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Housing Law—Not Over This Threshold: The Crisis of Continued Housing Discrimination Against Queer Americans—Smith v. Avanti, 249 F. Supp. 3d 1194 (D. Colo. 2017)

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**HOUSING LAW—NOT OVER THIS THRESHOLD:
THE CRISIS OF CONTINUED HOUSING
DISCRIMINATION AGAINST QUEER
AMERICANS—SMITH V. AVANTI, 249 F. SUPP. 3D
1194 (D. COLO. 2017).**

As of 2019, there are no federal laws that protect against housing discrimination for LGBTQIA+ (“queer”) Americans.¹ Protections against discrimination on the basis of sex were added to the Fair Housing Act in 1974, however, there are still no federal legal protections that prevent housing discrimination against queer people.² In many of these discrimination cases, courts look to the expanded protections codified in Title VII of the Civil Rights Act of 1964 (“Title VII”) to determine if the denial of housing is discriminatory.³ In addition to banning discrimination based on sex, Title VII also protects against discrimination based on “sexual stereotypes.”⁴

¹ See 42 U.S.C.S. § 3604(b) (LexisNexis 2020) (stating illegality of housing discrimination on basis of sex). According to the Fair Housing Act—passed by Congress as part of the Civil Rights Act of 1968—it is illegal to “refuse to sell or rent . . . a dwelling to any person because of race, color, religion, sex, familial status, or national origin.” *Id.*; see also Kerith J. Conron & Shoshana K. Goldberg, *LGBT People in the U.S. Not Protected by State Nondiscrimination Statutes*, THE WILLIAMS INST. (Apr. 2020), <https://williamsinstitute.law.ucla.edu/publications/lgbt-nondiscrimination-statutes> (providing data on lack of antidiscrimination protection for queer Americans).

At the federal level and in most states, nondiscrimination statutes do not expressly enumerate sexual orientation and gender identity as protected characteristics . . . [t]here are an estimated 11 million LGBT adults in the U.S. Over 5.444 million live in states without statutory protections against sexual orientation and gender identity discrimination in housing

Conron & Goldberg, *supra* note 1.

² See 42 U.S.C.S. § 3604(b) (LexisNexis 2020) (banning discrimination on basis of sex in 1974); see also *Fair and Equal Housing Act*, THE HUM. RTS. CAMPAIGN (Mar. 10, 2020), <https://www.hrc.org/resources/fair-and-equal-housing-act> (citing study that found “same-sex couples experience significant levels of discrimination when responding to advertised rental housing in metropolitan areas nationwide . . . [and] heterosexual couples were favored over same-sex couples by sixteen percent.”)

³ See *Mountain Side Mobile Est. P’ship v. Sec’y of Hous. & Urb. Dev. ex rel. VanLoozenoord*, 56 F.3d 1243, 1251 (10th Cir. 1995) (demonstrating that Tenth Circuit historically looks to Title VII in housing discrimination cases); *Honce v. Vigil*, 1 F.3d 1085, 1090 (10th Cir. 1993) (highlighting historic practice of looking to Title VII for guidance in housing discrimination cases).

⁴ See 42 U.S.C. § 2000e-2 (LexisNexis 2020) (prohibiting workplace discrimination based on sex stereotypes). According to the annotations of the statute, “Title VII prohibits hiring decisions based on stereotypical characterization of sexes.” *Id.*; see also *New Supreme Court Brief*

These protections were then applied in *Smith v. Avanti*⁵ where the judge used Title VII legal precedent to find that, by refusing to rent to the Plaintiffs, the Defendant had engaged in discriminatory housing practices.⁶

The Plaintiffs, Rachel and Tonya Smith (“Plaintiffs”), are a lesbian couple, one of whom is transgender, and residents of Colorado.⁷ In April 2015, the Plaintiffs began searching for a new apartment as their current apartment was being sold.⁸ The couple learned of a townhouse in Golds Hill, Colorado, which was advertised by Deepika Avanti, (hereinafter “Defendant”); they subsequently filled out an application and communicated their interest in renting the property.⁹ The Plaintiffs viewed the available units and met the family living in the adjacent townhouse.¹⁰ Shortly after the tour, the Defendant emailed the Plaintiffs and informed them that they were not permitted to rent any property that she owned.¹¹ In the email, the Defendant explained that she and her husband were dedicated to keeping “a low profile” and that the “uniqueness” of the Plaintiffs’ family would damage the Defendant’s reputation within the community, which she had maintained for thirty years.¹²

Calls for End of Workplace Discrimination Against LGBT People Based on Sex Stereotypes, COLUM. L. SCH. (Jul. 3, 2019), <https://www.law.columbia.edu/news/archive/new-supreme-court-brief-calls-end-workplace-discrimination-against-lgbt-people-based-sex-stereotypes> (providing examples of litigation based on sexual stereotypes used to discriminate). Clinic Director and “expert on gender and sexuality law,” Suzanne B. Goldberg, explains that “extensive case law shows that employers sometimes rely on sex stereotypes to make workplace decisions.” *Id.* “These stereotypes [include] how women and men ‘should’ present themselves, interact with others, and conduct their family life—help explain why fewer women than men are chosen for leadership positions, and why women earn less.” *Id.* To exemplify Goldberg’s point, this language prohibits terminating a man’s employment because he is too effeminate, or a woman for being too aggressive and masculine. *Id.* In both cases, a court could find discrimination for firing the individuals based on stereotypes concerning how someone of their respective gender should behave. *Id.*

⁵ 249 F. Supp. 3d 1194, 1203 (D. Colo. 2017).

