁶ See *Lawrence*, 539 U.S. at 579 (O'Connor, J., concurring) (writing that the Justice joined the *Bowers* majority and was unwilling to join the *Lawrence* plurality in overruling it).

¹¹⁷ See, e.g., *Eisenstadt*, 405 U.S. at 454-55 (extending a fundamental right to privacy to cover unmarried couples' interests in their private, intimate conduct).

¹¹⁸ *Loving*, 388 U.S. at 12 (applying strict scrutiny to Virginia's miscegenation law, which prohibited interracial marriage).

¹¹⁹ See Brief of Amici Curiae American Psychological Association et al. at 15-23, *Lawrence V. Texas*, 539 U.S. 558 (2003) (stating that sexual intimacy is a fundamental aspect of human

sodomy laws because it recognized that partners' intimate sexual relations are an important privacy interest.¹²⁰ By focusing on privacy rights rather than an Equal Protection analysis, the Court paved the foundation for a future Court to explicitly declare that private, homosexual conduct is a fundamental right, consistent with other fundamental privacy rights that the Court has granted.¹²¹

The *Lawrence* Court's focus on European jurisprudence to impeach its previous findings in *Bowers* implicitly supports a

experience); see also P. Blumstein & P. Schwartz, *AMERICAN COUPLES: MONEY, WORK, SEX* 193, 201, 205-06 (1983) (saying that, "[A] good sex life is central to a good overall relationship").

¹²⁰ See *Lawrence*, 539 U.S. at 567 (finding that homosexual persons' intimate conduct can simply be but one element of a more enduring relationship).

¹²¹ See Bobbie L. Stratton, *A Prediction Of The United States Supreme Court's Analysis Of The Defense Of Marriage Act, After Lawrence v. Texas*, 46 S.TEX.L.REV. 361, 388 (arguing that the *Lawrence* Court's focus on the history of society's acceptance of homosexuals, on prohibiting society's moral values from trumping individual liberties, and on disapproving of laws that are based on animus towards a group, will allow future courts to declare the Defense of Marriage Act unconstitutional).

finding that homosexual conduct is a fundamental right because the European cases that the Court cites use strict scrutiny to protect homosexual conduct under a fundamental right to privacy in the same way that the United States Supreme Court has used strict scrutiny to protect other liberties as fundamental rights.¹²² The Court cited the Wolfenden Report, which advised the British Parliament to repeal laws that punished homosexual conduct, and the ensuing Sexual Offences Act of 1967, which enacted the report's recommendations.¹²³ The Court also cited

¹²² See, e.g., *Dudgeon v. United Kingdom*, 4 Eur. H.R. Rep. 149, 164 (invalidating a law that prohibited private, homosexual conduct, providing that the law was not 'necessary' to achieving Northern Ireland's important interests of protecting certain sections of society, such as children, and the morality of the citizenry as a whole).

¹²³ See *Lawrence*, 539 U.S. at 572-573 (citing The Wolfenden Report as evidence rebutting the *Bowers* Court finding that Western civilization and Judeo-Christian moral and ethical standards condemned homosexual conduct); see also *The Wolfenden Report: Report of the Committee on Homosexual Offenses and Prostitution* (Stein & Day, Inc. 1963) (concluding that outlawing homosexuality impinged on homosexuals' civil liberties and that it was not the law's job to impose private morality on others);

European Court of Human Rights cases with similar legal rationale to U.S. jurisprudence involving fundamental rights status.¹²⁴ Specifically, these cases declared laws proscribing private, homosexual conduct invalid because they invaded individuals' rights to privacy and they were not "necessary" to achieve important government interests.¹²⁵

Furthermore, in its amicus brief, Amnesty International urged the *Lawrence* Court to reject its *Bowers* holding in the same way that European courts have done.¹²⁶ By citing these

Sexual Offenses Act of 1967, c. 60, § 1 (Eng.) (decriminalizing private homosexual conduct between two consenting adult men).

¹²⁴ See *Lawrence*, 539 U.S. at 576 (citing European Court of Human Rights cases that have protected homosexual adults' rights to engage in intimate, consensual conduct).

¹²⁵ See, e.g., *Modinos*, 16 Eur. H.R. Rep. at 489 (prohibiting the government from interfering in the private and family life of homosexuals because the government's intrusion is not 'necessary' to serve the government's interests in, "national security, public safety, the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others").

