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SEXUAL ORIENTATION AND ECOA: A CASE FOR STATUTORY PROTECTIONS

*Andrew Potter**

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INTRODUCTION

Created in 1974, the Equal Credit Opportunity Act (“ECOA”) made it “unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction on the basis of race, color, religion, national origin, sex or marital status, or age.”¹ Drawing from language present in Title VII of the Civil Rights Act, ECOA is a crucially important bulwark against insidious behavior by creditors and lenders against many of society’s most vulnerable populations. In service of this goal, there have been a number of attempts by LGBT advocates to expand ECOA to explicitly prohibit discrimination against individuals on the basis of sexual orientation, relying heavily on precedent established in Title VII cases. Efforts to do so have found purchase in circuit court holdings, agency adjudication, and statements by government officials. However, there has been opposition to this expansion in other circuits and by administrative agencies increasingly disinterested in advocating for the expansion of regulation. With this in mind, I argue that the best course of action for advocates is to push for the explicit expansion of ECOA (and Title VII) by Congress, in

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¹ 15 U.S.C. § 1691.

line with statutes existing in many states, as this approach avoids the danger of a circuit split and is better insulated against the actions of an executive and Supreme Court that are likely to be hostile to such expansion.

I. EQUAL CREDIT OPPORTUNITY ACT HISTORY AND JURISPRUDENCE

Written so as to provide coverage to a number of disfavored groups, ECOA was primarily intended to remedy (1) perceived deficiencies in the credit reporting system that led to the distribution of inaccurate and potentially harmful information with little oversight on who could access it and (2) discriminatory lending practices facing single women, a growing problem in light of the increasing commonality of divorced and unmarried women.² Despite the ubiquity of credit reports in lending decisions, the content of these reports and the source of the information therein was inaccessible to most consumers, meaning that consumers could neither learn why they were denied credit or whether the factors influencing that decision were even accurately reported.³

A lack of restrictions on who could access credit reports meant that potential employers, landlords, and more could gain access to potentially embarrassing or damaging information without confidentiality mandates.⁴ Compounding this problem were the particular difficulties faced by women applying for credit. Single women were often seen as risky borrowers, such that even with otherwise good credit reports, gender could prove a dispositive factor in the lender's eyes.⁵ This problem was especially prevalent among divorced or widowed women, who were forced to reapply for credit that was previously granted to them in light of their newly unmarried status.⁶ In light of these discriminatory practices against women, Congress passed ECOA, a broad statutory reform that mandated numerous disclosures by creditors and prohibited discrimination against often disfavored groups, and set out its terms in its implementing regulation, Regulation B.⁷ Notably, the statutory language contained within

² Elwin Griffith, *The Quest for Fair Credit Reporting and Equal Credit Opportunity in Consumer Transactions*, 25 U. MEM. L. REV. 37, 38 (1994).

³ *Id.*

⁴ *Id.* at 39.

⁵ *Id.* at 41.

⁶ *Id.*

⁷ *Id.*

ECOA was heavily influenced by the language within Title VII of the Civil Rights Act, a similarly worded statute that prohibited discrimination in the employment context on the basis of race, color, religion, sex, or national origin.⁸ The connection between ECOA and Title VII is crucially important in predicting courts' interpretations of ECOA's language.

Much of ECOA's jurisprudence stems from its connection to Title VII. Indicators of legislative intent during the creation of ECOA indicated that, in Congress's eyes, courts should be guided by precedent established under Title VII to determine how provisions of ECOA should be understood.⁹ The court followed suit, holding in cases like *Rosa v. Park W. Bank & Trust Co.* that when interpreting ECOA, the court would consider Title VII case law and follow the greater depth and breadth of precedent in the Title VII area due to the nearly identical language in the two statutes.¹⁰ With this in mind, and considering the lack of court holdings on the issue of sexual orientation discrimination in the ECOA context, holdings based in Title VII are an important bellwether for the future of ECOA holdings in this area.

