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Ernesto Rivero

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## FLORIDA'S LATE ENTRANCE TO THE ONGOING TREND: SEXUAL ORIENTATION DISCRIMINATION IN THE WORKPLACE

*Ernesto G. Rivero\**

### I. INTRODUCTION

John Doe is an exceptional firefighter who also happens to be a homosexual.<sup>1</sup> John performs his duties every day to the utmost of his ability; however, in response to his sexual orientation, John is verbally harassed daily, underpaid for his line of work, and subsequently discharged from his position.<sup>2</sup> This is a consequence of practicing his protected constitutional right of same sex marriage at his workplace.<sup>3</sup> Every individual

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\* Ernesto G. Rivero, *Juris Doctor* Candidate, May 2020, St. Thomas University School of Law, ST. THOMAS LAW REVIEW, *Articles Editor*; Entertainment and Sports Law Society, *Vice President*; B.A. Finance, Florida State University, 2017. First, I would like to thank God, my friends, and my family for their continued support throughout my law school career. I also want to thank the St. Thomas Law Review for their time and energy spent during the publication process of my Comment.

<sup>1</sup> See *Homosexual*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/homosexual> (last visited May 27, 2020) (defining homosexual activity as “of, relating to, or characterized by a tendency to direct sexual desire toward another of the same sex”); see also Christy Mallory and Brad Sears, *Employment Discrimination Based on Sexual Orientation and Gender Identity in Florida*, WILLIAMS INST. (Mar. 2015), <https://williamsinstitute.law.ucla.edu/publications/employ-discrim-sogi-fl/> (highlighting that approximately 328,000 workers in Florida identify as lesbian, gay, bisexual, or transgender, and that Florida does not prohibit discrimination based on sexual orientation or gender identity in employment by failing to have a statewide law in place).

<sup>2</sup> See *Evans v. Ga. Reg'l Hosp.*, 850 F.3d 1248, 1251 (11th Cir. 2017) (explaining that the Plaintiff alleged she was denied equal pay and work, physically assaulted, and harassed, and that her status as a gay female did not conform with her superiors' gender stereotypes, which subjected her to experience a hostile work environment); see also Mallory & Sears, *supra* note 1 (noting in February 2012, a homosexual man “working for an airline in Tallahassee was fired by his manager the day after he made a complaint to Human Resources about the manager constantly referring to him as ‘the homo’ and ‘Tinkerbell.’”).

<sup>3</sup> See *Obergefell v. Hodges*, 135 U.S. 2584, 2605 (2015) (holding that under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, “same-sex couples may exercise the fundamental right to marry.”); see also *2017 Workplace Equality Fact Sheet*, OUT & EQUAL WORKPLACE ADVOC. (2017), <http://outandequal.org/2017-workplace-equality-fact-sheet/> (highlighting that “[o]ne in four LGBT employees report[ed] experiencing employment discrimination in the last five years.”).

ought to have a fair and inclusive workplace free from discrimination; that is not the case in today's America.<sup>4</sup>

Although employees are protected from discrimination by the Civil Rights Act of 1964 ("Title VII"), courts have been reluctant on defining sex to include sexual orientation.<sup>5</sup> This is the unfortunate reality of the workforce: discrimination based on sexual orientation is not prohibited.<sup>6</sup> Despite the narrow interpretation of Title VII, several states have already amended their laws to extend the interpretation to sexual orientation.<sup>7</sup> Although several cities have local ordinances, Florida has no statutory law in place which protects the lesbian, gay, bisexual, or transgender

<sup>4</sup> See *Discrimination*, LAW DICTIONARY, <http://dictionary.law.com/Default.aspx?selected=532> (last visited May 27, 2020) (defining discrimination as "unequal treatment of persons, for a reason which has nothing to do with legal rights or ability . . . based on race, nationality, creed, color, age, sex or sexual orientation."); see also William N. Eskridge Jr., *Title VII's Statutory History and the Sex Discrimination Argument for LGBT Workplace Protections*, 127 YALE L.J. 322 (2017) (noting that a "lesbian couple can get married on Saturday and be fired from their jobs on Monday, without legal redress.").

<sup>5</sup> See Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (2018).

It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) 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 race, color, religion, sex, or national origin.