¹²⁶ See Brief of Amici Curiae Amnesty International et al. at 9,

European Human Rights Court cases, the Court in *Lawrence* gave weight to Amnesty International's argument that decisions to engage in sexual conduct with members of the same sex are among, "the most intimate and personal choices a person can make in a lifetime."¹²⁷ By focusing on how European courts treat homosexual conduct as a fundamental right to privacy, the *Lawrence* Court gave credence to the argument that courts should treat homosexual conduct as a fundamental right and opened the door for future courts to use *Lawrence* to create a fundamental right to private, homosexual conduct.

2. Granting Heightened Scrutiny To Homosexuals' Equal Protection Claims

While the courts largely have foreclosed homosexual employees' arguments that sexual orientation discrimination is akin to discrimination on the basis of sex for Title VII purposes, many courts have granted such claims in areas outside of Title VII, such as Equal Protection claims involving same sex

Lawrence, 539 U.S. 558 (2003) (No. 02-102) (noting how foreign courts have rejected *Bowers*' principles based on a decisional theory, relational theory, and zonal theory of privacy).

¹²⁷ *Id.* at 10 (citing *Casey*, 505 U.S. at 851) (asserting that homosexual conduct fits into *Casey*'s decisional theory of privacy, which protects persons' choices central to personal dignity and autonomy).

marriage.¹²⁸ In these cases, the courts have granted same sex couples heightened scrutiny for their Equal Protection claims.¹²⁹ If homosexual couples get heightened scrutiny analysis when they argue that state laws prohibiting same sex marriage violate the Equal Protection Clause, then homosexual employees should get heightened scrutiny analysis when they argue that their employers fired them for being homosexual, thus violating their Equal Protection rights.¹³⁰

C. Congress Should Enact The Employment Non-Discrimination Act

Congress should enact ENDA because current Federal legislation, mainly Title VII, neither effectively nor

¹²⁸ See *Baehr v. Lewin*, 852 P.2d 44, 64 (Haw. 1993) (finding that a restriction disallowing same-sex couples from applying for a marriage license constituted a sex-based classification).

¹²⁹ See *id.* (noting that the U.S. Supreme Court has granted heightened scrutiny, considering same sex challenges as classifications based on gender when analyzing Fifth and Fourteenth Amendment Equal Protection claims).

¹³⁰ Compare *Baehr*, 852 P.2d at 64 (granting same-sex couples heightened scrutiny when analyzing a law prohibiting same-sex marriage) with *Glover*, 20 F. Supp.2d at 1169 (applying a rational basis test to a homosexual employee's Equal Protection claim where his employer fired him for being gay).

consistently protects both private and public sector employees from sexual orientation discrimination.¹³¹ In effect, ENDA's drafters designed ENDA to mimic Title VII so that it would effectively and consistently protect employees from sexual orientation discrimination in the same manner that Title VII protects employees from racial, sexual, religious, and national origin discrimination.¹³² While individual states have enacted their own anti-discrimination legislation, expressly prohibiting sexual orientation discrimination,¹³³ most states still do not

¹³¹ See Taylor Flynn, *Transforming The Debate: Why We Need To Include Transgender Rights In The Struggles For Sex And Sexual Orientation Equality*, 101 COLUM. L. REV. 392, 402 (2001)

(demonstrating inconsistencies with the way that courts treat Title VII sex discrimination claims because some courts equate sex with gender and sexual orientation and some do not).

¹³² See 142 CONG. REC. S9986-01, S9986 (1996) (statement of Sen. Kennedy) (explaining that ENDA's drafters modeled it after Title VII and that their purpose was merely to add sexual orientation to the list of employment practices that Title VII already prohibits).

¹³³ See, e.g., CONN. GEN. STAT. ANN. § 46a-81c (West 2005) (exemplifying Connecticut's civil rights statute, which explicitly prohibits employers from discriminating against

have such legislation, leaving most homosexual employees vulnerable.¹³⁴ While the Senate continually has rejected past versions of ENDA, a more narrow construction of ENDA, plus the Court's reasoning in *Lawrence*, debunk many opposing Senators' concerns about ENDA and open the door for Congress to pass federal legislation prohibiting sexual orientation discrimination in the workplace.¹³⁵

employees on the basis of sexual orientation).