⁶ See 42 U.S.C. § 2000e-2 (LexisNexis 2020) (indicating Congress’s intent to outlaw discrimination based on sex stereotypes). As stated in the statute’s annotations: “Title VII prohibits hiring decisions based on stereotypical characterization of sexes.” *Id.*; see also *Smith*, 249 F. Supp. 3d at 1203 (finding for Plaintiffs).

⁷ See *Smith*, 249 F. Supp. 3d. at 1197 (providing background information about Plaintiffs).

⁸ See *id.* (outlining Plaintiffs’ housing search).

⁹ See *id.* (detailing initial interactions between parties). Via the email correspondence, the Defendant stated that there was a “three-bedroom living space . . . available for rent, and asked Tonya to send photos of [the family].” *Id.*

¹⁰ See *id.* (providing detail about Plaintiff’s search and interest in townhouse)

¹¹ See *id.* at 1198 (discussing Defendant’s reasons for not renting to Plaintiffs).

¹² See *Smith*, 249 F. Supp. 3d at 1198 (restating Defendant’s comments leading to discrimination suit). Over the course of their email correspondence, Tonya Smith mentioned that her wife, Rachel, is transgender. *Id.* In the email rejecting their application, the Defendant went so far as to mention that she spoke to a “psychic friend” who is “a transvestite herself.” *Id.*

The Plaintiffs were “shocked and upset by Deepika’s emails” and decided to pursue legal action against the Defendant for her discriminatory comments, which they described as “unfair and illegal.”¹³ In addition, Plaintiffs could not find suitable accommodations before their old apartment was sold and, as a result, had to move in with Rachel’s family for a period of time.¹⁴ The Plaintiffs filed suit on five counts due to the hardships they endured because of the Defendant’s discriminatory actions.¹⁵ The Plaintiffs moved for summary judgement as to liability on all claims and the Motion went unopposed.¹⁶ This case demonstrates a verifiable shift in the way cases of housing discrimination on the basis of sex and sexual orientation are litigated, and marks a departure from long-standing precedent.¹⁷

¹³ See *id.* at 1201 (finding that Defendant’s comments relied on stereotypes). In “referring to the Smiths’ ‘unique relationship’ and their family’s ‘uniqueness,’ Defendant relies on stereotypes of to or with whom a woman (or man) should be attracted, should marry, or should have a family.” *Id.* *Victory! Court Rules Landlord Discriminated Against LGBT Family*, LAMBDA LEGAL (Apr. 5, 2019), https://www.lambdalegal.org/blog/20170405_victory-colorado-housing-discrimination-case (quoting Plaintiffs’ reaction to Defendant’s comments).

¹⁴ See *Smith*, 249 F. Supp. 3d at 1201 (describing hardships caused by denial of application).

[The Plaintiffs] were able to move into another apartment on July 1, 2015, but it does not meet their family’s needs as well. Defendant’s Properties were of higher quality, were located in a better school district, and had nicer surroundings. The move also required an hour’s commute for Rachel, whereas Defendant’s Properties would have only required a 20 minutes’ commute for work. Rachel has since changed jobs, which is closer to the parties’ new apartment.

Id. at 1198.

¹⁵ See *id.* (listing Plaintiffs’ claims against Defendant).

Plaintiffs filed this lawsuit asserting the following claims: (1) Count I (the Smiths) - Sex Discrimination in violation of the Fair Housing Act, 42 U.S.C. § 3604(a) & (c); (2) Count II (Smith Family) - Discrimination based on Familial Status in violation of the Fair Housing Act, 42 U.S.C. § 3604(a) & (c); (3) Count III (the Smiths) - Sex Discrimination in violation of the Colorado Anti-Discrimination Act, C.R.S. § 24-34-502; (4) Count IV (the Smiths) - Sexual Orientation Discrimination in violation of the Colorado Anti Discrimination Act, C.R.S. § 24-34-502; and (5) Count V (Smith Family) - Discrimination based on Familial Status, in violation of the Colorado Anti-Discrimination Act, C.R.S. § 24-34-502.

Id. at 1201.

¹⁶ See *id.* at 1189 (discussing procedural posture of case).

¹⁷ See *id.* at 1200 (noting departure from presiding law); see also *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1222 (10th Cir. 2007) (stating that Tenth Circuit “has explicitly declined to extend Title VII protections to discrimination based on a person’s sexual orientation”); Keith Coffman, *Federal Judge Rules Fair Housing Law Protects Colorado LGBT Couple*, REUTERS (Apr. 5, 2017, 7:21 PM), <https://www.reuters.com/article/us-colorado-lgbt/federal-judge-rules-fair-housing-law-protects-colorado-lgbt-couple-idUSKBN17731A> (emphasizing landmark status of ruling). “‘It sends a strong message: discrimination against LGBT Americans in housing and employment is illegal and will not be tolerated.’” Coffman, *supra* note 17.