*Id.*; see also *Schroeder v. Hamilton Sch. Dist.*, 282 F.3d 946, 951 (7th Cir. 2002) (holding that sexual orientation is not a prohibited basis for discriminatory acts under Title VII); Braden Campbell, *Gay Bias Split Too Recent For Justices' Review*, *County Says*, LAW 360 (Aug. 13, 2018, 6:49 PM), <https://www.law360.com/articles/1072679/gay-bias-split-too-recent-for-justices-review-county-says> (highlighting the nations split between defining Title VII reach, and that the Supreme Court has denied review and awaits to see how the lower courts of the states define the Titles reach).

<sup>6</sup> See *Evans*, 850 F.3d at 1255 (holding that Title VII does not cover discrimination based on sexual orientation, therefore "discharge for homosexuality is not prohibited by Title VII," and that sexual orientation is still not a protected class); see also *Medina v. Income Support Div.*, 413 F.3d 1131, 1135 (10th Cir. 2005) (finding "Title VII's protections, however, do not extend to harassment due to a person's sexuality . . . 'Congress has repeatedly rejected legislation that would have extended Title VII to cover sexual orientation.'").

<sup>7</sup> See Kelly M. Peña, *LGBT Discrimination in the Workplace: What Will the Future Hold?*, 92 FLA. B.J. 35, 38–39 (2018) (explaining "the national trend in the last decade generally points to greater protections for the LGBT community . . ." and twenty-two different states have enacted laws to prevent employment discrimination on the basis of gender identity and sexual orientation); see also Joe Sayas Jr., *Work Discrimination Based On Sexual Orientation Is Illegal In California*, INQUIRER (Mar. 3, 2018, 3:35 AM), <http://usa.inquirer.net/10565/work-discrimination-based-sexual-orientation-illegal-california> (highlighting in order to further create a peaceful work environment, "California law prohibits employment discrimination based on sexual orientation.").

(“LGBT”)<sup>8</sup> community in the workplace.<sup>9</sup> Over the course of ten years, Florida has attempted and failed to pass the Florida Competitive Workforce Act (“FCWA”),<sup>10</sup> placing their own employees in fear of being harassed or even discharged from work for practicing their own beliefs.<sup>11</sup>

Amending Florida legislation to include protections for LGBT employees would ensure the highest qualified worker is hired for employment and would undoubtedly boost the economy as a result of solely merit-based hiring.<sup>12</sup> Due to the nation’s ongoing trend, the FCWA should be brought up once again for legislation and become the law of the land in Florida.<sup>13</sup> If the bill is denied, Florida risks national animosity and falling behind the growing global economy.<sup>14</sup>

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<sup>8</sup> See *What is the Meaning of LGBT?*, MENTAL HELP (2018), <https://www.mentalhelp.net/articles/what-is-the-meaning-of-lgbt/> (defining LGBT terms as lesbian, gay, bisexual, and transgender, which describe distinct groups within the gay culture); see also Peña, *supra* note 7 (discussing the importance of greater protections for the LGBT community).

<sup>9</sup> See Peña, *supra* note 7, at 38 (finding that many Florida cities are expanding their interpretation as there are 11 counties and 34 municipalities within Florida that prohibit discrimination based on both sexual orientation and gender identity); see also *Discrimination*, EQUALITY FLA., <https://www.eqfl.org/Discrimination> (last visited May 27, 2020) (explaining that although Florida has passed more local nondiscrimination laws including sexual orientation and gender identity than any other state in the country, there is still no statewide law that prohibits discrimination against LGBTQ).

<sup>10</sup> See *Sexual Orientation Discrimination: Status of the Law*, JONES FOSTER (Mar. 2017), <http://www.jonesfoster.com/?t=40&an=64558> (defining the Florida Competitive Workforce act as legislation intended to ban discrimination on the basis of sexual orientation and gender identity in employment, housing, and public accommodations); see also *2018: The Year We Pass the Florida Competitive Workforce Act*, FLA. COMPETES, <https://www.flcompetes.org/2018-the-year-we-pass-the-florida-competitive-workforce-act/> (last visited May 27, 2020) (stating how important it is for Florida to pass the FCWA as other years in the past have been unsuccessful).

<sup>11</sup> See *2018: The Year We Pass the Florida Competitive Workforce Act*, *supra* note 10 (highlighting the FCWA has been brought up for ten years resulting in continuous legislative inaction). But see *Sexual Orientation Discrimination: Status of the Law*, *supra* note 10 (stating that several prior FCWA bills have failed, but there is renewed pressure on legislators to conform with local ordinances, which already cover the majority of the state’s population).