¹³⁴ See *Summary of States, Cities, and Counties Which Prohibit Discrimination Based on Sexual Orientation* (listing the states, cities, and counties that prohibit sexual orientation discrimination in public employment, private employment, public accommodations, education, housing, credit, and union practices, along with the relevant source that prohibits the discrimination), available at <http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=217> (last visited Feb. 11, 2005).

¹³⁵ See S. REP. No. 107-341, at 39 (discussing the minority view of the Senate Committee on Health, Education, Labor, and Pensions that ENDA is overly broad and unclear regarding its effect on individual, constitutional and states' rights).

1. Current Federal And State Legislation Neither Effectively Nor Consistently Protects Employees From Sexual Orientation Discrimination

New federal legislation, specifically prohibiting sexual orientation discrimination in employment, is necessary because the courts generally do not recognize a cause of action for discrimination based on sexual orientation under the current federal legislation of Title VII.¹³⁶ The courts repeatedly have held that Title VII does not prohibit discrimination or harassment based on a worker's sexual preference.¹³⁷ Most courts also conclude that Title VII's prohibition of discrimination on the basis of one's "sex" is different than discrimination on the basis of one's "sexual orientation."¹³⁸

¹³⁶ See, e.g., *Hamm v. Weyauwega Milk Prods. Inc.*, 332 F.3d 1058, 1059 (7th Cir. 2003) (holding that proof that co-workers harassed a male employee because they thought he was gay was not enough to prove discrimination on the basis of sex without additional evidence linking the bias to sex rather than sexual orientation).

¹³⁷ See, e.g., *Simonton*, 232 F.3d at 35 (denying a homosexual employee's Title VII sexual harassment claim because the harassers based their harassment on the homosexual employee's sexual orientation rather than his sex).

¹³⁸ See *id.* at 36 (stating that "sex" refers to membership in a

The courts are also split in characterizing sexual orientation discrimination as a form of sex discrimination whereby employers discriminate against a gay male employee for being too effeminate or against a lesbian female employee for being too masculine.¹³⁹ Only a small minority of courts have been willing to protect homosexual employees under the theory that sexual stereotyping of homosexuals is discrimination on the basis of sex and therefore actionable under Title VII.¹⁴⁰ Most

class delineated by gender, not sexual orientation). *But see* *Oncale v. Sundowner Offshore Serv., Inc.*, 523 U.S. 75, 79 (noting that Title VII does not bar a claim of sex discrimination merely because the plaintiff and the defendant are of the same sex).

¹³⁹ See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250, 235 (1989) (finding that an employer discriminated against a female employee on the basis of sex, by refusing to promote the employee because the employer believed she portrayed herself in a stereotypically male fashion).

¹⁴⁰ See, e.g., *Smith v. Salem*, 378 F.3d 566, 572 (6th Cir. 2004) (holding that a fire department discriminated against a transsexual male firefighter on the basis of sex by means of sexual stereotyping, where the firefighter acted effeminately); *Nichols v. Azteca Rest. Enters. Inc.*, 256 F.3d 864, 874 (9th

courts have been reluctant to extend Title VII to include sexual orientation as a form of discrimination on the basis of sex, leaving homosexual employees vulnerable to sexual orientation discrimination due to inconsistent protection under federal law.¹⁴¹ The inconsistency with which the courts deal with sexual orientation discrimination demonstrates the need for Congress to create specific federal legislation that unequivocally prohibits employers from discriminating against their employees based on their employees' sexual orientation.¹⁴²

Moreover, while some states have passed their own anti-

Cir. 2001) (upholding a homosexual employee's Title VII sexual harassment claim, finding that coworkers who harassed the homosexual employee for acting too feminine discriminated against him on the basis of sex).

¹⁴¹ See, e.g., *Simonton*, 232 F.3d at 36 (defining the issue as whether the employer offered members of one sex disadvantageous employment terms and conditions over members of another sex, rather than offering disadvantageous employment terms and conditions over members of a certain sexual orientation).

¹⁴² See S.REP.NO. 107-341, at 11 (2001) (arguing that Congress' failure to enact federal legislation prohibiting sexual orientation discrimination is a tacit endorsement of anti-gay bias).

discrimination statutes that expressly prohibit employers from discriminating on the basis of sexual orientation, many states have not.¹⁴³ Senators opposing ENDA argued that Congress does not need to be responsible for enacting federal legislation when the states are enacting their own anti-discrimination legislation.¹⁴⁴ Their concern was that the states that had prohibited sexual orientation discrimination limited their

¹⁴³ See Summary Of States Which Prohibit Discrimination Based On Sexual Orientation (June 24, 2004) (listing California, Connecticut, Hawaii, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Washington D.C., and Wisconsin as the states that have either civil rights legislation or executive orders that protect employees from sexual orientation discrimination), *available at* <http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=185> (last modified June 24, 2004).