In 1968, President Lyndon B. Johnson signed the Civil Rights Act of 1968 as a “follow-up” to the Civil Rights Act of 1964.¹⁸ The Act was codified after a long and arduous battle in Congress, and likely would not have passed if not for both the galvanizing effect of Dr. Martin Luther King Jr.’s assassination in 1968 and the mounting pressure from families of fallen soldiers of the Vietnam War.¹⁹ Many soldiers who died overseas were African American or Latinx, and their families could not purchase or rent homes due to normalized housing discrimination practices.²⁰ There is a notable lack of protection on the basis of sexuality or gender identity, even with additional amendments to the Act that forbid discrimination on the basis of “sex, religion, ethnic origin, family status, or disability[.]”; as of 2016, only twenty states had passed legislation that ban housing discrimination against queer people.²¹ This lack of protection has led to a precipi-

¹⁸ See 42 U.S.C. § 3604(b) (LexisNexis 2020) (noting date Fair Housing Act was signed into law); see also *History of Fair Housing*, U.S. DEP’T OF HOUS. AND URB. DEV., https://www.hud.gov/program_offices/fair_housing_equal_opp/aboutfheo/history (last visited Oct. 7, 2019) (recounting history of Fair Housing Act).

¹⁹ See *History of Fair Housing*, *supra* note 18 (describing political pressures that led to passing of Fair Housing Act); see also *History*, FAIR HOUSING ACCESSIBILITY FIRST, <https://www.fairhousingfirst.org/fairhousing/history.html> (last visited Oct. 7, 2019) (emphasizing role of Dr. Martin Luther King Jr.’s assassination in passing of Fair Housing Act); *Fair Housing Act: United States [1968]*, ENCYCLOPEDIA BRITANNICA (Apr. 4, 2020), <https://www.britannica.com/topic/Fair-Housing-Act> (highlighting Dr. Martin Luther King Jr.’s impact on bill’s passage). “One of the bill’s strongest supporters was Martin Luther King, Jr. . . . [a]fter King was assassinated on April 4, 1968, President Lyndon B. Johnson encouraged Congress to pass the bill as a memorial to the slain civil rights leader before King’s funeral.” *Fair Housing Act: United States [1968]*, *supra* note 19.

²⁰ See *Fair Housing Act: United States [1968]*, *supra* note 19 (detailing history and legacy of Fair Housing Act).

[P]ressure to pass the bill was also being put on the federal government by such organizations as the National Association for the Advancement of Colored People (NAACP), the American GI Forum, and the National Committee Against Discrimination in Housing. Those groups, as well as others, were outraged that the families of African American soldiers who had been killed in Vietnam were facing discrimination in matters related to housing.

Id.

²¹ See *History of Fair Housing*, *supra* note 18 (discussing amendments added to Fair Housing Act that expanded protections from Civil Rights Act); see also *Fair Housing Act*, U.S. DEP’T OF JUST., <https://www.justice.gov/crt/fair-housing-act-1> (last updated Dec. 21, 2017) (describing in detail legal and applicable definitions of discrimination against protected groups).

The Fair Housing Act . . . prohibits discrimination by direct providers of housing, such as landlords and real estate companies as well as other entities, such as municipalities, banks or other lending institutions and homeowners insurance companies whose discriminatory practices make housing unavailable to persons because of: race or color[,] religion[,] sex [,] national origin[,] familial status[,] or disability.

tous but chronically underreported rise in housing discrimination against queer Americans.²² In 2012, the Department of Housing and Urban Development (“HUD”) implemented a policy, which required that any housing providers receiving HUD funding must make their housing accessible to all persons, “regardless of sexual orientation, gender identity, or marital status”—a small but important step in protecting queer housing rights nationwide.²³

Fair Housing Act, *supra* note 21; *Past LGBT Nondiscrimination and Anti-LGBT Bills Across the Country (2016)*, AM. CIV. LIBERTIES UNION, <https://www.aclu.org/other/past-lgbt-nondiscrimination-and-anti-lgbt-bills-across-country-2016> (last visited Oct. 7, 2019) (listing state protections for queer people, as well as anti-LGBTQIA+ legislation). “By the close of 2016, 20 states plus DC banned discrimination based on sexual orientation and gender identity or expression in employment, housing, and public accommodations, and an additional three states provided incomplete statewide nondiscrimination protections.” *Past LGBT Nondiscrimination and Anti-LGBT Bills Across the Country (2016)*, *supra* note 21.; *LGBTQ Americans Aren’t Fully Protected from Discrimination in 29 States*, FREEDOM FOR ALL AMERICANS, <https://www.freedomforallamericans.org/states/> (last visited Oct. 30, 2019) (providing list of states without LGBT protections).

²² See *Victory! Court Rules Landlord Discriminated Against LGBT Family*, *supra* note 13 (discussing why such discrimination claims are underreported).

While housing discrimination is a pervasive problem for LGBT people, it is very much underreported . . . [i]n many instances, LGBT people who are either overtly or subtly discriminated against in housing do not report the discrimination because of their immediate need to find housing or due to the costs of pursuing a claim.