<sup>12</sup> See *SB 666: Prohibited Discrimination*, FLA. SENATE, (2016), <https://www.flsenate.gov/Session/Bill/2017/006666> (citing this act “as the ‘Florida Competitive Workforce Act;’ adding sexual orientation and gender identity as impermissible grounds for discrimination in public lodging establishments and public food service establishments; defining the terms ‘gender identity’ and ‘sexual orientation.’”); see also Eskridge Jr., *supra* note 4, at 322 (finding that expanding Title XII to include discrimination of sexual orientation in the workplace will set more merit-based workplace where status-based criteria such as race, color, national origin, and sex are irrelevant to a person’s job opportunities).

<sup>13</sup> See *Discrimination*, *supra* note 9 (explaining that over 75% of Fortune 500 companies protect employees against discrimination based on sexual orientation and gender identity, therefore that is the ongoing trend); see also Michael Auslen, *Florida Ban on LGBT Discrimination Nearly Dies, But Will Have Re-Hearing Tuesday*, MIAMI HERALD (Feb. 8, 2016, 7:01 PM), <https://www.miami-herald.com/news/local/community/gay-south-florida/article59215843.html> (asserting that not passing the bill will essentially send a message to “every gay person in the state of Florida and across America that you are not accepted here in Florida,” which will have tremendous negative economic impact).

<sup>14</sup> See *2018: The Year We Pass the Florida Competitive Workforce Act*, *supra* note 10 (focusing on how the “Workforce Act will make the State of Florida more competitive in the national and global

This Comment addresses the proposed legislation by the Florida House of Representatives known as the FCWA.<sup>15</sup> Part II will focus on the history of Title VII.<sup>16</sup> In particular, it will discuss federal circuit split cases in dispute regarding the scope of Title VII's coverage of sexual orientation discrimination.<sup>17</sup> Part II will also review Florida's judicial interpretation of Title VII and cases within the state that have granted protection to those discriminated against based off of their sexual preference.<sup>18</sup> Further, Part III will analyze the negative ramifications of failing to pass such legislation both socially and economically.<sup>19</sup> Lastly, Part IV will emphasize the policy behind the FCWA and how its enactment will promote a more balanced and morally sound workplace by creating a business environment suitable for optimal competitive development in Florida.<sup>20</sup>

## II. BACKGROUND

### A. TITLE VII HISTORY

Before Title VII was enacted, an employer could reject an applicant or fire them solely based on the color of their skin, their religion, or their sex.<sup>21</sup> Title VII's implementation has protected workers over the years

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marketplace in much the same way anti-discrimination policies have benefited employers.”); *see also* A.G. Gancarski, *Competitive Workforce Act Filed Once Again in Legislature*, FLA. POL. (Feb. 2, 2017), <http://floridapolitics.com/archives/231454-lgbt-protection-bill-filed-florida-house> (noting that by modernizing Florida's civil rights laws, it can protect its “LGBT community from discrimination, and make Florida a more competitive state in the global economy”).

<sup>15</sup> *See infra* Part I-IV; *see also* H.B. 347: *Prohibited Discrimination*, FLA. SENATE (last visited May 27, 2020), <https://www.flsenate.gov/Session/Bill/2018/00347/?Tab=BillHistory> (describing the proposed legislation filed by the House on October 16, 2017, which provided that sexual orientation and gender identity are impermissible grounds for discrimination in certain establishments).

<sup>16</sup> *See infra* Part II, Section A; *see also* Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)–(d) (2018) (listing unlawful employment practices).

<sup>17</sup> *See infra* Part II, Section B; *see also* FLA. STAT. § 760.01(2) (2018).

The general purposes of the Florida Civil Rights Act of 1992 are to secure for all individuals within the state freedom from discrimination because of race, color, religion, sex, pregnancy, national origin, age, handicap, or marital status and thereby to protect their interest in personal dignity, to make available to the state their full productive capacities, to secure the state against domestic strife and unrest, to preserve the public safety, health, and general welfare, and to promote the interests, rights, and privileges of individuals within the state.

*Id.*

<sup>18</sup> *See infra* Part II, Section C.

<sup>19</sup> *See infra* Part III.

<sup>20</sup> *See infra* Part IV.