¹⁴⁴ See S.REP.NO. 107-341, at 39 (2001) (noting how the thirteen states that enacted laws prohibiting sexual orientation discrimination at the time had tailored these laws to their own needs and sensitivities by defining "sexual orientation" in different ways).

statutes' protections to non-criminal activity, whereas ENDA did not make such a distinction.¹⁴⁵ ENDA, being federal law, would preempt states' anti-discrimination laws¹⁴⁶ and therefore would have forced employers to employ homosexuals that the states deemed were engaging in the criminal conduct of sodomy.¹⁴⁷ The Court in *Lawrence* foreclosed that argument when it decriminalized all state sodomy statutes because ENDA's definition of "sexual orientation" no longer conflicts with states' definitions of "sexual orientation" regarding the criminality of private, homosexual conduct.¹⁴⁸

¹⁴⁵ See, e.g., R.I. GEN. LAWS § 28-5-6(15) (2004) (narrowing Rhode Island's definition of "sexual orientation" to define the status of a person rather than to render criminal conduct lawful).

¹⁴⁶ See U.S. CONST. art. VI, cl. 2 (declaring the U.S. Constitution and federal law to be the supreme law of the land, notwithstanding state laws to the contrary).

¹⁴⁷ See S.REP.No. 107-341, at 40 (2001) (arguing that because ENDA would preempt state law, it should take into account different states' definitions of "sexual orientation" by recognizing that homosexual conduct is criminal behavior under certain state's criminal codes).

¹⁴⁸ See S.REP.No. 107-341, at 39 (2001) (demonstrating that pre-*Lawrence*, Senators claimed that ENDA likely would conflict with

Moreover, while Senators opposing ENDA would have liked to have left it up to the states to continue enacting their own legislation, Congress has enacted Federal anti-discrimination legislation in the past, even when some states had already prohibited similar discrimination.¹⁴⁹ For example, when Congress enacted the Civil Rights Act of 1964, several states already had some form of civil rights law prohibiting racial discrimination.¹⁵⁰ Furthermore, Congress passed the Americans

many state laws because ENDA failed to account for the varying definitions of "sexual orientation" among state laws).

¹⁴⁹ See S.REP.NO. 107-341, at 13 (2001) (noting that Congress passed the Civil Rights Act of 1964 because it recognized that a large number of states offered no protection against racial discrimination). *But see* 151 CONG. REC. S146-01, S365 (2005) (statement by Sen. Allard) (demonstrating Congress' attempt to limit homosexuals' rights via the "Marriage Protection Amendment" which is a constitutional amendment that defines marriage as a union between a man and a woman).

¹⁵⁰ See, e.g., N.J. STAT. ANN. § 10:5-4 (West 1945) (exemplifying New Jersey's Civil Rights Law that prohibited employers from discriminating against employees on the basis of race, enacted prior to the Civil Rights Act of 1964); accord CONN GEN. STAT. ANN. § 46a-60 (West 1949); DEL. CODE ANN. tit. 19 § 711 (1953)

with Disabilities Act ("ADA"), even though several states provided some protection to individuals with disabilities prior to 1990.¹⁵¹ In passing these two pieces of legislation, Congress affirmed that civil rights is a matter of national interest and that Congress is responsible for creating uniform standards to reinforce the nation's commitment to equality.¹⁵²

2. ENDA's Narrow Drafting And The Court's Reasoning In Lawrence Debunk ENDA's Opposition's Arguments

Senators opposing ENDA cited concerns that ENDA would force employers with deeply held religious and moral beliefs, who find homosexuality morally repugnant, to hire homosexual employees.¹⁵³

¹⁵¹ See, e.g., WIS.STAT.ANN. § 111.321 (West 1981) (demonstrating Wisconsin's Fair Employment Law, enacted 9 years prior to the federal ADA, that prohibits employers from discriminating against employees on the basis of disability).

¹⁵² See S.REP.NO. 107-341, at 13 (2001) (arguing that it is Congress's responsibility to create a uniform standard of prohibiting discrimination based on sexual orientation, just like it was Congress' responsibility to create a uniform standard of prohibiting discrimination based on race, disability, and age).