Id.; see also *LGBTQ Americans Aren’t Fully Protected From Discrimination in 29 States*, *supra* note 21 (listing states without nondiscrimination protections for queer Americans); Lou Chibbaro, Jr., *Study Reveals LGBT Rental Housing Discrimination*, WASH. BLADE (Jul. 3, 2017, 9:10 AM), <https://www.washingtonblade.com/2017/07/03/lgbt-rental-housing-discrimination/> (noting widespread yet underreported housing discrimination against queer Americans). Specifically testing discrimination against transgender individuals, the study revealed that in “one out of every 5.6 test visits to a rental office, the rental agents or landlords offered to show a self-identified transgender applicant one fewer apartment than was shown to non-transgender applicants” and “told gay men about one fewer available rental unit for every 4.2 tests than they told heterosexual men.” Chibbaro, *supra* note 22. In addition, “[t]he average yearly costs agents quoted gay men were \$272 higher than the costs quoted to heterosexual men.” Chibbaro, *supra* note 22; Richard Eisenberg, *Housing Discrimination: The Next Hurdle for LGBT Couples*, FORBES (Jul 2, 2015, 10:06 AM), <https://www.forbes.com/sites/nextavenue/2015/07/02/housing-discrimination-the-next-hurdle-for-lgbt-couples/#48bcb3b95900> (reporting that “gay and lesbian couples emailing potential landlords were significantly less likely to get responses than heterosexual couples.”).

²³ See *HUD LGBT Resources*, U.S. DEP’T OF HOUS. AND URB. DEV., https://www.hud.gov/LGBT_resources (last accessed Oct. 7, 2019) (recounting HUD efforts to protect queer housing rights).

[A] determination of eligibility for housing that is assisted by HUD or subject to a mortgage insured by the Federal Housing Administration shall be made in accordance with the eligibility requirements provided for such program by HUD, and such housing shall be made available without regard to actual or perceived sexual orientation, gender identity, or marital status. The rule also included a definition for sexual orientation and gender identity and expanded the definition of family in most of HUD’s programs.

Although there are no statutory federal protections that ban housing discrimination against queer people, there has been progress in providing queer people equal opportunities within the workforce.²⁴ While outlawing discrimination based on sex and sexual stereotypes did not create explicit protection against anti-queer discrimination, it did, however, open the door for courts to use this language to affect change.²⁵ With the limited protection of the Fair Housing Act, many courts instead look to Title VII for guidance on how to rule in anti-queer housing discrimination cases.²⁶ The significance of Title VII's interpretation cannot be overstated, and recent Supreme Court rulings regarding Title VII have the potential to create

Id.

²⁴ See 42 U.S.C. § 2000e-2 (LexisNexis 2020); see also *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000) (explaining that one should not be discriminated against for failing to conform to gender-specific stereotypes). “Discrimination because one fails to act in the way expected of a man or woman is forbidden under Title VII . . . both statutes prohibit discrimination based on gender as well as sex.” *Schwenk*, 204 F.3d at 1202..

²⁵ See *Spearman v. Ford Motor Co.*, 231 F.3d 1080, 1084 (7th Cir. 2000) (defining “sex” in Title VII as biological sex). “Congress intended the term ‘sex’ to mean ‘biological male or biological female,’ and not one’s sexuality or sexual orientation.” *Id.*; see also *Hively v. Ivy Tech Cmty.*, 853 F.3d 339, 346-7 (7th Cir. 2017) (expanding scope of discrimination based on sex and sex stereotypes).

[A] policy that discriminates on the basis of sexual orientation does not affect every woman, or every man, but it is based on assumptions about the proper behavior for someone of a given sex. The discriminatory behavior does not exist without taking the victim’s biological sex (either as observed at birth or as modified, in the case of transsexuals) into account. Any discomfort, disapproval, or job decision based on the fact that the complainant—woman or man—dresses differently, speaks differently, or dates or marries a same-sex partner, is a reaction purely and simply based on sex. That means that it falls within Title VII’s prohibition against sex discrimination . . .

Hively, 853 F.3d at 346-7; Chris Johnson, *Rulings in Favor of Title VII Protections for LGBT Workers on the Rise*, WASH. BLADE (Mar. 19, 2018, 2:40 PM), <https://www.washingtonblade.com/2018/03/19/rulings-in-favor-of-title-vii-protections-for-lgbt-workers-on-the-rise/> (explaining impact of recent court rulings). “As a result of these court rulings, workplace protections for LGBT people have advanced in measurable ways. . . . However, the reasoning [behind said rulings] is often based on the determination that anti-LGBT discrimination is sex-stereotyping” Johnson, *supra* note 25.