<sup>21</sup> *See* Peña, *supra* note 7, at 36 (finding “the very definition of the word ‘sex’ has been heavily litigated since this statute’s enactment”); *see also* 42 U.S.C. § 2000e-2(a)(1)–(d) (2018) (defining Title VII of the Civil Rights Act of 1964 as prohibiting an employer from discriminating against an individual “with respect to his compensation, terms, conditions, or privileges of employment,

from various forms of discrimination including gender discrimination.<sup>22</sup> However, centuries later, Title VII's interpretation of sex discrimination encompasses a much broader range of issues than the traditional misfortunes experienced by women in a male-dominated workforce.<sup>23</sup> Employees are now being treated unfairly, harassed, and even discharged solely because of their sexual orientation.<sup>24</sup> In *Blum v. Gulf Oil Corp.*, the courts first decided the extent to which "sex" was defined within Title VII's parameters by granting protection for sexual orientation discrimination; this opened the flood gates to many ensuing statutory interpretation arguments.<sup>25</sup>

### B. FEDERAL INTERPRETATION SPLIT

Although the Supreme Court has yet to rule on the issue, several lower courts have been consistent with determining that Title VII does not cover discrimination on the basis of sexual orientation.<sup>26</sup> In *Evans v.*

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because of such individual's race, color, religion, sex, or national origin").

<sup>22</sup> See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 237 (1989) (determining gender stereotyping qualifies as yet another form of sex discrimination prohibited by Title VII); see also *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998) (holding that sexual harassment between members of the same sex in the workplace was also cognizable under Title VII protection); *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 63 (1986) (finding that sexual harassment is a form of prohibited sex discrimination under the Civil Rights Act).

<sup>23</sup> See Eskridge Jr., *supra* note 4, at 326 (explaining that judges around the enactment of the Civil Rights Act defined "sex" as the division of humanity into biological men and female); see also Tamara Lytle, *Title VII Changed the Face of the American Workplace*, SOC'Y FOR HUM. RESOURCE MGMT. (May 21, 2014), <https://www.shrm.org/hr-today/news/hr-magazine/pages/title-vii-changed-the-face-of-the-american-workplace.aspx> (noting that the authors of Title VII did not anticipate the need to include sexual orientation into the original Civil Rights Act).

<sup>24</sup> See *Employment Discrimination Against LGBT Workers*, WILLIAMS INST., <https://williamsinstitute.law.ucla.edu/williams-in-the-news/research-on-lgbt-workplace-protections/> (last visited May 27, 2020) (finding that "[b]etween 15% to 43% of lesbian, gay, bisexual or transgender workers have experienced being fired, denied promotions or harassed, according to the Williams Institute, a think tank at UCLA School of Law that studies LGBT issues."); see also *2017 Workplace Equality Fact Sheet*, *supra* note 3 (finding that in twenty-eight states, you can be fired for practicing your LGBT rights).

<sup>25</sup> See *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979) (finding defendant was not protected under Title VII when defendant claimed he was terminated due to his sexual preference); see also Susan K. Lessack, *Circuit Split on Sexual Orientation Discrimination Continues With New Second Circuit Opinion*, POWER OF INTELLIGENCE (Mar. 5, 2018), <https://www.pepper-law.com/publications/circuit-split-on-sexual-orientation-discrimination-continues-with-new-second-circuit-opinion-2018-03-05/> (highlighting the problematic circuit split and that "sexual orientation discrimination is unlawful in the Second and Seventh Circuits and in many states, cities and municipalities, but lawful elsewhere unless Congress acts or the Supreme Court accepts an appropriate case for review").

<sup>26</sup> See Reuters, *Supreme Court Declines to Hear Gay Workplace Discrimination Case*, NEWS (Dec. 11, 2017, 11:42 AM), <https://www.nbcnews.com/feature/nbc-out/supreme-court-declines-hear-gay-workplace-discrimination-case-n828416> (noting the U.S. Supreme Court refused to hear an appeal by a Georgia security guard who was harassed and forced from her job because she identified as lesbian, "avoiding an opportunity to decide whether a federal law that bans gender-based bias also outlaws discrimination based on sexual orientation"); see also *Oncale*, 523 U.S. at 75 (holding

*Ga. Reg'l Hosp.*, the Eleventh Circuit, relying on the *Blum* decision, ruled that “sex” does not expand to discrimination based off of sexual orientation.<sup>27</sup> Further, in *Vickers v. Fairfield Med.*, the Sixth Circuit followed the *Blum* holding once again when deciding a sexual orientation claim may not be brought under Title VII.<sup>28</sup> The reasons for excluding this specific form of bias from the definition of sex has yet to be explained by the Eleventh Circuit, rather the court points to the thirty-year-old *Blum* case to explain their reasoning and that their holding is established precedent.<sup>29</sup>

