COLLECTIVELY BARGAINED FOR & STATUTORILY ARBITRATED: RESOLUTION OF SEXUAL ORIENTATION DISCRIMINATION AND OTHER STATUTORY CLAIMS IN THE UNIONIZED WORKFORCE

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INTRODUCTION

The legal debate over the rising enforcement of mandatory arbitration clauses within collective bargaining agreements is in full swing. Decades worth of precedent and predictability has been toppled with a single ruling. Both sides are absolute in the conviction that his or her perspective is the only valid, reasonable, and, therefore, worthy assessment of the situation. This has left the landscape of employment and labor law divided and uncertain. A workable solution to resolve this legal war of attrition could reduce a great deal of money, time, and energy; resources that could be redirected to other matters of importance.

Critics of mandatory arbitration's increasing hold on society have been especially vocal. In the opening sentence of his confrontation on what he calls "Compelled Arbitration," Scholar David S. Schwartz bluntly and unapologetically asserted that the "[t]he Supreme Court has created a monster." [1] Similarly, the National Employment Lawyers Association (NELA), as a self-proclaimed "leader in opposing forced arbitration of employment claims" has held mandatory arbitration to be "anathema to our public justice system." [2] However, not all of the criticism of mandatory arbitration was as openly scathing and derogatory. In a 2004 study conducted by the Arizona Bar Association, broad and varied responses were received on topics such as the arbitration

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[1] David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration,* 1997 WIS. L. REV. 33.

[2] Staff, *Advocacy: Forced Arbitration*, NELA.ORG, https://www.nela.org/index.cfm?pg=mandarbitration (last accessed Oct. 8, 2018).

process itself, arbitrator competence, and the structure of mandatory arbitration programs. [3] It is the latter category of criticism that breathes life into the possibility that mandatory arbitration is not wholly irredeemable.

This article's focus will be on the issues of arbitration as they pertain to resolving statutory claims arising under a collective bargaining agreement (hereinafter "CBA"). More precisely, this article centers on claims of discrimination based on sexual orientation, and how collectively bargained for arbitration clauses effect an individual employee's articulation and resolution of those claims. [4] In an attempt to break from the current 'all-or-nothing' mindset, and address what this author agrees to be a flawed but beneficial entity of the legal process [5], this article seeks to present, *inter alia*, minimum standards to the collective bargaining and arbitration processes that prove palatable to both factions of the adjudication divide.

In Part I, this document will begin with a review of the pertinent historical aspects of the National Labor Relations Act (NLRA) and unionization. This will include a discussion of the development and evolution of collective bargaining, as well as,

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[3] Bob Dauber & Roselle Wissler, *Lawyer Views of Mandatory Arbitration*, ARIZ. BAR. ASSOC., https://www.myazbar.org/azattorney/pdf_articles/0705mandit-2.pdf (July 1, 2005). The survey was issued to all 9,338 members, but only 31 percent, or 2,934 lawyers, responded. The study found highly favorable reviews of the arbitration process: 93% felt they could fully present their case, 82% felt the hearings were fair and the parties acted in good faith, and 79% felt the arbitrator was unbiased. Conversely, with the exception of one county, there were strong majorities that rated the arbitrators, themselves, very poorly with regard to preparation, understanding of the issues, and knowledge of procedure.

[4] While this article will focus on, and reference only, claims of discrimination based upon sexual orientation, the provided recommendations will have application to all statutory claims under a collective bargaining agreement.

[5] *See generally* Lewis L. Maltby, *Employment Arbitration and Workplace Justice*, 38 U.S.F. L. Rev. 105, 118 (2003) ("Employment arbitration needs to be preserved and improved not abandoned"); Michael Z. Green, *Reading Ricci and Pyett to Provide Racial Justice Through Union Arbitration*, 87 IND. L.J. 367, 416 (2012) ("To the extent a collectively bargaining arbitration process provides reasonable options to effectively vindicate statutory claims, employees whose unions fairly represent all of their interests should be able to use this arbitration process").

arbitration clauses within a CBA. Additionally, this section will briefly discuss the origins of Title VII, and then move to modern issues of employment discrimination based on sexual orientation.

Part II will open with a lead-in to, and current arguments for, a Supreme Court ruling that provides Title VII protections against discrimination based on sexual orientation under the "because of … sex" clause. The section will conclude with an examination of the collective bargaining and arbitration processes—as they apply to sexual orientation discrimination claims in employment CBAs—through a brief discussion of the disadvantages the process has on the vindication of individual employee rights.

Finally, Part III will make brief reference to the arguments in the opening of Part II and assert that the first step in resolving the arbitration issue involves a Supreme Court ruling that affirmatively holds that the provisions of Title VII's "because of … sex" clause protect against discrimination based upon sexual orientation. Then the section will close by addressing the findings in the second half of Part II by making recommendations for (1) revised collective bargaining imposed on unions and employers, and (2) improvements to the arbitration process that enhance procedural and substantive standards while still maintaining the bargained for advantages of speed, cost, and informality.

I. LABOR RELATIONS & DISCRIMINATION: A HISTORICAL OVERVIEW OF AMERICAN EMPLOYMENT

A. *Origins of the National Labor Relations Act*

i. Early Collective Bargaining and Arbitration

In its simplest form, collective bargaining is "the process in which working people … negotiate contracts with their employers to determine their terms of employment." [6] The concept of collective bargaining, although not legislatively acknowledged or provided for, has been a part of American history since the colonial era. [7]

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[6] *See Collective Bargaining*, *at* https://aflcio.org/what-unions-do/empower-workers/collective-bargaining (last accessed Oct. 23, 2018).

[7] Lance A. Compa, *An Overview of Collective Bargaining in the United States*, *in* CORNELL UNIVERSITY ILR SCHOOL DIGITALCOMMONS@ILR 91 (2014),

Early views on collective bargaining, however, ranged from outright distrust and hostility to qualified tolerance. [8] Further, without the intervention and protection of federal legislation, individual state courts were the "ultimate arbiters of workers' collective action." [9] This resulted in many states openly allowing employers to promulgate employment contract clauses that prohibited union association, as well as terminate the employment of anyone shown to be affiliated with a union or wishing to bargain collectively.[10]

Alternative dispute resolution, namely arbitration, has a similar extensive history, spanning Colonial America. [11] Arbitration is defined as a "method of dispute resolution involving one or more neutral third parties who are usu[ally] agreed to by the disputing parties and whose decision is binding." [12] The first known state laws codifying arbitration as an official means of dispute resolution were enacted in the early 17th century. [13] Further, arbitration was used both as a final effort at evading the American Revolution [14], and a testamentary choice of law for the probate of George Washington's last will and testament [15].

Federal absence in matters concerning labor organizing, collective bargaining, and associative dispute resolution persisted throughout the majority of the 19th century. When the federal legislature did finally intervene, it started with dispute resolution

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available in Collective Bargaining Commons, http://digitalcommons.ilr.cornell.edu/articles/912.

[8] *Id.* at 91-92 (contrasting *Commonwealth v. Pullis*, Philadelphia Mayor's Court (1806), where the court held collective action to be "unnatural" and "a criminal conspiracy to inflict harm on the public," with the court in *Commonwealth v. Hunt*, 45 Mass. 111 (1842), which was okay with collective action so long as it "remained peaceful").

[9] *Id.* at 92.

[10] *Id.*

[11] Steven A. Certilman, *A Brief History of Arbitration in the United States*, 3 N.Y. ST. B. ASS'N: N.Y. DISP. RESOL. LAW. 10 (2010).

[12] Black's Law Dictionary 112 (8th ed. 2004).

[13] *See* Certilman, *supra* note 11, at 10. In 1632, Massachusetts became the first colony to adopt arbitration laws, followed by Pennsylvania in 1705.