²⁶ See *Mountain Side Mobile Est. P’ship v. Sec’y of Hous. & Urb. Dev. ex rel. VanLoozenoord*, 56 F.3d 1243, 1251 (10th Cir. 1995) (noting plaintiffs rely on statistical disparity in relation to Title VII in housing discrimination cases); *Honce v. Vigil*, 1 F.3d 1085, 1088 (10th Cir. 1993) (court looking to employment discrimination under Title VII for context concerning housing discrimination); see also Emily Bergeron, *Adequate Housing Is A Human Right*, AM. BAR ASS’N (Oct. 1, 2019), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/vol—44—no-2—housing/adequate-housing-is-a-human-right/ (delineating Fair Housing Act in relation to Title VII).

widespread changes to prevent housing discrimination against queer people.²⁷

Despite several steps forward, numerous state legislatures continue to resist providing protections for queer Americans.²⁸ Along with religious exemptions that provide loopholes to perpetuate discrimination, many lawmakers deliberately fight against proposed bills that would expand the language in the Fair Housing Act and Title VII.²⁹ Within the judicial sys-

²⁷ See *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1738 (2020) (granting certiorari for Title VII discrimination case); *Altitude Express, Inc. v. Zarda*, 139 S. Ct. 1599, 1599 (2019) (granting certiorari for Title VII discrimination case); *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, 139 S. Ct. 1599, 1 (2019) (granting certiorari for Title VII discrimination case); see also Joan Biskupic, *For LGBTQ Rights, it's a New Supreme Court*, CNN.COM, <https://www.cnn.com/2019/10/08/politics/supreme-court-john-roberts-lgbtq-arguments/index.html> (last updated Oct. 8, 2019, 7:19 PM) (describing impact of shifted Supreme Court majority). The Supreme Court heard arguments on three cases on Tuesday, October 8th, 2019, which involved two gay men and one transgender woman, all of whom lost their jobs and claimed discrimination on the basis of their sexual orientations and gender identity. Biskupic, *supra* note 27; Anna North, *How The LGBT Rights Cases Before The Supreme Court Could Affect All Americans*, VOX.COM (Oct. 8, 2019, 10:10 AM), <https://www.vox.com/2019/10/8/20903088/supreme-court-lgbt-lgbtq-case-scotus-stephens> (explaining potential consequences of Supreme Court ruling on Title VII). Though it is widely portrayed as a queer rights case, the Title VII ruling could have widespread impact. North, *supra* note 27. “A decision against the workers could affect not just employment but housing, health care, and education as well and even contribute to the epidemic of violence against trans women of color.” North, *supra* note 27; Eugene Scott, *Why the Supreme Court Case on LGBT Worker Protections will be Pivotal*, THE WASH. POST (Oct. 8, 2019, 5:13 PM), <https://www.washingtonpost.com/politics/2019/10/08/why-scotus-case-lgbt-worker-protections-will-be-pivotal/> (emphasizing importance and impact of Supreme Court ruling).

²⁸ See *Past LGBT Nondiscrimination and Anti-LGBT Bills Across the Country (2016)*, *supra* note 21 (listing anti-LGBT housing bills). In recent sessions, state legislators have proposed or passed several religious exemption bills, as well as bills preempting local protections, making it more difficult to pass protections for queer people or even legalizing discrimination outright. *Id.*; see also *Legislation Affecting LGBT Rights Across the Country*, AM. CIV. LIBERTIES UNION, <https://www.aclu.org/legislation-affecting-lgbt-rights-across-country> (last updated Jan. 20, 2021) (keeping current list of anti-queer laws that updates monthly). In many of the discriminatory laws in state legislatures across the country, anti-LGBT lawmakers target “transgender” and “nonbinary people” by “pre-empt[ing] local protections and allow[ing] the use of religion to discriminate.” *Legislation Affecting LGBT Rights Across the Country*, *supra* note 28.

²⁹ See Wade Goodwyn, *Business Leaders Oppose ‘License to Discriminate’ Against LGBT Texans*, NPR (May 6, 2019, 7:14 AM), <https://www.npr.org/2019/05/06/720060927/business-leaders-oppose-license-to-discriminate-against-lgbt-texans> (noting public outcry against bill that would “sanction discrimination against . . . LGBT employees”).

One of the bills would allow state licensed professionals of all stripes . . . to deny services on religious grounds. Supporters say the legislation is needed to protect religious freedoms. But opponents call them “religious refusal bills” or “bigot bills . . .” While the legislation might be designed mainly for Texas Christians to withhold their services from LGBT people . . . it would allow discrimination against anyone as long as the motive is a sincerely held religious belief.

tem, courts in many jurisdictions do not seek to protect queer people from discrimination under Title VII, and subsequently, the Fair Housing Act.³⁰ The widespread hesitance of the courts to expand protections is what led progressive judges to use “sex stereotypes” as an inroad to broaden anti-discrimination holdings.³¹ It is through this language that courts have begun to rule in favor of queer plaintiffs who claim discrimination.³² Unfortunately, many courts still make a point to differentiate between using Title VII’s language to protect those who simply do not conform to sexual stere-

Id.; Mike Lillis, *Pelosi Denounces NC Law Blocking LGBT Anti-Discrimination Measures*, THE HILL (Mar. 24, 2016, 4:02 PM), <https://thehill.com/blogs/blog-briefing-room/news/274233-pelosi-denounces-nc-law-blocking-lgbt-anti-discrimination> (remarking on recent North Carolina law blocking anti-discrimination measures at local level); Laura Vozzella, *Va. House Panel Kills Bills to Ban Anti-LGBT Discrimination in Housing and Jobs*, WASH. POST (Feb. 8, 2018, 6:04 PM), https://www.washingtonpost.com/local/virginia-politics/va-house-panel-kills-bills-to-ban-anti-lgbt-discrimination-in-housing-and-jobs/2018/02/08/17051270-0d15-11e8-8b0d-891602206fb7_story.html (noting that many state legislatures kill anti-discrimination bills, therefore allowing for outright discrimination).