II. PROHIBITION OF SEXUAL ORIENTATION DISCRIMINATION IN TITLE VII AND ECOA

The ancestor of modern holdings finding a prohibition on sexual orientation discrimination in Title VII is *Price Waterhouse v. Hopkins*, where the Supreme Court held that discrimination on the basis of gender nonconformity was actionable sex discrimination under Title VII.¹¹ In that case, a female partnership candidate at an accounting firm brought a claim under Title VII, alleging that she had been passed over for promotion, despite high praise from her superiors and exemplary qualifications, for being too "macho" and exhibiting characteristics that would have been otherwise ignored in a male

⁸ 42 U.S.C. § 2000e-2

⁹ See S. Rep. No. 94-589, 94th Cong., 2d. Sess., 4-5 (1976) (stating that Congress intended for judicial holdings in Title VII to influence holdings interpreting the language of ECOA).

¹⁰ *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 215 (1st Cir. 2000); see *Mercado-Garcia v. Ponce Fed. Bank*, 979 F.2d 890, 893 (1st Cir. 1992) (applying the burden-shifting test used in Title VII cases to ECOA); see also *Lewis v. ACB Bus. Servs. Inc.*, 135 F.3d 389, 406 (6th Cir. 1998) (applying the same test).

¹¹ *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989).

partnership candidate.¹² Writing for the plurality, Justice Brennan held that the plaintiff being passed over for a promotion came as a result of her displaying traits typically associated with male candidates constituted prohibited discrimination on the basis of sex.¹³ The legacy of this case is significant, particularly in relation to sexual orientation discrimination. Whereas traditional sex discrimination cases involve a plaintiff who was treated adversely on the basis of perceived traits typical to their gender, *Price Waterhouse* stands for the opposite: a plaintiff discriminated against for displaying traits atypical to her gender.¹⁴ This second formulation has proven to be important precedent in protecting gay and lesbian persons whose sexual orientation is seen as atypical to their gender. Thus, this precedent could be used in the sexual orientation discrimination cases going forward.¹⁵

A prohibition of discrimination on the basis of sexual orientation has been found within Title VII in two circuits, the Second and Seventh.¹⁶ In both cases, the appellate courts read sexual orientation protections into the prohibition on sex discrimination, another protection guaranteed by Title VII and ECOA. First, the Seventh Circuit held in *Hively v. Ivy Tech Community College of Indiana* that discrimination on the basis of sexual orientation is prohibited sex discrimination.¹⁷ The court arrived at this holding from two different legal theories: the comparative method, centering the issue on whether the plaintiff would have been treated differently had she been a man; and the associational discrimination theory, that sexual orientation

¹² *Id.* at 234-35.

¹³ *Id.* at 250, 258.

¹⁴ *See Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998) (holding that if the prospective employee is the same sex as the decision making employer, sex discrimination can still occur); *see also* *Griggs v. Duke Power Co.* 401 U.S. 424, 436 (holding that making a decision based on characteristics typically associated with individuals of a protected class also constitutes prohibited discrimination).

¹⁵ An analogous case in the ECOA context is *Rosa v. Park West Bank & Trust Co.*, discussed above, where the Court of Appeals for the First Circuit held that refusal to grant a loan to a prospective male customer who wore traditionally feminine clothing constituted prohibited sex discrimination under ECOA. That court, citing *Price Waterhouse*, held that if the prospective customer was denied service because he wore traditionally feminine attire, that would constitute impermissible sex discrimination akin to the discrimination in *Price Waterhouse*. *Rosa*, 214 F.3d at 216.

¹⁶ *Hively v. Ivy Tech Community College of Indiana*, 853 F.3d 339 (7th Cir. 2017); *Zarda v. Altitude Express*, 883 F.3d 100 (2nd Cir. 2018).

¹⁷ *Hively*, 853 F.3d at 351-52.

discrimination is sex discrimination based on the sex of the plaintiff's associates. Employing the comparative method, the court found that sexual orientation discrimination was on its face identical to other forms of sex discrimination.¹⁸ This method asks if, holding all other things constant, had the plaintiff's sex been different (here, had the plaintiff been a man rather than a woman), would the employer's decision be different?¹⁹ The court held that it clearly would have; had the plaintiff been a man, her sexual preference for women would not have been a disqualifying factor in the instant case.²⁰ From this perspective, sexual orientation discrimination is no different than other forms of sex discrimination; a prospective female employee treated adversely for being a lesbian is being discriminated against based on her sex in the same way that she would be if the employer's basis was instead a belief that women were less capable or competent. If this employee were a man in either case, the employer would not disqualify her.