[14] *Id.*

[15] *Id.* at 11.

and the enactment of the Arbitration Act of 1888. [16] Federal arbitration provisions took on its final form with the 1925 enactment of the Federal Arbitration Act (FAA) [17], supported a year later by The American Arbitration Association. [18]

Correspondingly, the government divided the other two issues into three major labor categories: the railroad and airline industries, covered by the Railway Labor Act of 1926 [19]; the remaining portion of private sector employees, govern by the National Labor Relations Act (NLRA) of 1935 [20]; and the public sector, which remained under the jurisdiction of the individual states [21] [22]. While the focus of this article will be on private sector employees governed by the NLRA, the issues and solutions presented herein are equally applicable to the public sector.

ii. Collective Bargaining and Dispute Resolution under the NLRA

As a federally enacted statute, the NLRA occupies and has preemptive power over the field of labor relations. [23] Under the enforcement of its administrating agency, the National Labor Relations Board (NLRB), the NLRA obligates employers and unions to bargain, in good faith, over "wages, hours, and other terms and conditions of employment." [24] The NLRA further mandates that

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[16] *Id.* The Arbitration Act originally granted investigative power, but was quickly replaced by the Erdman Act of 1898, which substituted investigation for a form of mediation.
[17] 9 U.S.C. §§ 1 *et seq.*
[18] *See*, Certilman*, supra* note 11, at 12.
[19] *See* Compa, *supra* note 7, at 92.
[20] *Id.* at 93.
[21] *Id.* at 97.
[22] It is important to note that while federal employees are classified as part of the public sector, they are governed by President Kennedy's 1962 executive order 10988 (codified by President Carter as Title VII of the Civil Service Reform Act of 1978), not the states. *See id.*; U.S. FED. LABOR RELATIONS AUTHORITY, 50TH ANNIVERSARY: EXECUTIVE ORDER 10988 (2012), https://www.flra.gov/50th_Anniversary_EO10988.
[23] *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244 (1959) (holding that any state action which is found to involve §7 or §8 activity is preempted by the NLRA).
[24] National Labor Relations Act, 29 U.S.C. § 158(d); *see also* Compa, *supra* note 7, at 93; Yeongsik Kim, *Using Collective Bargaining to Combat LGBT*

these subjects must be bargained over in good faith to impasse, that is, until the "good-faith negotiations have exhausted the prospects of concluding an agreement." [25] There is an additional requirement, on the union itself, to fairly represent all the employees of a collective bargaining unit. [26] This statutory duty demands that a union "serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." [27] The end goal of the bargaining process is the creation of the collective bargaining agreement (again "CBA"), which serves as the governing document for all employment terms and conditions, binding on both the employer and employees.

The Supreme Court described the CBA as a delineation of "the rights and duties of the parties," and "more than a contract … [but rather] a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate." [28] The Court went even further and called the CBA "an effort to erect a system of industrial self-government;" a system whose foundation rests in its "grievance machinery." [29] Conclusively, it held arbitration to be that "machinery." [30] Moreover, arbitration over litigation has been established as the preferred method of dispute resolution in a CBA [31], and is executed as the final decision-making vehicle once all other methods have been exhausted. [32]

Discrimination in the Private-Sector Workplace, 30 WIS. J.L. GENDER & SOC'Y 73, 82-83 (2015).

[25] *Taft Broad. Co.*, 163 N.L.R.B. 475, 478 (1967).

[26] *See Vaca v. Sipes*, 386 U.S. 171, 177 (1967).

[27] *Id.*

[28] *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960).

[29] *Id.* at 580-81.

[30] *Id.* at 581.

[31] *Id.* at 581-82 (discussing the broad functions of arbitration over the courts).

[32] *See* Eugene K. Connors and Brooke Bashore-Smith, *Employment Dispute Resolution in the United States: An Overview*, 17 CAN.-U.S. L.J. 319, 321 (1991), available at http://scholarlycommons.law.case.edu/cuslj/vol17/iss2/15 (discussing the progressive "steps" of dispute resolution required in a typical CBA before reaching arbitration).

In a prior passage, arbitration was defined as involving "one or more neutral parties," or arbitrators to facilitate a decision. Unlike in a traditional courtroom, where the jury decides the facts and a judge decides the law, arbitrators function as judge and jury. [33] Arbitrators are, generally, selected for their expertise in a particular labor field. [34] However, they may also be lawyers or retired judges. [35] In addition to the expertise of neutral arbitrators, arbitration has been favored by the labor industry for its "speed, efficiency, [and] privacy," as well as its cost-effectiveness. [36] This early form of arbitration was voluntary, bargained for, and molded to fit the industry's needs. [37] It's a stark contrast to the arbitration to be discussed later on in this article.

B. *Discrimination in the United States*

i. Title VII

Title VII of the Civil Rights Act of 1964 (the Act) [38], Title VII or simply the Title, was drafted to eliminate all forms of discrimination, within the workplace and otherwise. [39] The employment end-goal was "productive efficiency and equity" [40] demonstrated through "fair and racially neutral employment and personnel decisions." [41] At the Title's enactment, the American Civil War and, subsequent, Reconstruction efforts were almost a century passed, however the employment situation for Black Americans (as well as other minorities and women) was still

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[33] *See* Robert L. Ebe, *The Nuts and Bolts of Arbitration*, 22 FRANCHISE L.J. 85, 86 (2002).
[34] *Alexander v. Gardner-Denver*, 415 U.S. 36, 57 (1974) ("the specialized competence of arbitrators pertains primarily to the law of the shop")
[35] *See generally* Ebe, *supra* note 33, at 87.
[36] *See* Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1635 (2005) (arbitration is "sought [for its] expertise, speed, efficiency, privacy, and neutral decisionmakers"); Maltby, *supra* note 5, at 107 ("Arbitration is far less expensive than litigation").
[37] *See* Sternlight, *supra* note 36, at 1635.
[38] 42 U.S.C. §§ 2000e *et seq.*
[39] Major Velma Cheri Gay, *50 Years Later … Still Interpreting the Meaning of 'Because of Sex' within Title VII and Whether It Prohibits Sexual Orientation Discrimination*, 73 A.F. L. REV. 61, 67 (2015).
[40] *Id.*
[41] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973).

extremely unwelcoming. [42] Through the emerging and escalating civil rights protests, a spotlight was focused on the country's "pervasive and egregious racial discrimination and segregation." [43] The nation was unapologetically forced to confront its own failings and charged with corrective action. [44] The creation of the Act, and Title VII, were the result.

Title VII, in pertinent part, "forbids an employer to 'fail or refuse to hire or to discharge any individual, or otherwise to discriminate with respect to his compensation, terms, conditions, or privileges of employment,' or to 'limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, *because of* such individual's … sex.'" [45] Congress also founded the Equal Employment Opportunity Commission (EEOC) as the gatekeeper and primary facilitator of the Act, however it left the agency amputated, without any true enforcement authority. [46] Lack of enforcement power notwithstanding, the EEOC's inaugural year saw an excess of 9,000 discrimination charges filed; over quadruple the anticipated amount. [47] In the decade following, the

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[42] *See* Gay, *supra* note 39, at 66.
[43] U.S. EQUAL EMP'T OPPORTUNITY COMM'N: EEOC 35TH ANNIVERSARY, PRE-1965: EVENTS LEADING TO THE CREATION OF EEOC, https://www.eeoc.gov/eeoc/history/35th/pre1965/index.html (hereinafter "EEOC PRE-1965").
[44] *Id.*
[45] *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239-40 (1989) (quoting 42 U.S.C. §§ 2000e-2(a)(1), (2)) (emphasis in original). The full text of the statute proscribes discrimination "because of such individual's race, color, religion, sex, and national origin." However, for purposes of this article, the focus will be solely on "sex" discrimination.
[46] *See* EEOC PRE-1965, *supra* note 43 (Passage of Title VII was hard-fought, hard-won, and involved many compromises. One of which was the removal of any enforcement power within the EEOC. The commission was relegated to only the "power to receive, investigate, and conciliate complaints" of discrimination. Nevertheless, over the decades, the EEOC has grown and strengthened as an "enforcement" agency despite its inaugural hindrances).
[47] J. Clay Smith, Jr., *Overlapping Jurisdiction of the Equal Employment Opportunity Commission and the National Labor Relations Board* 1 (SELECTED SPEECHES, Paper No. 2, 1980), http://dh.howard.edu/jcs_speeches/2.

number grew to almost 95,000 charges. [48] It was clear that discrimination's hold on the country had not waned, but now there was a means to combat its effects.

ii. Empirical Research on Discrimination Based on Sexual Orientation

Approximately 6.5 million employees in the United States identify as Lesbian, Gay, Bi-Sexual, or Transgender (LGBT) [49], however Title VII provides no explicit prohibition against discrimination based on sexual orientation and, thus, these individuals are forced to rely on the mercies of state and local laws for employment protection. [50] Jurisdictions slow in, or resistant to, adopting anti-discrimination statutes that cover sexual orientation leave their citizens vulnerable to attack. [51]

In 2011, the National Center for Transgender Equality conducted a study of some 6,450 surveys geared at gender identity and sexual orientation discrimination in employment and other things. [52] The results were both staggering and disturbing. Ninety percent of the participants, 5,805 individuals, stated direct

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[48] *Id.*

[49] Lori Ecker, *Discrimination in Employment Issues for LGBT Individuals* (AM. BAR. ASS'N, Oct. 13, 2017), https://www.americanbar.org/groups/young_lawyers/publications/tyl/topics/sexual-orientation-gender-identity/discrimination-in-employment-issues-for-lgbt-individuals/.