³⁰ See *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1222 (10th Cir. 2007) (demonstrating “court’s reluctance to expand the traditional definition of sex in the Title VII context”); see also *Medina v. Income Support Div.*, 413 F.3d 1131, 1135 (10th Cir. 2005) (denying extension of Title VII protections). “Congress’s refusal to expand the reach of Title VII is strong evidence of congressional intent in the face of consistent judicial decisions refusing to interpret ‘sex’ to include sexual orientation.” *Medina*, 413 F.3d at 1135 (quoting *Simonton v. Runyon*, 232 F.3d 33, 35-36 (2nd Cir. 2000)).

³¹ See *McBride v. Peak Wellness Ctr., Inc.*, 688 F.3d 698, 711 (10th Cir. 2012) (laying out requirements for successful sexual stereotyping claim under sex discrimination doctrine). To succeed in a discrimination case based on sexual stereotyping, the plaintiff must prove that they were discriminated against for a “failure to conform to stereotypical gender norms.” *Id.* (quoting *Etsitty*, 502 F.3d at 1223); see also *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (broadening definition of sex discrimination to stereotyping based on biological sex).

As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for “[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.”

Price Waterhouse, 490 U.S. at 251 (quoting *Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702, 707, n.13 (1978)).

³² See *Hudson v. Park Cmty. Credit Union, Inc.*, No. 3:17-CV-00344-TBR, 2017 U.S. Dist. LEXIS 187620, at *15 (W.D. Ky. Nov. 13, 2017) (noting Kentucky state court’s failure to dismiss discrimination case based on sexual stereotypes). The Kentucky state court did not dismiss the plaintiff’s claim that she was discriminated against for not falling within a feminine sexual stereotype, and found that she “alleged sufficient facts to state a cognizable claim for gender stereotyping sex discrimination.” *Id.* at 15; see also *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 762 (6th Cir. 2006) (stating “that making employment decisions based on sex stereotyping, i.e., the degree to which an individual conforms to traditional notions of what is appropriate for one’s gender, is actionable discrimination under Title VII.”) (quoting *Price Waterhouse*, 490 U.S. at 250).

otypes, and using that precedent to also protect queer plaintiffs from discrimination outright.³³

In *Smith v. Avanti*, the United States District Court for the District of Colorado ruled in favor of the Plaintiffs, and found that the Defendant had violated the Fair Housing Act's ban on discrimination on the basis of sex by not renting Plaintiffs the townhouse.³⁴ Following existing precedent, the court looked to Title VII to determine whether discrimination on the basis of sexual stereotypes falls under discrimination on the basis of sex, though the exact language does not exist in the Fair Housing Act.³⁵ Specifically, the court determined that the Defendant's comments that the Plaintiffs' family's "uniqueness" barred them from renting the townhouse was discriminatory language, as it "rel[ied] on stereotypes of to or with whom a woman (or man) should be attracted, should marry, or should have a family."³⁶ Despite the fact that the Defendant did not oppose the Plaintiffs' Motion for Summary Judgment, the court's ruling solidifies a growing trend towards using the language of "sexual stereotypes" under Title VII to find discrimination on the basis of sex in housing cases.³⁷

In finding that there was discrimination, the *Smith* court builds upon previously thin precedent and establishes a firm case for using the language of "sexual stereotypes" as a shield against housing discrimination for queer Americans.³⁸ Before this ruling, the language of Title VII, while

³³ See *Hudson*, 2017 U.S. Dist. LEXIS 187620, at *15 (noting that "gender stereotyping or sexual orientation is a very fine line with the possibility of overlap."); see also *Thomas v. Osegueda*, No. 2:15-CV-0042-WMA, 2015 U.S. Dist. LEXIS 77627, at *11 (N.D. Ala. June 16, 2015) (differentiating between protections against sexual stereotyping and sexuality). "[E]xpanded protections for such individuals under the FHA is directly rooted in non-conformity with male or female gender stereotypes, and not directly derivative of sexual orientation" *Thomas*, 2015 U.S. Dist. LEXIS at *11..

³⁴ See *Smith v. Avanti*, 249 F. Supp. 3d, 1194, 1203 (D. Colo. 2017) (granting Plaintiffs' Motion for Summary Judgment).

³⁵ See *id.* at 1200 (stating court's deference to Title VII regulations in determining discrimination); see also *Mountain Side Mobile Est. P'ship v. Sec'y of Hous. & Urb. Dev. ex rel. VanLoozenoord*, 56 F.3d 1243, 1251 (10th Cir. 1995) (determining "whether discriminatory effect alone is sufficient to establish a prima facie case . . . in Title VIII housing discrimination claims."); *Etsitty*, 502 F.3d at 1222 (noting "plain meaning of 'sex' [does not] encompass[] anything more than male and female.")

³⁶ See *Smith*, 249 F. Supp. 3d at 1201 (finding discrimination based on sexual stereotypes). The Defendant's desire to "keep a low profile" and her belief that the makeup of the Plaintiffs' family and relationship ran counter to that desire, was plainly discriminatory, as it demonstrated a preconceived belief about how women and men should act and behave in order to fall within social and societal norms. *Id.* at 1198, 1201.