¹⁵³ See 142 CONG.REC. at S9991 (statement of Sen. Hatch) (fearing that ENDA would override millions of Americans' moral and religious sensibilities).

Before *Lawrence*, the Court validated this critique by holding that the Boy Scouts of America, a non-religious group, did not have to employ a homosexual Scout Master because this effectively would force the Boy Scouts to send a message that homosexual conduct is a legitimate form of behavior, when in fact the Boy Scouts wanted to send the contrary message, namely that they morally opposed homosexuality.¹⁵⁴ The 1996 version of ENDA exempted only non-profit religious groups, drawing harsh criticism from opposing Senators who objected to ENDA's applicability to for-profit, religious organizations that held the same moral reprehension to homosexuality as their non-profit counterparts.¹⁵⁵ The 2003 version of ENDA is more narrowly

¹⁵⁴ See *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 653 (2000) (legitimizing the Boy Scouts' concern that a homosexual Scout Master would be a bad role model).

¹⁵⁵ See 142 CONG.REC. at S9997 (statement of Sen. Nickles) (arguing that a for-profit religious organization, such as a Christian book store, should not forfeit its right to condemn homosexuality just because it makes a profit). *But see* 142 CONG.REC. at S9986, S10002 (statement of Sen. Kennedy) (noting that ENDA 1996 provided a broader religious exemption than Title VII and that ENDA 1996 exempted only nonprofit religious businesses, consistent with other civil rights laws, because the

constructed, exempting all religious organizations, regardless of their profit status, thereby allaying opposing Senators' previous concerns.¹⁵⁶ While the 2003 version of ENDA does not exempt the Boy Scouts, the Court's reasoning in *Lawrence* rebutted the premise that employers who are morally opposed to homosexuality may discriminate against homosexual employees because the *Lawrence* decision specifically recognized that society's moral judgments on homosexuality cannot be a rational basis for discrimination.¹⁵⁷ Additionally, the purpose of civil

drafters considered nonprofit businesses to be more directly associated with religious teachings while the for-profit businesses were more secular in nature).

¹⁵⁶ See Employment Non-Discrimination Act of 2003, S.1705, 108th Cong. § 9 (2003) (defining "religious organization" as, "A) a religious corporation, association, or society; or B) a school, college, university, or other educational institution or institution of learning if, i) the institution is ... controlled, managed, owned, or supported by a religion, religious corporation, association, or society; or ii) the curriculum of the institution is directed toward the propagation of religion").

¹⁵⁷ See *Lawrence*, 539 U.S. 577-78 (finding that a state's traditional view that homosexual conduct is immoral is not a

rights laws, like Title VII, is to protect the minority and combat those moral and ethical beliefs against disparaged classes so that everyone has an equal opportunity in employment.¹⁵⁸ Protecting citizens' civil rights is a basic federal duty, and ENDA is a proper response to sexual orientation discrimination.¹⁵⁹

Furthermore, nothing in ENDA protects inappropriate behavior, whether perpetrated by a homosexual employee or by a heterosexual employee.¹⁶⁰ As with the ADA, a person in the protected class cannot engage in bizarre behavior, must be

sufficient reason to prohibit it).

¹⁵⁸ See 142 CONG.REC. at S9994 (statement of Sen. Kennedy) (arguing that Congress has enacted previous civil rights laws in order to prohibit employers from using their ethical and moral beliefs as a basis for discrimination based on race, religion, ethnicity, national origin, gender, and disability).

¹⁵⁹ See 142 CONG.REC. at S10002 (statement of Sen. Kennedy) (stating that Congress has the duty to set national standard of fairness and equality so that citizens may travel across the country without facing unjust discrimination).

¹⁶⁰ See 142 CONG.REC. at S9999 (statement of Sen. Feinstein) (asserting that ENDA does not protect inappropriate conduct, such as a waiter or waitress kissing on their job).

qualified for the job, and must abide by workplace rules.¹⁶¹ A homosexual teacher, publicly engaging in homosexual conduct, is just as inappropriate as a heterosexual teacher engaging in the same conduct.¹⁶² ENDA treats homosexual employees wearing inappropriate clothing and accessories the same as heterosexual employees wearing similarly inappropriate clothing and accessories.¹⁶³ Moreover, the Court's reasoning in *Lawrence* prohibits employers from objecting to homosexual conduct as an

¹⁶¹ See *Raytheon Co. v. Hernandez*, 540 U.S. 44, 55 (2003) (holding that an employer did not discriminate against an employee based on disability where the employer fired the employee for testing positive for cocaine at work, and where the company had a policy of not rehiring employees whom the employer terminated for violating workplace rules).