[50] Zascha Abbott et al., *Recent Developments in Employment Law and Litigation*, 53 TORT & INS. L.J. 335 (2018).

[51] HUMAN RIGHTS CAMPAIGN, STATE MAPS OF LAWS & POLICIES: EMPLOYMENT (2018), https://www.hrc.org/state-maps/employment. As of June 11, 2018, 21 states and the District of Columbia have laws prohibiting employment discrimination based on sexual orientation or gender identity; one state (Wisconsin) protects based on sexual orientation only; six states have provisions against discrimination based on sexual orientation or gender identity for public employees; and five states protect based on sexual orientation only for public employees. Idaho, Wyoming, North Dakota, South Dakota, Nebraska, Kansas, Oklahoma, Texas, Arkansas, Louisiana, Mississippi, West Virginia, Tennessee, Alabama, South Carolina, Georgia, and Florida have no form of state level employment provisions against discrimination based on sexual orientation and/or gender identity.

[52] *See* Kim, *supra* note 24, at 76.

harassment or mistreatment in their place of employment. [53] Additionally, forty-seven percent of the participants suffered adverse employment actions, with approximately twenty-one percent citing a direct correlation between their gender identity or sexual orientation and termination of employment. [54] Forty-four percent reported that they were not hired, and twenty-three percent were not promoted, on account of their gender identity or sexual orientation. [55] Finally, the study also showed that participants who were of a racial minority asserted much higher rates of discrimination; upwards of double or triple that of non-racial minority participants.[56]

In 2008, the General Social Survey (GSS) conducted a study, using probability samples representative of the United States population, that found a substantial portion of the LGBT community experienced some form of workplace discrimination because of their sexual orientation or gender identity. [57] Workplace harassment was the prevailing form of discrimination, with thirty-five percent, followed by about sixteen percent who reported having lost their job due to their sexual orientation and/or gender identity. [58] The study also measured differences between those who were open about their sexual orientation or gender identity versus those who were not. [59] It is clear from the data that invidious discrimination based on sexual orientation and/or gender identity is a problem in American employment. Further, the few state provisions that are in place are insufficient to adequately mitigate the issue. Federal intervention is not only crucial, it is inevitable.

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[53] *Id.* The study's sample was diverse in composition. It pulled from a varied range of racial, socio-economic and geographic environments.
[54] *Id.*
[55] *Id.* at 76-77.
[56] *Id.* at 77.
[57] BRAD SEARS & CHRISTY MALLORY, GENDER IDENTITY AND SEXUAL ORIENTATION DISCRIMINATION IN THE WORKPLACE 40-2, 40-3 (Christine Michelle Duffy & Denise M. Visconti eds., 2014).
[58] *Id.* at 40-4.
[59] *Id.* Of those who were open, fifty-six percent reported harassment and discrimination. Whereas, ten percent of those who were not open reported experiences of harassment and discrimination.

II. RESOLUTION OF SEXUAL ORIENTATION DISCRIMINATION CLAIMS IN MODERN COLLECTIVE BARGAINING AGREEMENTS

A. *"[B]ecause of ... Sex" Protections for Discrimination Based on Sexual Orientation*

At its inception, Title VII's focus was on eliminating employment discrimination against Black Americans, the inclusion of "sex" discrimination was an addition. [60] Further, Congress failed to provide any guidance on its intent or meaning regarding the "because of … sex" prohibition. [61] Thus, it has been up to the courts to establish doctrines and interpretations to determine the application of this provision. [62]

Early interpretations of the "because of … sex" provision took a traditional approach to the legislature's ambiguity, narrowly and literally defining "sex" as the biological man or woman. [63] This is in line with the "fundamental cannon of statutory construction," which decrees that "unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." [64] Hence, under this approach, the Title's provision would simply and only mean that employers are prohibited from "discriminat[ing] against women because they are women and against men because they are men." [65]

i. When Society Moves, the Law Must Move with It

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[60] *See* Gay, *supra* note 39, at 67.
[61] *Id.* at 68-69.
[62] *Id.* at 69.
[63] *Id.* at 73 (referencing *Holloway v. Arthur Anderson & Co.*, 566 F.2d 659, 662 (9th Cir. 1977)) ("Congress has not shown any intent other than to restrict the term 'sex' to its traditional meaning"); *see also Hively v. Ivy Tech Cmty. College of Ind.*, 853 F.3d 339, 353 (7th Cir. 2017) (Posner, J., concurring) (noting that "the term 'sex' in [Title VII], when enacted in 1964, undoubtedly meant 'man or woman'").
[64] *Id.* at 362 (Sykes, J., dissenting) (quoting *Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870, 876 (2014)).
[65] *Id.* at 363.

Society has evolved and continues to do so. Further, with that evolution comes changes in perception and understanding. [66] The Supreme Court set the standard for an evolving interpretation of "because of … sex" in *Price Waterhouse*. [67] There, the Court gave substance to the "sex stereotype theory," which makes actionable any discrimination on the basis of non-conformity to stereotypical gender roles and behavior. [68] The Supreme Court then followed that up with its ruling in *Oncale v. Sundowner Offshore Services.,* [69] where it held that "nothing in Title VII necessarily bars a claim of discrimination 'because of … sex' merely because the plaintiff and the defendant" are both of the same sex. [70]

The Circuit courts soon began to follow in the Supreme Court's footsteps. [71] In *EEOC v. Boh Brothers Construction Co.*, [72] an *en banc* Fifth Circuit Court ruled that harassment on the basis of gender-stereotypes may be actionable under Title VII's "because of … sex" provisions. [73] In *Boh Brothers*, an employee suffered continuous "verbal and physical harassment" simply for not conforming to his supervisor's perspective of how men should act. [74] The employee was severely mock for his use of sanitary wipes rather than standard toilet paper, was called pejorative and derogatory names, and threatened with sexual assault. [75] Despite lacking the three prongs of evidence highlighted in *Oncale*—(1) that

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[66] *See* Kim, *supra* note 24, at 79 n.41 (illustration of both courts' progressive interpretation of "sex" as it relates to Title VII).
[67] 490 U.S. 228 (1989).
[68] *Id.* at 250-51.
[69] 523 U.S. 75 (1998).
[70] *Id.* at 79; *see also Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 117 (2d Cir. 2018) (paraphrasing the Supreme Court's holding in *City of L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978), by stating that discrimination according to life expectancy was "simply a proxy for sex" and, thus, the action equated to discrimination "because of … sex").
[71] *See* Gay, *supra* note 39, at 81.
[72] 731 F.3d 444 (5th Cir. 2013).
[73] *See* Gay, *supra* note 39, at 81; *see also Boh Bros.*, 731 F.3d at 453 ("[A] plaintiff may rely on gender-stereotyping evidence to show that discrimination occurred "because of … sex" in accordance with Title VII") (referencing *Price Waterhouse*, 490 U.S. 228).
[74] *Boh Bros.*, 731 F.3d at 445-46.
[75] *Id.*

the harassing party was either homosexual or motived by sexual desire; (2) that harassing party was motivated by hostility to a certain gender; or (3) the harassing party treated the sexes differently—the court found the EEOC's claims cognizable. [76] The Fifth Circuit declined to follow *Oncale's* precise evidentiary standards and, like its sister circuits, concluded that those standards were "illustrative" rather than "exhaustive." [77] It held that the EEOC needed only to show evidence that the discrimination was based upon perception of a lack of gender conformity. [78] Following the trajectory of both the Supreme and Circuit courts, the path leads directly to a line of reasoning and interpretation that is currently splitting the judiciary: discrimination based upon sexual orientation should be protected under Title VII's "because of … sex" clause.

ii. Why Title VII's "[B]ecause of … [S]ex" Provisions Cover Discrimination Based on Sexual Orientation

As discussed in the preceding sections, Title VII does not explicitly prohibit discrimination on the basis of sexual orientation. [79] Nevertheless, several state and federal laws have established protections prohibiting such discrimination. [80] Even, Congress and certain federal agencies have taken notice of, and acted on, a need for provisions against discrimination based upon sexual orientation. [81] Further, the circuits have become split on the issue of