However, in *Hively v. Ivy Tech Cmty. College of Indiana*, the Seventh Circuit decided for the first time that alleging employment discrimination on the basis of sexual orientation is, in fact, a discrimination case protected under Title VII.<sup>30</sup> In *Zarda v. Altitude Express*, the Second Circuit followed right behind when they decided sexual orientation discrimination is motivated in part by sex and falls under sexual discrimination as Title VII is defined.<sup>31</sup> The courts placed great deference on the fact that employees should be evaluated on their job performance — not on who they love.<sup>32</sup> Both U.S. Appellate courts agree that with exponentially

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that Title VII does not afford a cause of action for discrimination based upon sexual orientation).

<sup>27</sup> See *Evans v. Ga. Reg'l Hosp.*, 850 F.3d 1248, 1255–56 (11th Cir. 2017) (holding court made its decision based on preceding holding that it would not recognize sexual orientation claims under Title VII and denied further review); see also *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 762 (6th Cir. 2006) (“[S]exual orientation is not a prohibited basis for discriminatory acts under Title VII.”).

<sup>28</sup> See *Evans*, 850 F.3d at 1255–56 (following precedent when the court decided the sexual discrimination claim was unwarranted); see also *Bostock v. Clayton Cty.*, 2017 U.S. Dist. LEXIS 217815 at \*6–7 (N.D. Ga., July 21, 2017) (finding Title VII’s prohibition against sex discrimination does not extend to sexual orientation discrimination).

<sup>29</sup> See Braden Campbell, *11th Circ. Dissent Seeks Clarity On Title VII And Gay Workers*, LAW 360 (July 19, 2018, 10:16, PM), <https://www.law360.com/articles/1065376?scroll=1> (highlighting how the court has failed to explain the reliance on the Fifth Circuit’s 1979 decision in *Blum v. Gulf Oil Corp.*, which states “[d]ischarge for homosexuality is not prohibited by Title VII” without a word of explanation,” and challenges them to provide a reason); see also Nathan Hale, *Title VII Gay Bias Split Needs To Be Settled, Justices Told*, LAW 360 (Aug. 27, 2018, 10:57 PM), <https://www.law360.com/articles/1077024?scroll=1> (“[N]oting precedent stating ‘discharge for homosexuality is not prohibited by Title VII.’”).

<sup>30</sup> See *Hively v. Ivy Tech Cmty. College of Ind.*, 853 F.3d 339, 347 (7th Cir. 2017) (finding that “[a]ny discomfort, disapproval, or job decision based on the fact that the [defendant] . . . dresses differently, speaks differently, or dates or marries a same-sex partner, is a reaction purely and simply based on sex”); see also *Videckis v. Pepperdine Univ.*, 150 F. Supp. 3d 1151, 1159 (C.D. Cal. 2015) (holding that “sexual orientation discrimination is a form of sex or gender discrimination . . .”).

<sup>31</sup> See *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 111–12 (2d Cir. 2018) (stating in the context of Title VII, the statutory prohibition extends to all discrimination “because of . . . sex” and sexual orientation discrimination is an actionable subset of sex discrimination, and overturn their prior ruling); see also *Court: US Anti-Discrimination Law Covers Sexual Orientation*, NBC 6 PRIDE (Feb. 26, 2018, 3:07 PM), <https://www.nbcmiami.com/news/politics/Court-US-Anti-Discrimination-Law-Covers-Sexual-Orientation-475190303.html> (highlighting how the federal appeals court in New York became the second one in the country to break with precedent and rule that U.S. anti-discrimination law protects employees from being fired because of their sexual orientation when a flying instructor was fired after he told a customer he was gay).

<sup>32</sup> See Eskridge Jr., *supra* note 4, at 332 (noting that the courts determining sexual orientation

different times, the focus should be on what the law interprets “sex” discrimination as defined in today’s culture, rather than what it meant forty years ago.<sup>33</sup>

The conflicting interpretations of federal law provided by the different circuits should warrant review by the Supreme Court to clarify the scope of Title VII.<sup>34</sup> In *Obergefell*, awarding same sex marriage nationwide, the circuit courts faced a similar predicament and the Supreme Court answered by granting review.<sup>35</sup> Unfortunately, one can be protected from being discriminated on the basis of their sexual preference on one side of the country, while being harassed on the other.<sup>36</sup> The opposing opinions have even sparked interest from two federal agencies to file several amicus briefs demanding resolutions.<sup>37</sup> Ultimately, it is not

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discrimination is protected are leaning towards a merit-based workplace where specified traits or status-based criteria such as race, color, national origin, religion, and sex, are supposed to be irrelevant to a person’s job opportunities); *see also* Reuters, *supra* note 26 (stating no employer should be able to penalize its employees because of who they love).