¹⁶² See, e.g., *Petit v. State Bd. of Educ.*, 513 P.2d 889, 889 (Cal. 1973) (finding that a public school properly discharged a teacher, who went to a "swingers" club with her husband, and engaged in three separate acts of oral copulation).

¹⁶³ See *Kelley v. Johnson*, 425 U.S. 238, 246-247 (1976) (upholding a police department's hair and grooming standards because they promoted the legitimate government interests of keeping uniformity in their police departments as well as promoting esprit de corps).

objectionable behavior unto itself because the *Lawrence* Court constitutionally protects homosexual conduct as a private, liberty interest, not subject to society's moral objections.¹⁶⁴

Similarly, Senators opposing the Civil Rights Act of 1964 argued that the legislation would force employers to hire black employees, which many employers morally opposed.¹⁶⁵ However, the Supreme Court consistently has rejected these arguments and upheld employees' Title VII racial, religious, sex, and national origin discrimination claims.¹⁶⁶

¹⁶⁴ See 539 U.S. 577-78 (stating that individuals' private, homosexual conducts deserve the same privacy interests as married and unmarried individuals' interests in their intimate conduct).

¹⁶⁵ See 142 CONG.REC. at S10003 (statement of Sen. Kennedy) (recalling Senators' arguments that blacks did not deserve federal protection from discrimination because these Senators believed that blacks did not work hard, were lazy, and were not competent).

¹⁶⁶ See, e.g., *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973) (upholding a black employee's Title VII racial discrimination claim, where an employer treated employees of one race differently than employees of another race); see also *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 73 (1986)

Senators should also not use ENDA's "perception" language as an excuse to reject ENDA because including this language is most consistent with Congress' intent to prevent discrimination.¹⁶⁷ Senators opposing ENDA voiced concerns that ENDA not only covers discrimination against known homosexual employees, but also covers discrimination against employees whom employers and colleagues perceive to be homosexual.¹⁶⁸ Some in Congress fear that this definition would lead to a deluge of litigation over the definitions of homosexuality and perception.¹⁶⁹ However, ENDA's "perception" language is

(holding that a woman's claim of a hostile work environment constituted discrimination on the basis of sex, and was therefore actionable under Title VII)

¹⁶⁷ See S. REP. NO. 107-341, at 30 (2001) (arguing that by reading "perception" language into civil rights statutes the courts are supporting the spirit in which Congress has enacted such statutes).

¹⁶⁸ See Employment Non-Discrimination Act of 2003, S.1705, 108th Cong. § 3(a)(9) (2003) (defining "sexual orientation" as, "homosexuality, bisexuality, or heterosexuality, whether the orientation is real or perceived").

¹⁶⁹ See S. REP. NO. 107-341, at 39 (2001) (claiming that ENDA will force employers to settle sexual orientation discrimination

consistent with similar language in other federal civil rights legislation, such as the ADA.¹⁷⁰ Moreover, many courts have read “perception” language into Title VII, even though Title VII does not expressly prohibit discrimination based on the employers’ perceptions.¹⁷¹ For example, courts have interpreted Title VII to encompass employers who discriminate based on their perceptions of their employees’ sex by means of sex stereotyping.¹⁷² Furthermore, ENDA’s “perception” language is consistent with many state anti-discrimination statutes’

claims because the only way for employers to defend themselves using ENDA’s broad definition of “sexual orientation” is by proving a negative).

¹⁷⁰ See American’s With Disabilities Act 42 U.S.C. §§ 12112, 12102(2)(C) (2005) (prohibiting employers from discriminating against employees whom the employer knows or regards as being disabled).

¹⁷¹ See 42 U.S.C. § 2000e-2 (containing the language “because of such individual’s race ... national origin” and not “perception of such individual’s race ... national origin”).