When analyzing the associational discrimination theory, the court held that sexual orientation discrimination was also sex discrimination by association, that is, the individual was being discriminated against because of the sex of her associates, itself a prohibited basis under Title VII.²¹ The court relies heavily on the landmark case *Loving v. Virginia*, where the Supreme Court held that discrimination against an individual based on the race of their spouse was prohibited as if the individual in question was his or her self the target of that discrimination.²² Similar to the comparative method above, the basis for that decision is that if the plaintiff was the same race (or sex) as their associate, the employer's decision would have been different.²³ The court drew clear parallels between adverse treatment on the basis of the race of one's sexual partners and adverse treatment on the basis of the sex of one's sexual partners in ultimately holding that sexual orientation discrimination was sex discrimination based on this theory as well.²⁴

The Second Circuit held similarly in *Zarda v. Altitude Express, Inc.* where it held that sexual orientation discrimination is motivated in part by sex and is thus prohibited sex

¹⁸ *Id.* at 345-46.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at 347.

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 347-48.

discrimination.²⁵ Referencing *Hively*, the *Zarda* court performed a similar analysis of both the comparative method and associational theory that led the *Hively* court to its holding.²⁶ Of particular importance to the *Zarda* court was the Equal Employment Opportunity Commission's ("EEOC") holding in *Baldwin v. Foxx* (discussed below), which held that sexual orientation and sex were so intimately linked that any decision made on the basis of sexual orientation should be understood as a decision made on the basis of sex.²⁷ For these reasons, the court here held in line with the court in *Hively*, that sexual orientation discrimination is prohibited sex discrimination.

Aside from these holdings in circuit courts, the EEOC has issued its own rulings that find sexual orientation discrimination to be prohibited under Title VII.²⁸ In *Baldwin v. Foxx*, the EEOC held that "sexual orientation as a concept cannot be defined or understood without reference to sex."²⁹ An individual's sexual orientation cannot be understood without understanding sex. Even the simplistic gay-straight binary is defined entirely by the individual in question's sex; put simply, a gay man being discriminated against is fundamentally being discriminated against on the basis of his sex, as a woman with the same sexual interests would not be discriminated against on the basis of her sexual orientation. Due to this inextricable link, the agency held that discrimination on the basis of sexual orientation is purely sex discrimination, as it relies on treating an employee differently than a similarly situated employee who is of a different sex, and thus prohibited under Title VII.³⁰ As discussed above, Title VII is an important analogous case to ECOA; a strong statement from the agency in that area on this topic is evidence that the enforcing agency in the lending context should follow suit.

Former leadership of the Consumer Financial Protection Bureau ("CFPB"), the enforcing agency for ECOA, also supported application of the holdings in *Hively* and *Zarda* and the EEOC's ruling in *Baldwin* to ECOA. In a letter to an advocacy group for LGBT older adults, former CFPB Director

²⁵ *Zarda*, 883 F.3d at 112.

²⁶ *Id.* at 113-15.

²⁷ *Id.* at 113.

²⁸ The EEOC is the federal administration that enforces civil rights and discrimination laws in the workplace and is the primary entity that deals with Title VII cases.

²⁹ *Baldwin v. Foxx*, EEOC Appeal No. 0120133080, 2015 WL 4397641, 5 (July 15, 2015).