[76] *Id.* at 458, 461.
[77] *Id.* at 456; *see also* Gay, *supra* note 39, at 82 n.166 (comparing the 10th, 8th, and 7th circuit's conclusions that the *Boh Bros.* evidentiary route was not "exhaustive").
[78] *Boh Bros.*, 731 F.3d at 456; *see,* e.g., *Smith v. City of Salem*, 378 F.3d 566, 568 (6th Cir. 2004) (holding that the "sex stereotyping theory" under Title VII was applicable to transsexuals); *Barnes v. Cincinnati*, 401 F.3d 729 (6th Cir. 2005); *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011).
[79] 42 U.S.C. §§ 2000e-2(a)(1), (2) (employers are only proscribed from discriminating "because of such individual's race, color, religion, ***sex***, and national origin").
[80] *See* HUMAN RIGHTS CAMPAIGN, *supra* note 51; Section II(A)(i), *supra*.
[81] *See Hively*, 853 F.3d at 344 ("Congress has frequently considered amending *Title VII* to add the words "sexual orientation" to the list of prohibited characteristics"); *Baldwin v. Foxx*, EEOC Appeal No. 0120133080, 2015 WL 4397641 (E.E.O.C. July 15, 2015) (holding affirmatively that "allegations of discrimination on the basis of [] sexual orientation state a claim of

incorporating Title VII protections under the "because of … sex" clause. [82] With the obvious movement toward expanding the provisions of Title VII, the split in the circuits, and the interest but lack of action by Congress, it is only reasonable to expect that the Supreme Court will have to intervene and make a ruling on the subject. This section seeks to discuss the two prevailing arguments, purported by the Second and Seventh Circuit courts, for why Title VII's "because of … sex" provision protects against discrimination based on sexual orientation and why, in this author's opinion, the Supreme Court should affirmatively hold so.

a. <u>It is all because of "sex"</u>

The first argument championed is that discrimination on the basis of sexual orientation is prohibited under Title VII's "because of … sex" provisions, because the term "sex" in intrinsic to sexual orientation. As highlighted in the opening of Part II, the term "sex" has undergone several interpretations with regards to its application to Title VII. The circuits charge that the Supreme Court, through its rulings, has established that "Title VII prohibits not just discrimination based upon sex itself, but also discrimination based upon traits that are a function of sex, such as life expectancy, and non-conformity with gender norms." [83] Equally, they contend that the interpretation of statutes and their terms must be done on a "basis of present need and understanding rather than original meaning." [84]

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discrimination on the basis of sex within the meaning of Title VII"); *see also* U.S. EQUAL EMP'T OPPORTUNITY COMM'N, PREVENTING EMPLOYMENT DISCRIMINATION AGAINST LESBIAN, GAY, BISEXUAL OR TRANSGENDER WORKERS, https://www.eeoc.gov/eeoc/publications/brochure-gender_stereotyping.cfm (hereinafter "EEOC PREVENTING DISCRIMINATION").

[82] *See Hively*, 853 F.3d at 351-52 (holding that "a person who alleges that she experienced employment discrimination on the basis of her sexual orientation has put forth a case of sex discrimination for Title VII purposes); *Zarda*, 883 F.3d at 132 (holding that a petitioner "is entitled to bring a Title VII claim for discrimination based on sexual orientation); *but see Evans v. Ga. Reg'l Hosp.*, 850 F.3d 1248, 1255 (11th Cir. 2017) (holding that the court is bound by prior precedent, and unless overruled by Supreme Court or this court sitting *en banc*, there is no cause of action for discrimination based on sexual orientation under Title VII).

[83] *Zarda*, 883 F.3d at 112.

[84] *Hively*, 853 F.3d at 353 (Posner, J., concurring).

Furthermore, they reference that even the late Justice Antonin Scalia, a firm "originalist," understood this concept [85] and stated the following:

> [I]t is simply incompatible with democratic government, or indeed, even with fair government, to have the meaning of a law determined by what the lawgiver meant, rather than by what the lawgiver promulgated. … [Ours is a] government of laws, not of men. Men may intend what they will; but it is only the laws that they enact which binds us." [86]

Given their above rationale, one is led to conclude that statutory interpretation not only accepts the changes in society, it is a product of those changes. A question remains, then, of how these changes relate to "sex" and "sexual orientation"?

Sexual orientation deals with a "person's predisposition or inclination toward sexual activity or behavior with other males or females" and follows under three primary categories: "heterosexuality, homosexuality, or bisexuality." [87] The courts advance their argument with the assertion that fundamental to the above definition is a determination of attraction to individuals of the same or differing "sex." [88] Hence, they contend that it would not be unreasonable to conclude that, if the definition of sexual

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[85] *Id.* at 353-54 (referencing Scalia's pivotal fifth vote in the "flag burning" cases). Flag burning was held to be protected speech under the First Amendment, yet such an *action* would not have been considered as "speech" by the framers or ratifiers of the amendment.

[86] *Id.* at 362 (Sykes, J., dissenting) (quoting ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 17 (Amy Gutmann ed., 1997)); *see also Id.* at 344 (quoting *Oncale*, 523 U.S. at 79-80) ("statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed").

[87] Black's Law Dictionary (10th ed. 2014).

[88] *See Hively*, 853 F.3d at 358 (Flaum, J., concurring) ("One cannot consider a person's homosexuality without also accounting for their sex: doing so would render 'same' and 'own' meaningless").

orientation is dependent upon a classification of the "sex" of both the individual and his or her partner, "sexual orientation [must invariably be] a function of sex." [89] Moreover, application of the corollary would then lead to a conclusion that discrimination based upon sexual orientation "does not exist without taking the victim's biological sex … into account," and that any adverse reaction by the offender is "purely and simply based on sex." [90] Taken further, as specifically noted by the court in *Hively*, "if we were to change the sex of one partner in a [homosexual] relationship, the outcome would be different … reveal[ing] that the discrimination rests on distinctions drawn according to sex." [91] The end product of such reasoning appears obvious, even to this author; sexual orientation is a product of sex, thus any discrimination on the basis thereof would be the equivalent of discrimination "because of … sex."

b. <u>Sex stereotyping</u>

The Supreme Court in *Manhart*, held that "employment decisions cannot be predicated on mere 'stereotyped' impressions about the characteristics of males and females." [92] The Court again discussed the concept of stereotyping in *Price Waterhouse*, when it found impermissible sex discrimination in an employer's adverse employment action based upon a belief that "a female accountant should walk, talk, and dress femininely." [93] There, the Court succinctly removed any question that sex stereotyping had any place in employment. [94] However, if the Court has deemed sex stereotyping so reprehensible as to fall under Title VII's "because of … sex" proscriptions, it begs the question of what is sex-based

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[89] *Zarda*, 883 F.3d at 113.
[90] *Hively*, 853 F.3d at 346-47.
[91] *Id.* at 349.
[92] *Manhart*, 435 U.S. at 707.
[93] *Zarda*, 883 F.3d at 120.
[94] *Price Waterhouse*, 490 U.S. at 251. ("[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group").

stereotyping? [95] More importantly, how does sex stereotyping relate to discrimination based on sexual orientation being prohibited under Title VII?

The Second Circuit court in *Zarda* concluded that discrimination based on sex stereotyping could be found where the "behavior or trait" causing issue or an adverse employment action "would have been viewed more or less favorably if the employee were of a different sex. [96] Applying the above test to sexual orientation, molded by *Price Waterhouse* reasoning, the court held that "when … 'an employer … acts on the basis of a belief that [men] cannot be [attracted to men], or that [they] must not be,' but takes no such action against women who are attracted to men, the employer 'has acted on the basis of gender.'" [97] The court's conclusive proclamation is that "sexual orientation discrimination is almost invariably rooted in stereotypes about men and women" [98] and "is predicated on assumptions about how persons of a certain sex can or should be." [99]

The Seventh Circuit court in *Hively* echoed this sentiment when it referred to homosexuality as "the ultimate case of failure to conform to … stereotype" in a society that "views heterosexuality as the norm." [100] Even the Eleventh Circuit—despite hiding behind precedent and holding that "there is no sexual orientation action under Title VII [101] [102]—found that "holding males and females to different standards of behavior" constitutes "discriminat[ion] on the

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[95] *See Zarda*, 883 F.3d at 120.
[96] *Id.*
[97] *Id.* at 120-21; *see Price Waterhouse*, 490 U.S. at 250.
[98] *Zarda*, 883 F.3d at 119.
[99] *Id.* at 112.
[100] *Hively*, 853 F.3d at 346.
[101] *Evans*, 850 F.3d at 1255 (referencing the binding 5th Circuit holding in *Blum v. Gulf Oil Corp.*, 597 F.2d 936 (5th Cir. 1979).
[102] *See generally* UNITED STATES COURTS, *The Eleventh Circuit Historical Society*, http://www.ca11.uscourts.gov/eleventh-circuit-historical-society; WIKIPEDIA, *United States Court of Appeals for the Eleventh Circuit*, https://en.wikipedia.org/wiki/United_States_Court_of_Appeals_for_the_Eleventh_Circuit (as of Oct. 13, 2018, 01:56 (UTC)) (The 11th Circuit was established on October 1, 1981, from a portion of the 5th Circuit that had split off. Thus, 5th Circuit opinions prior to that date are considered binding on the 11th Circuit).

basis of … sex." [103] The *Hively* court, like the court in *Zarda*, came to the ultimate conclusion that a "[distinction] between a gender nonconformity claim and one based on sexual orientation … does not exist at all. [104] When there is "[a]ny 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," that "reaction [is] purely and simply based on sex." [105]

Given all of the arguments, interpretations, and illustrations provided above, it is reasonable to assume that both the Second and Seventh Circuit courts support the contention that it is past time for the Supreme Court to revisit and affirm Title VII "because of … sex" provisions against discrimination based on sexual orientation. The Court's precedents have already set the framework. [106] Even the *Hively* court noted the cognitive incongruence in the Supreme Court's use of an associative racial illustration in *Loving v. Virginia* [107], juxtaposed against its steadfast resistance to using the same illustration with regards to sexual orientation. [108] The proverbial 'writing is on the wall.' Now the Supreme Court needs only to read and apply it.