¹⁷² See, e.g., *Nichols*, 256 F.3d at 874-75 (holding that discrimination based on the employer’s perception that the employee is effeminate is discrimination because of sex, and therefore actionable under Title VII).

definition of sexual orientation discrimination.¹⁷³

ENDA's narrow construction also refutes opposing Senators' concerns that ENDA will give the Equal Employment Opportunity Commission ("EEOC") the power to require employers to provide the EEOC with data on the sexual orientation of their employees.¹⁷⁴ They argue that in order to defend against sexual orientation discrimination claims, employers will need to be able to show that they do in fact hire homosexual employees.¹⁷⁵ They claim that the only way employers can show that they hire homosexual employees is by keeping statistics on the sexual

¹⁷³ See, e.g., N.H. REV. STAT. ANN. § 354-A:2 (2004) (defining "sexual orientation" as "having or being perceived as having an orientation for heterosexuality, bisexuality, or homosexuality").

¹⁷⁴ See 142 CONG.REC. at S9992 (statement of Sen. Hatch) (alleging that ENDA invites employers to gather statistics based on sexual orientation because Section 11 of ENDA 1996 grants the EEOC the same enforcement power as it already has under Title VII).

¹⁷⁵ See *id.* (explaining how the EEOC would require employers to keep statistics of their employees' sexual orientations so as to defend against pattern and practice cases, where the plaintiff complains that the employer has a policy that discriminates by failing to hire homosexual employees).

orientations of their employees and invading their privacy.¹⁷⁶ Again, ENDA's narrow construction refutes these claims by expressly prohibiting the EEOC from collecting statistics.¹⁷⁷

Moreover, the EEOC recordkeeping and reporting requirements also suggest that the EEOC will not require employers to keep statistics on the sexual orientation of their employees, and this lack of a requirement does not preclude those aggrieved by their employers on the basis of sex, age, or disability from successfully litigating claims.¹⁷⁸ The EEOC's only reporting requirement, applicable to private sector employees, is the EEO-1 form, which does not request any information regarding

¹⁷⁶ See 142 CONG.REC. at S9998 (statement of Sen. Nickles) (arguing that employers, in order to protect themselves from litigation under ENDA, will need to inquire and keep records of their employees' sexual orientations).

¹⁷⁷ See Employment Non-Discrimination Act of 2003, S.1705, 108th Cong. § 7 (2003) (prohibiting the EEOC from collecting or compelling the collection of statistics on sexual orientation from covered entities).

¹⁷⁸ See 29 C.F.R. § 1602.12 (2005) (stating that the EEOC does not require employers, in general, to keep or make records under Title VII and the ADA).

employees' ages or disabilities.¹⁷⁹ It is unlikely that the EEOC would require employers to gather information regarding their employees' sexual orientations on the EEO-1 form because employers do not need to know their employees' sexual orientations in order to comply with ENDA.¹⁸⁰ The Uniform Guidelines on Employee Selection, designed to help employers create employee selection procedures that comply with Title VII, also include recordkeeping requirements.¹⁸¹ However, these guidelines only address issues of disparate impact discrimination on the basis of race, color, religion, sex, and national origin and therefore would not apply to ENDA, which

¹⁷⁹ See 29 C.F.R. § 1602.7 (2005) (requiring employers of one hundred or more employees to file annually a form with the EEOC that has information about the race, national origin, and gender of their employees).

¹⁸⁰ See 142 CONG.REC. at S10057 (stating that because the EEOC does not require employers to keep records on the disabilities and ages of their employees, there is no reason to believe they would require employers to keep records on the sexual orientations of their employees).

¹⁸¹ See 29 C.F.R. § 1607.4 (2005) (suggesting that employers keep records documenting the impact that their employee selection procedures have on members of Title VII-protected classes).

specifically excludes disparate impact as a cause of action.¹⁸²

By barring employees from making disparate impact claims, which allege that an employer's facially neutral employment policy negatively impacts members of a protected class, EDNA actually further discourages employers from collecting statistics on their employees' sexual orientations.¹⁸³ ENDA's narrow focus on disparate treatment claims forces the EEOC and courts to examine employers' subjective intents rather than employers' general employment practices, thereby eliminating the employers' needs to keep statistics to establish their use of fair employment practices in compliance with ENDA.¹⁸⁴

¹⁸² See 29 C.F.R. § 1607.1 (2005) (providing guidance to employers on how to use tests and other employee selection procedures so as to comply with Title VII without creating a disparate impact on Title VII-protected classes); *see also* Employment Non-Discrimination Act of 2003, S. 1705, 108th Cong. § 4(f) (2003) (omitting disparate impact as a cause of action).

¹⁸³ See Employment Non-Discrimination Act of 2003, S.1705, 108th Cong. § 4(f) (2003) (stating that employees may only bring suit on disparate treatment claims).