³⁰ *Id.*

Richard Cordray presented the agency's perspective that sexual orientation discrimination was prohibited discrimination based on an individual's association.³¹ Citing official Regulation B interpretations, Cordray noted that discrimination on the basis of sexual orientation is essentially discrimination based on the sex of those the individual associates with, a form of sex discrimination recognized in those interpretations.³² Rather than limiting ECOA's prohibitions to just the individual in question, these official interpretations noted that lenders were also prohibited from discriminating against an individual because of traits of those associated with the individual, such as co-applicants, spouses, or business partners.³³ These interpretations line up with the Circuit Court holdings in *Hively* and *Zarda* and are clearly a boon for proponents of the prohibition of sexual orientation discrimination. If an individual is judged for the sex of their sexual partners, the "discrimination by association" that Cordray describes indicates that sex discrimination has occurred. Under this theory, Cordray argued that in the ECOA context, sexual orientation discrimination is prohibited sex discrimination.

As shown above, there is substantial support for a reading of sexual orientation discrimination into the prohibition on sex discrimination in ECOA and Title VII. The issue, however, is by no means settled law, and there is a great deal of opposition to this expansion from other sources.

III. OPPOSITION TO JUDICIAL EXPANSION OF ECOA AND TITLE VII PROTECTIONS

Despite hard-fought victories against sexual orientation discrimination in both the Second and Seventh Circuits, there remains substantial opposition to these holdings in the courts and elsewhere. In *Evans v. Georgia Regional Hospital*, the Eleventh Circuit set forth the clearest recent holding opposing the expansion of sex discrimination to include sexual orientation discrimination. There, the court held that discrimination against an employee who is gay is not violative of the prohibition on sex discrimination and that sexual orientation discrimination is not

³¹ Letter from Richard Cordray, CFPB Director, to Michael Adams, CEO, Services & Advocacy for GLBT Elders, 4 (Aug. 30, 2016) (PDF from the CFPB Journal). <https://www.cfpbmonitor.com/wp-content/uploads/sites/5/2016/09/SAGE-Letter.pdf>

³² *Id.*

³³ See Official Staff Commentary, 12 C.F.R. pt. 1002, Supp. 1 ¶2(z)-1,2.

prohibited under Title VII.³⁴ In that court's eyes, the fact that many gay and lesbian individuals would be protected under *Price Waterhouse* (from discrimination due to their "stereotypically gay conduct"), meant that the prohibited discrimination is not on the basis of their sexual orientation but on their conduct.³⁵

Other courts have held similarly to the court in *Evans* in cases decided around the beginning of the millennium. In *Higgins v. New Balance*, the First Circuit held that harassment on the basis of an employee's sexual orientation is not prohibited by Title VII, as did the Third, Fourth, Fifth, Sixth, Eighth, Ninth, and Tenth Circuits in similar cases decided up until the early 2000s.³⁶ These cases held that discrimination based on a person's, often speculative, sexual orientation stemming from the way they dress, speak or act, is unprotected. Instead, harassment or negative treatment due to the exhibition of characteristics atypical for one's gender is all that is protected.³⁷ Understanding the distinction between these two facially similar ideas is crucially important. While, as the court in *Higgins* notes, individuals who are discriminated against for sexual orientation will often be judged as such because they present themselves atypically for their gender, this by no means covers the entire spectrum of gay and lesbian persons.³⁸ Individuals who exhibit characteristics the *Evans* court called "stereotypically gay" may be protected if they can prove they are being judged for those characteristics rather than their orientation. However, this is a difficult task, as often the basis for negative treatment of individuals with atypical characteristics is a belief that those characteristics are evidence that the individual is gay or lesbian. Further, individuals who exhibit characteristics typical for their gender are wholly unprotected from discrimination on the basis of their sexual orientation and thus completely unprotected in that court's eyes.

Another potential source of opposition to a broader reading of ECOA that prohibits sexual orientation discrimination

³⁴ *Evans v. Georgia Regional Hospital*, 850 F.3d 1248, 1256 (11th Cir. 2017).

³⁵ *Id.* at 1260.

³⁶ *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 260-61 (1st Cir. 1999); *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 260-61 (3d Cir. 2001); *Wrightson v. Pizza Hut of Am*, 99 F.3d 138, 142-43 (4th Cir. 1996); *Vickers v. Fairfield Med. Ctr.*, 452 F.3d 757, 762 (6th Cir. 2006); *Williamson v. A.G. Edward & Sons, Inc.*, 876 F.2d 69, 69-70 (8th Cir. 1989); *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1063-64 (9th Cir. 2002); *Medina v. Income Support Div.*, 413 F.3d 1131, 1135 (10th Cir. 2005).