³⁷ See *id.* at 1203 (noting Plaintiffs' Motion was unopposed); see also *Hively v. Ivy Tech Cmty.*, 853 F.3d 339, 346 (7th Cir. 2017) (providing example of courts using "sexual stereotypes" language to expand scope of discrimination).

³⁸ See *id.* at 1203 (ruling for Plaintiffs); see also *Coffman*, *supra* note 17 (emphasizing importance of ruling to anti-discrimination movement). The court's ruling marks a shift in housing

used to guide housing discrimination law, had not yet been applied as a way to find discrimination on the basis of sex, as outlawed by the Fair Housing Act.³⁹ The judge in the *Smith* case looked to the history of employment discrimination on the basis of sex and “sexual stereotypes” before transferring the logic of those rulings to *Smith v. Avanti*.⁴⁰ Although housing discrimination against queer Americans has been both rampant and underreported throughout history, hopefully the court’s ruling in this case will set a new precedent for courts in other jurisdictions using Title VII’s language to provide protections against housing discrimination alongside employment discrimination.⁴¹

Although *Smith* marks a decisive victory for progress, housing equality is still not guaranteed for queer Americans.⁴² In the absence of federal protection, many states have laws that explicitly allow landlords to discriminate against potential tenants based on their sexual orientation.⁴³ Despite HUD’s implementation of an anti-discrimination policy for any housing development receiving federal funding, private housing in unpro-

discrimination law and is “the first in which a court has extended protections to people based on their sexual orientation or gender identity under the federal Fair Housing Act.” Coffman, *supra* note 17.

³⁹ See 42 U.S.C.S. § 3604(b) (LexisNexis 2020) (outlawing housing discrimination on basis of sex under Fair Housing Act); 42 U.S.C.S § 2000e-2 ((LexisNexis 2020) (banning use of “sex stereotypes” to discriminate under Title VII); see also *Mountain Side Mobile Est. P’ship*, 56 F.3d at 1251 (stating precedent for using Title VII in housing discrimination cases); *Honce v. Vigil*, 1 F.3d 1085, 1088 (10th Cir. 1993) (establishing practice of looking to Title VII to guide housing discrimination cases); Coffman, *supra* note 17 (emphasizing importance of ruling in this case).

⁴⁰ See *Smith*, 249 F. Supp. 3d at 1203 (finding discrimination in employment case based on “sexual stereotypes”); see also *Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339, 347 (7th Cir. 2017) (expanding discrimination on basis of sex to include assumptions based on stereotypes); *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 762 (6th Cir. 2006) (stating discrimination based on sexual stereotypes violates Title VII); *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000) (finding Title VII protects individuals who experience discrimination for not acting according to presumed gender); *Johnson*, *supra* note 25 (marking history of discrimination based on “sexual stereotypes” in employment cases).

⁴¹ See Chibbaro, *supra* note 22 (listing reported statistics of discrimination). The report found that “the number of instances in which a landlord or rental agent appeared to discriminate against the gay or transgender testers . . . were statistically significant and clearly not due to chance.” *Id.*; see also Eisenberg, *supra* note 22 (detailing difficulties visibly queer individuals and couples face when searching for housing); *Victory! Court Rules Landlord Discriminated Against LGBT Family*, *supra* note 13 (emphasizing how issue of discrimination often goes unreported and not litigated).

⁴² See *Past LGBT Nondiscrimination and Anti-LGBT Bills Across the Country (2016)*, *supra* note 21 (listing states that do not guarantee equal protection for housing); *LGBTQ Americans*, *supra* note 21 (noting gaps in protection for queer Americans).

⁴³ See *Past LGBT Nondiscrimination and Anti-LGBT Bills Across the Country (2016)*, *supra* note 21 (examining anti-LGBTQ housing bills). Many states have enacted “religious exemption” laws that permit discrimination on the basis of a landlord’s religious beliefs, which undercuts any progress made towards housing equality on a state level. *Id.*

tected states is still rife with discrimination.⁴⁴ Moreover, despite this step forward, the law is still woefully inadequate when it comes to the protection of queer Americans, including transgender and gender-nonbinary individuals, who may face equal if not more discrimination, and are still wholly unprotected.⁴⁵

Thankfully, some of the uncertainty regarding the *Smith* decision has been assuaged as of June 15, 2020.⁴⁶ On October 8, 2019 the Supreme Court of the United States heard testimony regarding discrimination on the basis of sexual orientation and gender identity under Title VII.⁴⁷ Though not ubiquitous, courts have begun using the language of Title VII to shield queer plaintiffs from discrimination on the basis of their sexual orientation or gender identity.⁴⁸ However, if the Supreme Court had not ruled that

⁴⁴ See *HUD LGBT Resources*, *supra* note 23 (outlining anti-discrimination policy for federally funded housing). In 2012, HUD enacted a policy allowing tenancy in federally funded housing “regardless of their sexual orientation, gender identity, or marital status.” *Id.*; see also *LGBTQ Americans*, *supra* note 21 (listing states where discrimination is legal); Eisenberg, *supra* note 22 (discussing anti-discrimination statistics). In a survey conducted of 1,798 queer Americans “73% of them were ‘strongly concerned’ about housing discrimination by real estate agents, home sellers, landlords and neighbors.” Eisenberg, *supra* note 22. Additionally, the survey found that “LGBT clients were not accepted by sellers despite making full-price cash offers. ‘So there was clearly discrimination and there was nothing that could be done . . . We’ve also heard of LGBT discrimination from landlords restricting same-sex couples from renting their property.’” Eisenberg, *supra* note 22.