¹⁸⁴ See S.REP.No. 107-341, at 26 (2001) (asserting that the purpose of ENDA is to prohibit intentional discrimination based on sexual orientation in employment, rather than extending

Finally, ENDA's narrow construction allays Senators' fears that ENDA will create extra protections for homosexual employees and reverse discrimination against heterosexual employees.¹⁸⁵ ENDA specifically prohibits employers from using quotas to ensure that they hire proportionate numbers of employees of every sexual orientation.¹⁸⁶ ENDA also prohibits employers from using affirmative action or other preferential treatment on the basis of sexual orientation.¹⁸⁷ As a result, employers will not need to know their employees' or applicants' sexual orientations

special rights to homosexual employees).

¹⁸⁵ See 142 CONG.REC. at S9992 (statement of Sen. Hatch) (alleging that because ENDA gives Federal courts the same enforcement power as they hold under Title VII, courts will be obliged to implement affirmative action or other equitable relief to remedy where an employer intentionally discriminated against an employee based on sexual orientation in violation of ENDA).

¹⁸⁶ See Employment Non-Discrimination Act of 2003, S.1705, 108th Cong. § 8(a) (2003) (prohibiting employers from adopting or implementing quotas on the basis of sexual orientation).

¹⁸⁷ See Employment Non-Discrimination Act of 2003, S.1705, 108th Cong. § 8(b) (2003) (prohibiting employers from giving preferential treatment to individuals on the basis of sexual orientation).

in order to comply with ENDA because ENDA precludes employers from taking their employees' and applicants' sexual orientations into account when making hiring and promoting decisions.¹⁸⁸

IV. Conclusion

This Comment has discussed the many ways in which *Lawrence* will help protect homosexual employees from sexual orientation discrimination in public employment. First, the Court's decision ultimately shifts the paradigm from a rational basis test, which strongly favors employers, to a much more diluted one, which provides greater protection to homosexual employees.¹⁸⁹ Second, the Court's decision provides a springboard for a future Court to expressly declare gays, lesbians, and bisexuals as a suspect class and private, homosexual conduct as part of a fundamental right to privacy;

¹⁸⁸ See S.REP.NO. 107-341, at 13 (2001) (stating ENDA's drafters' intentions that ENDA extend Title VII protections to cover employees' sexual orientation).

¹⁸⁹ See *supra* part IIIA (arguing that post-*Lawrence*, courts will apply much more exacting scrutiny to employers' rationales that homosexual employees are unfit for employment as criminals, and that employing homosexual employees will destroy workplace unity, compromise public credibility, and pose national security risks).

thereby providing homosexual employees with more exacting scrutiny for their Equal Protection and Due Process claims.¹⁹⁰ Finally, the Court's decision, combined with a narrower drafting of ENDA, provides a solid foundation for Congress to enact the long overdue Employment Non-Discrimination Act.¹⁹¹

Once Congress enacts ENDA, homosexual employees will no longer need to depend solely on a court's interpretation of their constitutional rights. Instead, employers who take adverse employment actions against their homosexual employees will automatically trigger ENDA, which will provide federal, explicit, uniform protections in both the public and private sectors.¹⁹² In addition to homosexual employees bringing actions

¹⁹⁰ See *supra* part IIIB (alleging that the Court's focus in *Lawrence* tacitly recognized private, homosexual conduct as a fundamental right, even though the Court did not expressly do so).

¹⁹¹ See *supra* part IIIC (demonstrating how the Court's *Lawrence* decision plus ENDA's more narrow drafting, rebuts opposing Senator's objections to enacting ENDA).

¹⁹² Compare 42 U.S.C. § 2000e-2(a)(1) (2005) (providing a cause of action to employees whose employers discriminated against on the basis of race, color, religion, sex, or national origin), with Employment Non-Discrimination Act of 2003, S.1705, 108th

under ENDA, future litigation may also focus on heterosexual employees and applicants claiming employers gave preferential treatment to homosexual employees, reading a cause of action into ENDA's prohibition of quotas and preferential treatment. An investigation of Title VII's legislative history and case law should provide significant guidance as to what the future of sexual orientation discrimination will ultimately look like in post-ENDA jurisprudence.

Cong. § 4(a)(1-2) (2003) (providing a cause of action to employees whose employers discriminated against on the basis of sexual orientation).