At the onset, this article proposed a discussion and resolution of the issues presented in claims of discrimination based on sexual orientation under a CBA arbitration clause. Thus far the topics covered have included an overview of both early and post-NLRA collective bargaining and dispute resolution (arbitration), as well as

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[103] *Evans*, 850 F.3d at 1260 (Pryor, J., concurring); *see also Nichols v. Azteca Rest. Enters, Inc.*, 253 F.3d 864, 869 (9th Cir. 2001) (holding that Title VII was violated where a homosexual employee was verbally harassed by some male co-workers and a supervisor because he was effeminate and did not meet their views of a male stereotype).

[104] *Hively*, 853 F.3d at 346.

[105] *Id.* at 347.

[106] *See generally* Part II(A)(i), *supra*.

[107] 388 U.S. 1 (1967).

[108] *See Hively*, 853 F.3d at 342 (Why is a rule that recognizes "discrimination on the basis of the ***race*** with whom a person associates [as] a form of ***racial*** discrimination" okay, but one that would recognize discrimination on the basis of the ***sex*** with whom a person associates as a form of ***sexual*** discrimination, not?).

a history of Title VII, sexual discrimination, and the judiciary's integration of the two. Next, will be a consideration of how all of these various components function, and fail to function, together within the employment arena.

B. Bargaining and Arguing Against Discrimination

i. Anti-Discrimination Provisions within a CBA

Justice Thurgood Marshall stated that "national labor policy embodies the principles of nondiscrimination as a matter of highest priority." [109] Additionally, he charged that "[t]he elimination of discrimination and its vestiges is an appropriate subject of bargaining [of which] an employer may have no objection to incorporating into a collective agreement." [110] Further, the Supreme Court has held that good faith "collectively bargained … employment-related discrimination claims … easily qualif[y] as a 'conditio[n] of employment' that is subject to mandatory bargaining." [111] [112] It is under this framework that collective bargaining for provisions against discrimination based on sexual orientation will be addressed.

Since there lacks, as of yet, a national federally mandated prohibition against discrimination based on sexual orientation, employers and unions have taken to including protective provisions within the CBA. This practice has proven both beneficial and detrimental. In jurisdictions where anti-discrimination provisions are already statutorily established to provide for sexual orientation, [113] the presence, or lack thereof, of protections within the CBA become of lesser concern. Conversely, in other locations, failure of the employer/union bargaining process to yield anti-discriminatory accommodations have greatly imperiled employee working

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[109] *Emporium Capwell Co. v. W. Addition Cmty. Org.*, 420 U.S. 50, 66 (1975).
[110] *Id.* at 69.
[111] *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 256 (2009).
[112] *See also Star Tribune*, 295 N.L.R.B. 543, 547 (1989) (mandatory bargaining subjects are "matters that materially or significantly affect unit employees' terms and conditions of employment"); 29 U.S.C. §158 (failure to engage in good faith collective bargaining is an unfair labor practice).
[113] *See generally* HUMAN RIGHTS CAMPAIGN, *supra* note 51.

conditions and/or employment, without any available remedy. [114] Unfortunately, bargaining for such protections and delineating them within a CBA does not guarantee protection because, as discussed above, the "grievance machinery" for claims under a CBA is, generally, arbitration. [115]

Under the new Supreme Court regime, should the employer/union bargaining process create a CBA that "clearly and unmistakably" requires statutory claims to be handle by arbitration, employees could lose the right to be heard in a court of law. [116] This now puts vindication of an individual employee's statutory rights in the hands of the union. The employee, after exhausting all other available grievance mechanisms, is now dependent on the union viewing his claim as meritorious and electing to submit it to arbitration. Should the union decline to bring the employee's claim to arbitration, the employee's recourse is to file a claim that the union violated its duty of fair representation (DFR).[117] The DFR claim, however, will only be successful if an employee can sufficiently satisfy a two-pronged test: (1) that the employer breached the employment contract, and (2) that the union's actions were "arbitrary, discriminatory, or in bad faith." [118] The employee

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[114] *See generally Evans*, 850 F.3d 1248; *Brandon v. Sage Corp.*, 808 F.3d 266, 270 n.2 (5th Cir. 2015) ("Title VII in plain terms does not cover 'sexual orientation'"); *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 762 (6th Cir. 2006) ("sexual orientation is not a prohibited basis for discriminatory acts until Title VII").

[115] *See* Part I(A)(ii), *supra*.

[116] *See 14 Penn Plaza*, 556 U.S. at 274.

[117] *Id.* at 271-72.

[118] *Id.* at 271; *see* Mitchell H. Rubinstein, *Duty of Fair Representation Jurisprudential Reform: The Need to Adjudicate Disputes in Internal Union Review Tribunals and the Forgotten Remedy of Re-Arbitration*, 42 U. MICH. J. L. REFORM 517, 525 (2009); *see*, e.g., *Gardner-Denver*, 415 U.S. at 58 n.19 ("a breach of the union's duty of fair representation may prove difficult to establish"); *Vaca*, 386 U.S. at 192 ("a union does not breach its duty of fair representation … merely because it settled the grievance short of arbitration"); Brendan D. Cummins & Nicole M. Blissenbach, *The Law of the Land in Labor Arbitration: The Impact of 14 Penn Plaza LLC v. Pyett*, 25 A.B.A. J. LAB. & EMP. L. 159, 171 (2010) ("the duty of fair representation has historically not been a high standard to meet"); Connye Y. Harper, *Origin and Nature of the Duty of Fair Representation*, 12 THE LABOR LAW. 183 (1996) (simple

has a secondary option, but it is of limited benefit. In a pivotal 2002 decision, the Supreme Court held that the EEOC is not precluded from filing a lawsuit on the employee's behalf regardless of the presence of a binding arbitration agreement. [119] However, as mentioned, this alternative's value is conditional. If the EEOC decides not to file a claim in federal court on the employee's behalf, the employee remains under the prohibition of his employment CBA. He cannot pursue a claim himself, even if issued a right to sue letter.

This rationale instantly pleads a series of new questions, which will be addressed in Part III. If there is a clear waiver of the judicial forum, is the union now obligated to arbitrate ***all*** statutory claims? If not, should it be? And what are the employee's options if a union refuses to arbitrate a claim, but is not found to have violated its DFR? Would not a union's refusal to arbitrate, in this instance, constitute a "substantive waiver" of an employee's statutory rights? [120] Also of concern is how the arbitration process measures up, in and of itself?

ii. Arbitrary Arbitration

The arbitration process, while advantageous in many ways, also has several glaring faults. Early criticisms of arbitration revolved around power disparities and unfairness to employees,

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negligence in "processing a grievance or representing a member" does not constitute a union's breach of its duty of fair representation).

[119] *See EEOC v. Waffle House*, 534 U.S. 279, 292 (2002); *see generally* Michael Z. Green, *Retaliatory Employment Arbitration*, 35 BERKELEY J. EMP. & LAB. L. 201, 204 (2015) (providing a brief synopsis and analysis of *EEOC v. Waffle House*).

[120] *See 14 Penn Plaza*, 556 U.S. at 249, 273 (the Court stating that "a substantive waiver of federally protected civil rights will not be upheld," then deftly avoiding the subject because it "was not fully briefed"; *see also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 637 n.19 (1985) (noting that any clause that functioned as "a prospective waiver of a party's right to pursue statutory remedies" would be "condemn[ed] … as against public policy").

limited damages and various procedural flaws. [121] [122] Those concerns still exist in modern arbitration and have expanded to include: the lack of written opinions, lack of voluntariness, arbitrator bias, limited discovery, lack of arbitrator competence in the law, and limited judicial review. [123] [124] Further, there are strong concerns that when dealing with statutory claims, where an arbitration clause is contained within a CBA, the union will supplant the interests of the collective unit over those of the individual employee. [125] The concern pertinent to this article, however, is how do these issues relate to, and effect, arbitration as an appropriate forum for the resolution of employee statutory claims?