⁴⁵ See 42 U.S.C. § 3604(b) (LexisNexis 2020) (noting lack of codified protection on basis of sexual orientation or gender identity); see also *LGBTQ Americans*, *supra* note 21 (listing states without protections against gender identity discrimination). In Wisconsin, though there are protections in place against discrimination based on sexual orientation, there is still no protection to shield against discrimination based on gender identity. See *LGBTQ Americans*, *supra* note 21; see also Chibbaro, *supra* note 22 (examining heightened discrimination against transgender people). “[I]n one out of every 5.6 test visits to a rental office, the rental agents or landlords offered to show a self-identified transgender applicant one fewer apartment than was shown to non-transgender applicants . . . [y]es, trans people are treated worse. . . .” Chibbaro, *supra* note 22.

⁴⁶ See Ariane de Vogue & Devan Cole, *Supreme Court says Federal Law Protects LGBTQ Workers from Discrimination*, CNN (Jun. 15, 2020, 12:22 PM), <https://www.cnn.com/2020/06/15/politics/supreme-court-lgbtq-employment-case/index.html> (discussing Supreme Court victory against employment discrimination). “‘Today’s decision is one of the court’s most significant rulings ever with respect to the civil rights of gay and transgender individuals,’ said Steve Vladeck, CNN Supreme Court analyst and professor at the University of Texas School of Law.” *Id.*

⁴⁷ See *Altitude Express, Inc. v. Zarda*, 139 S. Ct. 1599, 5991 (2019) (granting certiorari for Title VII discrimination case); *Bostock v. Clayton Cnty.*, 140 S. Ct. 1727, 1727 (2019) (denying certiorari for Title VII discrimination case); *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, 139 S. Ct. 1599, 1599 (2019) (granting certiorari for Title VII discrimination case), *aff’d*, 140 S. Ct. 1731 (2020).

⁴⁸ See *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 762 (6th Cir. 2006) (stating “that making employment decisions based on sex stereotyping, i.e., the degree to which an individual conforms to traditional notions of what is appropriate for one’s gender, is actionable discrimination under Title VII”); *Hudson v. Park Cmty. Credit Union, Inc.*, No. 3:17-CV-00344-TBR, 2017 U.S. Dist. LEXIS 187620, at *21 (W.D. Ky. Nov. 13, 2017) (holding plaintiff discriminated against for be-

both sexual orientation and gender identity do, in fact, fall under the purview of discrimination on the basis of sex, it would still be federally lawful to discriminate against queer Americans.⁴⁹ Additionally, the decision could have led to the appeal of any case that had found discrimination in the absence of a ruling from the Supreme Court.⁵⁰ The Supreme Court's ruling in *Bostock v. Clayton County* had the potential to overturn countless employment discrimination cases—including *Smith v. Avanti*—and reverse decades of progress.⁵¹

The issue the court faced in *Smith v. Avanti* was whether or not to use the language of “sexual stereotypes” could be used in a housing discrimination case. Over the years, courts have utilized this language to find anti-queer discrimination under Title VII's ban on discrimination on the basis of sex, but never in a housing case. The judge in *Smith v. Avanti* built on thin, adjacent precedent and made a progressive judgement that marks a victory for anti-discrimination movements. This landmark decision could signify the beginning of a new movement to protect LGBT queer Americans who have no federal shield against housing discrimination, and with the Supreme Court's ruling in their favor, there is hope that this victory will soon be one of many.

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ing “too butch.”); *see also* Scott, *supra* note 27 (restating that courts have used language of Title VII in queer discrimination cases). In a conversation with the president of the Human Rights Campaign, Alphonso David, David stated: “[W]e have been relying on case law for the past 20 years. . . . Courts have concluded that federal civil rights laws do protect LGBTQ people from discrimination.” *See* Scott, *supra* note 27; North, *supra* note 27 (detailing impact of ruling across several legal sectors).

⁴⁹ *See* North, *supra* note 27 (describing consequences of ruling against sexual orientation falling under discrimination based on sex). “LGBTQ people already face high rates of employment discrimination . . . and it's already hard to prove employment discrimination even where you are protected . . . A decision against the workers would only make matters worse.” *Id.*

⁵⁰ *See id.* (explaining impact of ruling). The Supreme Court's ruling could “decimate legal protections for LGBTQ workers in America . . . LGBTQ people could stand to lose not just their jobs as a result of the three cases at issue . . . but also potentially their housing and access to health care and education as well.” *Id.*; *see also* Scott, *supra* note 27 (stating that plaintiffs in October 8, 2019 cases asked Supreme Court “to affirm what everyone has relied on for decades—that LGBT people should be protected under federal civil rights laws.”)

⁵¹ *See* Biskupic, *supra* note 27 (confirming effect of ruling on queer rights); North, *supra* note 27 (reiterating consequences of SCOTUS ruling); Scott, *supra* note 27 (emphasizing ramifications on LGBT lives).