³⁷ *Higgins*, 194 F.3d at 261.

³⁸ *Id.*

is the current CFPB. Writing for *The Wall Street Journal* in 2018, then-CFPB Director and current Director of the Office of Management and Budget Mick Mulvaney argued that the CFPB had become too active in its enforcement of ECOA, and had mistakenly treated the financial-service industry as the “bad guys.”³⁹ In service of this goal, Mulvaney attempted to eliminate the CFPB’s fair-lending office of its enforcement powers, effectively weakening penalties for firms engaging in discriminatory practices.⁴⁰ Though Mulvaney no longer heads the Bureau, his statements on this subject are still indicative of the agency’s direction under the Trump administration; a diminished focus on enforcement of ECOA, and a disinterest in any efforts to expand ECOA through advocacy in the courts. While Mulvaney did not speak on the issue of sexual orientation discrimination during his tenure as director, his emphasis on the CFPB as a passive agency rather than an active force engaging in advocacy is telling. As discussed above, under the Obama administration, CFPB leadership saw the agency as an active advocative force, one that was particularly concerned with following the lead of Title VII cases and expanding the definition of sex discrimination to include sexual orientation discrimination. A lack of movement in that direction indicates that the CFPB under the new administration is unlikely to undertake the necessary advocacy to extend holdings in Title VII to ECOA.

Another foe to this expansion within the federal government is the Department of Justice. As discussed above, the Second Circuit held in *Zarda* that sexual orientation discrimination is prohibited sex discrimination.⁴¹ The court did so against the urging of the Department of Justice in an amicus brief filed in that case.⁴² In that brief, the Department of Justice (“DOJ”) advanced several theories as to why sexual orientation discrimination did not fall within sex discrimination. According to the DOJ, the bar against sex discrimination in Title VII is not

³⁹ Mick Mulvaney, *The CFPB Has Pushed Its Last Envelope*, THE WALL ST. JOURNAL (Jan. 23, 2018), <https://www.wsj.com/articles/the-cfpb-has-pushed-its-last-envelope-1516743561> (accessed Feb. 15, 2019).

⁴⁰ Berry, Kate, *CFPB’S Mulvaney strips his fair-lending office of enforcement powers*, AMERICAN BANKER (Feb. 01, 2018), <https://www.americanbanker.com/news/cfpbs-mulvaney-strips-his-fair-lending-office-of-enforcement-powers> (accessed Feb. 23, 2019). Mulvaney later reneged on this stance, stating at a CFPB symposium on fair lending that the Bureau was still focused on ensuring that lenders did business fairly.

⁴¹ *Zarda*, 883 F.3d at 113.

⁴² Brief for the United States as Amicus Curiae at 1, *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (July 26, 2017).

implicated unless men and women are treated unequally.⁴³ In its opinion, the key question was whether homosexual men and women were being treated differently, not whether gay men were being treated differently from straight women, or vice versa.⁴⁴ The court in *Zarda* responded directly to this argument, stating that the defense, and by extension the DOJ, misapplied the statute.⁴⁵ The DOJ's argument, according to the *Zarda* and *Hively* courts, did not keep all factors other than sex constant; in fact, it intentionally did otherwise.⁴⁶ The DOJ changed the sexual attraction of the individual in question so as to obfuscate the core issue of sex discrimination at the heart of sexual orientation discrimination.⁴⁷ Another of the DOJ's key arguments, the one that fared better, was that Congress had been given ample opportunity to amend Title VII to include a prohibition on sexual orientation discrimination, and had deliberately chosen not to.⁴⁸ The brief cites Congress's explicit reference to sexual orientation discrimination in other statutes that also barred sex discrimination, such as the Violence Against Women Act and housing statutes.⁴⁹ The conspicuous lack of sexual orientation discrimination, in light of its presence in other statutes alongside sex discrimination, was strong evidence of Congressional intent in the eyes of the DOJ.⁵⁰ Congress was certainly aware of the practice of sexual orientation discrimination, according to the DOJ, so its choice not to include it in the statute more clearly indicates that it had no intention of prohibiting such discrimination.⁵¹

A reading of sexual orientation discrimination into the prohibition on sex discrimination has been largely unsupported by many circuits, and recent statements from relevant governmental agencies suggests that there is little the executive branch will do to further such arguments. With that in mind, it is important now to turn to possible avenues to continue the positive momentum from cases like *Hively* and *Zarda*.