A unanimous Supreme Court in *Alexander v. Gardner-Denver* concluded that, against litigation, "arbitration [is] a comparatively inappropriate forum for the final resolution of [statutory] rights." [126] Articulated through Justice Powell, the Court held that "the resolution of statutory or constitutional issues is a primary responsibility of [the] courts," whereas "the specialized competence of arbitrators pertains primarily to the law of the shop,

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[121] *See* Zev. J. Eigen & David Sherwyn, *Deferring for Justice: How Administrative Agencies Can Solve the Employment Dispute Quagmire by Endorsing an Improved Arbitration System*, 26 CORNELL J. L. & PUB. POL'Y 217 (2016).
[122] Many of the criticisms mentioned in this section directly refer to individual arbitration, however they also apply in a collective bargaining/union setting.
[123] *See*, e.g., *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30-33 (1991); *Gardner-Denver*, 415 U.S. at 56-57; Charles D. Coleman, *Is Mandatory Employment Arbitration Living Up to Its Expectations? A View from the Employer's Perspective*, 25 A.B.A. J. LAB. & EMP. L. 227, 229 (2010); 9 U.S.C. §10(a).
[124] This list is by no means exhaustive of the expressed criticisms of arbitration over the years, but rather an illustrative display of the range of concerns.
[125] *See Gardner-Denver*, 415 U.S. at 58 n.19; *see also* Mark Berger, *A Step Too Far: Pyett and the Compelled Arbitration of Statutory Claims Under Union-Controlled Labor Contract Procedures*, 60 SYRACUSE L. REV. 55, 77 (2009) ("a collective bargaining unit grievant subject to an arbitration requirement is not free to decide whether to pursue his claim to arbitration or how to handle the case if the union processes it that far"); Green, *supra* note 5, at 381 ("Labor arbitration reflects a 'majoritarian' process pertaining to collective contractual rights, as opposed to the statutory employment discrimination rights of individual members").
[126] *Gardner-Denver*, 415 U.S. at 35.

not the law of the land." [127] Unless stipulated to within the clauses of a CBA, arbitrators are not required to follow the laws pertinent to the claims being heard. [128] The Court has since retreated from its early assertions, arguing that "there is no reason to assume at the outset that arbitrators will not follow the law." [129] Even if this is true, is it fair, or even reasonable, to force employees to take such a gamble with regard to their statutory rights? Many critics and scholars echo the sentiments of Justice Powell, and argue that the *Gardner-Denver* Court was completely correct in its original assessment. [130]

Critics have frequently attacked arbitration of statutory claims on procedural grounds. Limits on both discovery and an employee's control over processing his claims are among the top issues with labor arbitration. [131] Unions are not required to secure counsel when processing employee grievance claims. [132] And even if an attorney is retained, he or she is controlled and directed by the union, not the employee. [133] Additionally, depending on what is agreed upon at the bargaining table, arbitration grievants may find that the union has bargained away their ability to recover certain

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[127] *Id. at 57.*
[128] *See* Berger, *supra* note 125, at 64 ("labor arbitrators are obligated to follow the dictates of the contract, not statutory mandates").
[129] *See 14 Penn Plaza*, 556 U.S. at 268.
[130] *See* Miriam A. Cherry, *Not-So-Arbitrary Arbitration: Using Title VII Disparate Impact Analysis to Invalidate Employment Contracts that Discriminate*, 21 HARV. WOMEN'S L.J. 267, 282 (1998) (referencing *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993) and Title VII disparate treatment procedures, "[arbitration's] limited discovery provisions … disadvantage employment discrimination plaintiffs because [they] bear the burden of persuasion while at the same time are usually the party with less information"); Becky L. Jacobs, *Often Wrong, Never in Doubt: How Anti-Arbitration Expectancy Bias May Limit Access to Justice*, 62 ME. L. REV. 531, 537 (2010) ("arbitration is not a proper forum for the resolution of disputes implicating important civil rights").
[131] *See* Lucy T. France & Timothy C. Kelly, *Mandatory Arbitration of Civil Rights Claims in the Workplace: No Enforceability without Equivalency*, 64 MONT. L. REV. 449, 486 n.231 (2013).
[132] *See* Eric Esposito, *14 Penn Plaza v. Pyett: Into the Abyss Between Judicial Process and Collectively Bargained Agreements to Arbitrate Individual Statutory Claims*, 38 RUTGERS L. REC. 173, 184 (2011).
[133] *Id.*

damages, or has substantially limited the amount of time available to bring forth a claim. [134]

Arbitration has also been confronted as being contrary to goals regarding the vindication of public policy and the development of public awareness of the law and violations of such. [135] The private nature of arbitration, and the general lack of published opinions, work counter-intuitively to Congress' objective of eliminating the "vestiges" of discrimination in the workplace. [136] Another major concern is the lack of voluntariness in arbitration clauses, both for individual employees and those represented by a union. [137] Even unionized employees suffer in this regard, because although unions and employers bargain as equals [138], employees have no say over the bargaining process or resulting CBA. [139]

Clearly arbitration of statutory claims, whether individually or collectively through a union, still has some serious reservations to overcome if it is to be readily accepted in the legal community. Is such a renovation even feasible? If so, what are the best options for success? Further, if there are critics of arbitration, there must also be

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[134] *See* Sternlight, *supra* note 36, at 1652 (arbitration clauses "may shorted plaintiffs' statutes of limitation; bar recovery of punitive damages, compensatory damages, or attorney fees; or bar recovery of injunctive relief").
[135] *See Gardner-Denver*, 415 U.S. at 45; Comsti, *infra* note 135.
[136] *See Emporium Capwell*, 420 U.S. at 69; *see generally* Sternlight, *supra* note 36, at 1658 (discussing difficulties in conducting empirical research on the actual effects, positive or negative, of arbitration).
[137] *See* Cherry, *supra* note 130, at 278-79 ("there is very little 'freedom' of choice involved in most arbitration contracts, which in reality are little more than contracts of adhesion … imposed as conditions of employment"); Jacobs, *supra* note 130, at 537 ("arbitration clauses in 'adhesion' … employment agreements are not the product of voluntary bargaining"); *see generally* THE EMPLOYEE RIGHTS ADVOCACY INSTITUTE FOR LAW & POLICY, NATIONAL STUDY OF PUBLIC ATTITUDES ON FORCED ARBITRATION (2009), http://employeerightsadvocacy.org/publications/national-study-of-public-attitudes-on-forced-arbitration/ (59% of Americans oppose forced arbitration clauses in the fine print of employment or consumer contracts).
[138] *See* Comsti, *infra* note 140, at 19 ("Labor arbitration is premised on an equal bargaining relationship between a union and an employer"); *see generally* Berger, *supra* note 125, at 81 (Both individual and union represented employees suffer from issues of involuntariness. In the former, the employer has all of the power; the union, in the latter).
[139] *See* Esposito, *supra* note 132, at 189 (Employees, generally, have no rights to vote on the CBA, or even various aspects of it).

supporters. What are the argued advantages of the arbitration process, and how, if at all, would any proposed changes to arbitration effect current benefits?

In the first half of Part II, this article discussed sexual orientation claims within a CBA and the attendant need for protections. That subject will now be revisited as a preliminary step in the overall renovation of the collective bargaining and arbitration process. From there, a series of recommendations will ensue that, compositely, will effectively mitigate the prevailing complaints against arbitration as a forum for the resolution of statutory claims.

III. NO LONGER SO ARBITRARY: RENOVATING THE COLLECTIVE BARGAINING AND ARBITRATION PROCESSES

A. *Trickle-down Reformation*

As alluded to in prior sections, one of Congress' primary goals in establishing Title VII, and its sister anti-discrimination statutes, was to promote "the overriding public interest in equal employment opportunity[ies]" and "vindicate[] the public interest in preventing employment discrimination." [140] A complementary goal of "peace" in employment was enshrined in the NLRA, specifically with regards to the adoption of arbitration within a CBA. [141] Hence, it is only reasonable to conclude that these ideals and policy interests were intended to work in concert; bargained for statutory protection, enforced and vindicated through arbitration.

Constitutional mandates of preemption and supremacy command that sweeping and comprehensive transformation of the treatment of statutory claims within the collective bargaining and arbitration process must start with the federal government; a Supreme Court ruling and/or legislative enactment [142]. As such, the

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[140] *See* Carmen Comsti, *A Metamorphosis: How Forced Arbitration Arrived in the Workplace*, 35 BERKELEY J. EMP. & LAB. L. 5, 23 (2014) (quoting *General Tel. Co. of Nw. v. EEOC*, 446 U.S. 318, 326 (1972).

[141] *See United Steelworkers*, 363 U.S. at 578 ("A major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances in the collective bargaining agreement").

[142] U.S. CONST. art. VI, § 2.

forthcoming proposals of this article must commence with an initial reaffirmation of the need for the Supreme Court to, once again, don its hat of statutory interpretation and issue a ruling that brings sexual orientation discrimination under the protective umbrella of Title VII's "because of … sex" provisions. This would establish a base standard, an even playing field, under which all other labor provisions can be implemented.

Despite its broad application, the reform process does not conclude at the federal level. As mentioned previously, even though provisions may be established at both federal and state levels, employees under a CBA arbitration clause may not necessarily benefit from the established laws. [143] Hence, to enjoy the full benefit of sexual orientation discrimination provisions, as well as any other statutory right, revisions have to also be made at the employer/union bargaining level.

B. *Collectively Bargained For, Statutorily Arbitrated*

i. What Is 'Good' About Arbitration …

As alluded to in the introduction to this article, arbitration, while obviously flawed, is truly a beneficial forum for the resolution of many legal issues. Part II(B)(ii) discussed many of the shortcomings within the arbitration process, yet this author would be remiss in the analytical principles of scholarly writing if even a brief high-level overview of the advantages of arbitration were neglected.

The benefits of arbitration expand from a central premise that arbitration is less expensive and faster than traditional litigation. [144] These two foci stem from arbitration's "simplicity" and

[143] *See generally* Part II(B), *supra*; *see also* Cherry, *supra* note 130, at 280 ("arbitrators are not bound to follow the law or even be cognizant of it").
[144] *Id.* at 276-77 ("arbitration generally reduces legal fees" and "provides a quicker resolution than the court system"); Coleman, *supra* note 123, at 229 (arbitration "is less expensive and faster than litigation"); France, *supra* note 131, at 486 ("A speedier resolution [of legal disputes] is a savings, not only in expenses but also in the personal and emotional costs that often accompany litigation"); Mark S. Mathison & Bryan M. Seiler, *What 14 Penn Plaza LLC v. Pyett Means for Employers: Balancing Interests in a Landscape of Uncertainty*, 25 A.B.A. J. LAB. & EMP. L. 173, 183 (2010) ("An arbitration case can often be resolved in a matter of months").

"informality," [145] and manifest further in terms of accessibility to justice, predictability of outcome, and heightened confidentiality. [146] Further, the informality aspect of arbitration lends itself to the NLRA's overarching goal of labor peace. [147] Finally, there are also arguments that arbitration tends to favor employees, however the limited empirical studies available have remained inconclusive on the matter. [148]

Regardless of where one falls on the "pro" versus "con" side of arbitration, it cannot be disputed that there are advantages to the process. All parties—employer, union, and employee—benefit in some fashion. Nevertheless, even good things can be improved upon. The barrage of criticism in the prior section illustrates that for many the bad far outweighs the good, particularly with respect to arbitrating statutory claims. What, then, can be done?

ii. … And What is 'Best'

If one were to distill down the arguments presented against the arbitration of statutory claims, a general summation would fall under the following three subheadings: (a) the lack of informed and voluntary judicial waivers in a CBA; (b) arbital substantive and procedural shortcomings; and (c) remedial inadequacies for a union's refusal to arbitrate. Essentially, these three areas cover issues before arbitration, during arbitration, and when arbitration is denied by the union. The remainder of this article will address the

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[145] *See 14 Penn Plaza*, 556 U.S. at 269.

[146] *See* Coleman, *supra* note 123, at 228; Sternlight, *supra* note 36, at 1653; Mathison, *supra* note 144, at 186.

[147] *See United Steelworkers*, 363 U.S. at 578; Mathison, *supra* note 144, at 186 ("Where the parties may need to continue to work together, as do employers and unions, the informality of arbitration can help the parties preserve their relationship … [which is] especially important in the context of a collective bargaining relationship").

[148] *See* Maltby, *supra* note 5, at 117 ("employees who arbitrate their claims are 50% more likely to win than those who go to court"); Jacobs, *supra* note 130, at 540 (showing that, statistically, employees prevailed more often than not against employers); *but see* Eigen, *supra* note 121, at 259 ("arbitrators are more likely to side with employers than employees"); Sternlight, *supra* note 36, at 1650-51 (discussing empirical evidence that suggests a tendency of employers faring better than employees in arbitration).

resolution of issues within these subheadings as individual steps of a progressive, overall recommendation.

a. Judicial forum waivers under a CBA

Waivers of the right to bring an employment dispute to court—requiring, instead, the use of internal grievance processes and arbitration—are the new *status quo*. The lack of informed and voluntary consent to an arbitration clause, whether individually or via a union/employer bargained CBA, has been shown to be a serious issue within the legal community. The arbitration clause is usually built into, and a requisite condition of, the employment contract or CBA. The employee rarely, if ever, has any say in the matter and, quite often, never even knows the clause exists until a dispute arises.

Additionally, it was shown that the arbitration process becomes especially heinous when dealing with disputes involving the violation of statutory rights. To help alleviate this issue, the Supreme Court instituted a threshold requirement that judicial forum waivers "clearly and unmistakably" state the inclusion of statutory rights as matters of arbitration. [149] However, this provision is insufficient to fully address the problem of informed and voluntary consent.

This article refers to the Court's ruling as a "threshold requirement," because it merely walks to the door of informed and voluntary consent but fails to guide parties through it, nor to explain what is to be expected beyond. This author would first propose that the Court clarify and require that the phrase "clearly and unmistakably" mirrors the *Penn Plaza* language, by comprehensively delineating all of the statutory rights to be included in the waiver. [150] Additionally, the author concurs with one scholar's suggestion that employers and/or unions also need to "explicitly and painstakingly" explain the waiver. [151] This explanation should include, but not be limited to: what the arbitration process is; the advantages and disadvantages of arbitration over litigation; the

[149] *See 14 Penn Plaza*, 556 U.S. 274.
[150] *See id.* at 252.
[151] *See* Cherry, *supra* note 130, at 292.

availability of an attorney and/or union grievance representative; the degree of the employee's control and input, in both the process and representation; the costs associated with arbitration and who will pay them; the available remedies and ability to appeal; and, if unionized, the employee's rights should a union decline to arbitrate his claim. Further, the arbitration clause should be conspicuous; contained within its own identifiable section or heading, or otherwise visibly set apart and noticeable.

The author acknowledges that this recommendation does little to eliminate the voluntariness issue, particularly with an employee who has limited employment prospects. However, it goes a long way to ensure that an employee is, at minimum, aware of the rights he or she is relinquishing and the effect such waiver may have on employment disputes. Moreover, the requirement to thoroughly explain the contents and ramifications of a waiver will help assuage questions of unconscionability on the part of the employer and/or union. The author also refutes potential arguments that such an obligation would excessively burden an employer or union, as this process can easily and quickly be streamlined into already established human resource pre-employment procedures.

b. <u>Arbitration ground rules</u>

Arbitration of statutory claims is criticized on both procedural and substantive grounds. Opponents cite to the limitations on discovery and evidence. They also take issue with an arbitrator's lack of compliance with, or even knowledge of, relevant statutory law. Moreover, attorneys are rarely present at arbitration, so employees must rely on union grievance representatives to process claims. And even if counsel is present, the employee still has no control over how his claim will be handled.

Resolution of these issues turns on comprehensive provisions, bargained for and expressed within a CBA. Unions and employers, alike, should zealously advocate for CBA language requiring an arbitrator of statutory claims to adhere to relevant local, state and/or federal law. The scope of the arbitrator's authority, inclusive of remedies, should be clearly established in writing. [152] In addition to setting the parameters of arbital review, a limited discovery provision, similar to that of the Uniform Arbitration Act (UAA), should be established. [153] Parties should stipulate a finite number of requests for admissions, production and/or interrogatories sufficient for the proper development of the case, but also mindful of preserving the cost-effective benefits of arbitration. [154] Additional language can be provided that allows for an arbitrator to consider granting more discovery, as needed.