⁴³ *Id.* at 4.

⁴⁴ *Id.*

⁴⁵ *Zarda*, 883 F.3d at 113-14.

⁴⁶ *Id.* at 114.

⁴⁷ Brief for the United States as Amicus Curiae at 6,7, *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (July 26, 2017).

⁴⁸ *Id.* at 10.

⁴⁹ *Id.* at 13.

⁵⁰ *Id.*

⁵¹ *Id.* at 14.

IV. ADVOCATING FOR THE BEST COURSE OF ACTION

Taking into account the above, it is unclear what the best course of action for advocates of a prohibition on sexual orientation discrimination is. While some circuits have found sexual orientation discrimination to be a type of sex discrimination in the employment context, others draw a bright line between the two and hold that sexual orientation discrimination is permissible. Though previous CFPB leadership and the EEOC have agreed with holdings that prohibit sexual orientation discrimination, the current CFPB has been publicly opposed to taking significant action in any area, and there is strong evidence based on the DOJ's action that even if it was more active, it would not be in pursuit of this goal. Finally, despite interpretations of ECOA that suggest it has always prohibited sexual orientation discrimination as sex discrimination by association, Congress has resisted adding language that explicitly clarifies the relationship between the two concepts.

The obvious avenue for further advocacy is through the Circuit Courts. While, as discussed above, many circuits have holdings explicitly rejecting the inclusion of sexual orientation discrimination in sex discrimination, there are several factors that indicate potential opposite holdings. First, outside of the Eleventh Circuit's holding in *Evans*, these cases range from fifteen to thirty years old, long before the EEOC's explicit support for the inclusion of sexual orientation discrimination within sex discrimination in its adjudication in *Baldwin* or the friendly holdings in *Hively* and *Zarda*. Importantly, those cases do little to reject the two dominant theories advanced by the EEOC and the *Hively* and *Zarda* courts that have come to characterize advocacy in this area: the comparative and associational methods discussed above. Second, these cases are all explicitly within Title VII jurisprudence. While it is certainly inaccurate to state that these holdings are limited to Title VII, advocates of a prohibition of sexual orientation discrimination should be emboldened by the fact that there has been no adverse holdings in an ECOA case, such holdings (and, of course, their positive counterparts), have been exclusively on the topic of Title VII. Thus, there is not the precedential mountain to overcome for courts seeking to provide these protections to individuals on the basis of sexual orientation.

In spite of these potential benefits, there are serious reasons to doubt the efficacy of a strategy hoping to establish these protections through the judicial branch. Perhaps most

pressing of these is simple accounting: of the twelve regional circuit courts, only two have held that sexual orientation discrimination is within sex discrimination, and while many of the adverse holdings are over two decades old, they still have binding precedential value. Attempting to overturn binding precedent in ten circuits is a monumental task, and a focus entirely on overcoming the existent circuit split increase the possibility of a second detrimental outcome: an adverse Supreme Court holding seeking to settle the dispute across circuits. Though there is little indication of how the Supreme Court will hold on this specific issue, there are several factors that suggest that if the Supreme Court were to get involved, it would likely do so in a way that is adverse to the interests of LGBT advocates.