Similarly, the FAA provides arbitrators with subpoena power. [155] This, like the discovery provisions above, should be included with specific and finite language that limits compelled witnesses to maybe one or two per side. Again, conditions can be set for additional subpoenas under certain circumstances. Further, this author agrees with various scholars who have suggested modified depositions that are used, not for discovery purposes, but as evidence for when a compelled party is unable to attend the arbitration hearing. [156]

Concerns about employee control of the arbitration process should be addressed by an allowance of retained counsel, at the employee's expense. [157] This provision would serve dual purposes. It offers security to the employee that his statutory rights will be properly addressed, and obviates concerns that a union may act with regard to the collective over the individual.

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[152] *See generally* Mathison, *supra* note 144, at 196 (parties should "clearly and explicitly provide the scope of the arbitrator's authority … include[ing] the authority to render a decision under the [applicable] statutes").

[153] *See* UAA § 17(c) (allowing for discovery "appropriate [to] the circumstances" and accounting for party needs and maintaining a "fair, expeditious, and cost effective" proceeding); *see also* Ebe, *supra* note 33, at 90; Cummins, *supra* note 118, at 172.

[154] *See generally* France, *supra* note 131, at 486 ("[Discovery is] considered by many to be the costliest part of a lawsuit").

[155] *See* 9 U.S.C. § 7.

[156] *See* Ebe, *supra* note 33, at 90; *see also* Esposito, *supra* note 132, at 192.

[157] *See generally* Green*, supra* note 5, at 410 (suggesting that a judicial forum waiver "must include some affirmative agreement by the union and employer to provide the employee with representation through arbitration as final resolution").

Finally, parties should strongly consider incorporating language that requires arbitrators to publish opinions for claims dealing with statutory discrimination. A major function of court opinions, beyond establishing common law precedent, is the education and awareness-building of the general public. Explaining the law, identifying its violators, and educating how those violations will be handled serves a vital function in society; a function particularly critical when dealing with discrimination.

The author fully understands and acknowledges the potential burden these proposals place on the arbitration process. Further, it is acknowledged that a blanket, bright-line, rule cannot be established for the implementation of these suggestions. However, given the importance of vindicating statutory rights, as evidenced by both federal legislative and judicial action over the decades, the author feels that good faith adherence to these recommendations is paramount. And, again, the author stress that these provisions are specific to the arbitration of statutory claims. The processes in place for handling all other, general, grievance claims would not be altered.

c. The *Kravar* example

A question raised by the Supreme Court's holding in *14 Penn Plaza* was: if unions should now be required to arbitration all employment claims? Many employers would probably prefer the answer to be in the affirmative. However, logistically and financially, it would be an extreme burden on a union; especially smaller unions. Further, it strips away the union's discretionary power to act as gatekeeper for employment grievances. This, then, leads to another query: if a union is not required to arbitrate all claims, or elects not to, does such an event constitute a prohibited "substantive waiver" of the employee's statutory rights? The Supreme Court skirted around issuing a ruling on that matter, leaving lower courts and scholars, alike, bereft of guidance. A district court in New York decided to rise to the challenge.

In *Kravar v. Triangle Services* [158], Ms. Kravar sued her employer, Triangle, for discrimination based on national origin. [159] Kravar was covered by a CBA that required all discrimination claims to be submitted to arbitration. [160] Triangle moved to compel arbitration, was denied, and appealed to the Second Circuit. [161] In a sworn affidavit, Kravar stated that she attempted to arbitrate her claims, but was denied by the union. [162] Pending resolution with the Second Circuit, the Supreme Court decided *14 Penn Plaza*, a case almost factually identical to Kravar's. [163] Although the Court's overall holding in *14 Penn Plaza* was adverse to Kravar, the Second Circuit held that the arbitration mandate in Triangle's CBA was unenforceable because "the CBA operated as a waiver over Ms. Kravar's substantive rights." [164] Since the CBA demanded arbitration of all claims and the union, within its discretionary power, declined to arbitrate Kravar's claim, she was left with absolutely no forum in which to vindicate her rights. [165]

Under the guidance and example of *Kravar*, this article proposes that, until the matter is properly addressed by the Supreme Court, district and circuit courts dealing with fact patterns similar to *Kravar* and *14 Penn Plaza* should decline to enforce arbitration clauses in those CBAs. As mentioned by one scholar, judicial modeling of *Kravar* has benefits to all parties involved; employee, union, and employer. [166] The employee benefits by being granted the right to pursue his statutory claim in a judicial forum, while retaining the collective benefits of unionization. [167] Additionally, the employee suffers no added burden, as he is in the same situation he

[158] No. 1:06-cv-07858-RJH, 2009 U.S. Dist. LEXIS 42944 *1 (S.D.N.Y. May 19, 2009).
[159] *Id.* at *2.
[160] *Id.* at *3-4.
[161] *Id.* at *5.
[162] *Id.* at *8.
[163] *Id.* at *6.
[164] *Id.* at *9; *see also 14 Penn Plaza*, 556 U.S. at 273.
[165] *Kravar*, 2009 U.S. Dist. LEXIS 42944 at *9.
[166] *See* F. Ryan Van Pelt, *Union Refusal to Arbitrate: Pyett's Unanswered Question*, 2010 J. DISP. RESOL. 515, 530-31 (2010).
[167] *Id.* at 531.

would be in had there never been a CBA to begin with. [168] Further, if the employee genuinely wished to arbitrate his claims, he is still free to pursue a DFR claim with the NLRB. [169] The union benefits simply by virtual of the fact that it retains its discretionary power to filter employee claims. [170] The employer suffers some threat to the cost-effectiveness it bargained for by choosing arbitration, however, this is off-set by two new tools at its disposal. [171] The employee now has the burden of footing his own litigation bill, and the employer regains to prospect of summary judgment dismissals. [172]

Some scholars have offered proposals similar to, or incorporating portions of, the above recommendations—"opt-out" provisions [173] and two-track arbitration processes [174], to name a couple. These all have merit and essentially end with the same result. This article simply supports a more comprehensive approach that has the potential for covering all of the disadvantages of arbitration without unduly encroaching upon, or negating, its inherent gains.

CONCLUSION

In the realms of American labor and employment, the preservation of peace, fairness, and the elimination of all forms of discrimination have been the principal driving forces of

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[168] *Id.*
[169] *Id.*
[170] *Id.*
[171] *Id.*
[172] *Id.* (Employer concerns about frivolous claims must pass these two thresholds. If an employee is not discouraged from bringing his claim by the prospect of looming court and attorney fees, the employer still can rely on summary judgment to eliminate unsubstantiated claims).
[173] *See generally* Cummins, *supra* note 118, at 171. During the union/employer bargaining process, the parties would include an "opt-out" provision specifically for statutory claims. This provision would simply state that, in the event a union declines to arbitrate a statutory claim, the employee can opt-out of the arbitration process and pursue judicial resolution.
[174] *See generally* Esposito, *supra* note 132, at 189 (discussing how bargaining parties can implement a two-track arbitration process. Statutory claims would fall into a second arbitration "track" which would adhere to modified procedures (i.e., presence of an attorney, limited discovery/evidence, etc.); Green, *supra* note 5, at 410-11 (discussing a provision within a mandatory arbitration clause that allows an employee to "pursue his or her own claim in court or arbitration if the union chooses not to").

Congressional legislation. Title VII of the Civil Rights Act of 1964 and the National Labor Relations Act have worked in concert to both provide and enforce protections in the workforce. Both Acts have been interpreted by the Supreme Court to provide maximum effectiveness that is reflective of public policy, as well as true to the language by which it was written.

As society has changed and evolved, so too has the interpretation and application of the laws. Legal concepts of "sex" have expanded from a simple view of what it means to be biologically "male or female" to an array of notions, such as: sex stereotyping, sexual harassment, sexual assault, sexual association, and sexual orientation. The colonial origins of collective bargaining and alternative dispute resolution, namely arbitration, have underwent similar renovations. From distrust and hostility, to grudging acceptance, and now to preference and expectation, collective bargaining and arbitration have become the staples of labor relations.

Inclusion of sexual orientation protection, within the purview of Title VII discrimination prohibitions, honor the goals of the federal government to remove all "vestiges" of discrimination from the workplace. It flows logically and reasonably from the language of the statute, even if its originators did not conceive of such a use at that time. Further, it is the culmination of an interpretive framework established by a long line of Supreme Court cases.

In much the same way, arbitration has been instituted as the more evolved and effective method of employment dispute resolution. Its application to statutory claims has been, rightfully, challenged. However, through changes in perception and procedure, such a function has been shown to not only be possible, but also beneficial to all parties involved. American jurisprudence is an entity of innovation and renovation. It is only through the continued evolution, improvement, and interaction of these legal precepts will full and comprehensive realization of Congress' goal be reached.