First, there are significant textualist arguments, likely to find support among the court's more conservative members, that the strict language of ECOA does not include sexual orientation discrimination. These textualists would also argue that Congress's failure to include this discrimination in the language of the statute at a later date indicates that "sex", in the context of ECOA, does not include sexual orientation. This argument seems particularly substantial in light of its status as the primary argument advanced by the DOJ in its amicus brief in *Zarda*.⁵² Even if this textualist argument was not sufficient on its own, precedent indicates that at minimum three of the justices, Roberts, Thomas, and Alito, are unlikely to be sympathetic to this outcome on the basis of the same political beliefs that motivated their dissent in *Obergefell v. Hodges*.⁵³ Finally, the precedent opposing the expansion of sex discrimination to include sexual orientation discrimination outnumbers holdings in favor of it ten-to-two. While this is by no means a dispositive factor, it further indicates to the Supreme Court what the dominant position

⁵² *Id.* at 13.

⁵³ *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015). In his dissent (joined by Thomas), Roberts argues that to change the definition of marriage to include same-sex marriage would constitute the court acting as a legislature and going against Congressional intent. *Id.* at 2611. Such an argument seems likely to be applied to the ECOA context as one of the textualist arguments discussed above. In his dissent, Thomas contends that to expand marriage to include same-sex couples would harm the innateness of "human dignity" and works to demean those same-sex couples. *Id.* at 2631, 2639. Finally, Alito contends that to permit same-sex marriage runs the risk of marginalizing those with "traditional ideas." *Id.* at 2643. The perspectives advanced by the dissents in *Obergefell* indicate a contingent of the Supreme Court that is likely to be hostile to judicial expansion of ECOA, especially judicial expansion with this result.

supported by many of the lower courts is. Even without Supreme Court intervention, this strategy runs the risk of unequal protections across the country, a problem that already exists with positive holdings by the Second and Seventh Circuits and adverse holdings nearly everywhere else.

Next, appeals to the executive agency that controls in this area, the CFPB, are likely fruitless. The CFPB has demonstrated little to no interest in expanding its role as a force for advocacy in the courts or in adjudication friendly to proponents of the prohibition. It seems unlikely, with the statements of former director Mulvaney in mind, that the CFPB would pursue the strong stance that former director Cordray advocated for based on the actions of the EEOC in the Title VII area. Added to this is a pervasive disinterest in increasing regulation from administrative agencies under direction of the Trump administration, and it seems unlikely that the CFPB would take a major role in pursuing this policy goal.⁵⁴

Considering the positives and negatives of pursuing either a judicial or executive solution, the best route available to advocates of a prohibition on sexual orientation discrimination in ECOA is legislative. Despite Congressional inaction in the area, there are strong reasons for pursuing this route. Perhaps the most straightforward of these is that Congress is the government body currently most likely to be receptive to the interests of LGBT advocacy groups, especially in the Democrat-controlled house. Further, a legislative strategy avoids many of the problems discussed above. Overcoming the arguably shaky jurisprudential ground on which positive holdings stand in relation to arguments like those advanced by the DOJ that Congress's intent is clear in the statute as written are the obvious first benefit. Members of Congress sympathetic to the cause of prohibiting sexual orientation discrimination would do well to push for such an inclusion, as it seems likely that the current executive will continue to advance arguments that had Congress intended to include sexual orientation discrimination in the statute, it would have. Additionally, a legislative strategy removes the need for so-called "activist judges" who feel comfortable reading meaning not explicitly within ECOA into the statute, a criticism levied against the court in *Zarda* by the DOJ.⁵⁵ Finally, and most importantly,

⁵⁴ See Exec. Order No. 13771, 82 Fed.Reg. §9339 (2017) (the 2-for-1 rule, stating that for every new regulation, two must be eliminated).

⁵⁵ Brief for the United States as Amicus Curiae at 14, *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (July 26, 2017).

as in any civil rights context, Congressional action on both ECOA (and Title VII) achieves the most important goal: clearly defining and reaffirming the essential rights held by citizens of the US. Unevenly enforced laws under a circuit split that allows creditors in some states but not others to discriminate against applicants on the basis of sexual orientation leaves individuals, largely unaware of what protections ECOA provides, without the ability to accurately judge why they are being declined credit. Such an action would further accomplish the core goal of ECOA, to provide consumers with the assurance that creditors are basing their decisions solely on relevant, appropriate characteristics.