<sup>33</sup> *See* Peña, *supra* note 7, at 38 (noting that “Title VII has expanded over the years to reflect progress and more modern notions of inclusiveness: ‘The goalposts have been moving over the years, as the Supreme Court has shed more light on the scope of the language that already is in the statute: no sex discrimination’”); *see also* Hale, *supra* note 29 (finding “the question is ‘not what someone thought the word “sex” meant one, ten or twenty years ago,’ but rather what the correct rule of law is now in light of this court’s authoritative interpretations . . .”).

<sup>34</sup> *See* Campbell, *supra* note 29 (noting that “[j]udges actually have to explain the decisions that they make, and when you just refuse to do that, it doesn’t help the institutional legitimacy . . .”); *see also* Vin Gurrieri, *5 Supreme Court Petitions Employers Should Watch*, LAW 360 (Sept. 21, 2018, 10:16 PM), <https://www.law360.com/articles/1085105?scroll=1> (highlighting that currently we have several circuit opinions, the Second and Seventh, “agreeing that Title VII protects sexual orientation, and the Eleventh Circuit creates a split by denying protection,” making this “a matter of great importance involving whether there should be federal protection of citizens from workplace harassment because of their sexual identity”).

<sup>35</sup> *See* *Obergefell v. Hodges*, 135 U.S. 2584, 2606 (2015) (resolving a severe circuit split when the Supreme Court held that states could no longer deny same-sex couples the right to marry under the same terms afforded to opposite-sex couples); *see also* Gurrieri, *supra* note 34 (stating the Supreme Court accepted *Obergefell* on the same-sex marriage rights judicial conflict when the split was similar to the current circuit split now, as four circuits agreed to marriage rights and only one, the Sixth Circuit, disagreed, then we have almost the same split on a similar important issue that Supreme Court review appears inevitable).

<sup>36</sup> *See* Hale, *supra* note 29 (highlighting how ignoring the conflict, which affects millions of individuals and employers throughout the country, “means that gay and lesbian employees in South Carolina or Texas — but not those in Indiana or Connecticut — may be fired because they do not conform to gender stereotypes about to whom they, as a member of one gender or another, should be romantically inclined . . .”); *see also* Mallory & Sears, *supra* note 1 (providing an example of a homosexual man who was fired based on his sexual orientation in Florida).

<sup>37</sup> *See* Peña, *supra* note 7, at 46 (finding the DOJ argument that “Title VII’s prohibitions on sex discrimination do not include discrimination because of sexual orientation, and that the law only covers discrimination between men and women,” and Congress only has the power to expand the laws). *But see* *Baldwin v. Dep’t of Transportation*, EEOC Appeal No. 0120133080 (July 15, 2015) (explaining the EEOC found that sexual orientation discrimination is sex discrimination “because it involved treatment that would not have occurred but for the individual’s sex; because it was based on the sex of the person(s) the individual associates with; and/or because it was premised on the fundamental sex stereotype, norm, or expectation that individuals should be attracted only to those of the opposite sex”).



for Congress to decide the law, but for the Supreme Court to interpret it, thus an answer to the circuit split is inevitable.<sup>38</sup>

### C. FLORIDA INTERPRETATIONS OF TITLE VII

The Florida Civil Rights Act of 1992 (the “FCRA”) is nearly identical in structure to Title VII, both prohibiting employment discrimination on the basis of sex, yet failing to define sex.<sup>39</sup> Rather than waiting for federal judicial precedent, Florida has attempted to file the FCWA to effectively define sex as encompassing sexual orientation by amending the FCRA; however, Florida’s nearly decade-long pursuit was of no avail.<sup>40</sup> Those against amending the FCRA argue that implementation could potentially open up the flood gates to further litigation, and would create “special rights” for specific persons in Florida.<sup>41</sup> However, those in favor

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<sup>38</sup> See Hale, *supra* note 29 (stating it is for the honorable court, not Congress, to decide whether sexual orientation discrimination is included because it rests on this court’s interpretations of Title VII as amended); see also Adam Liptak, *Supreme Court to Decide Whether Landmark Civil Rights Law Applies to Gay and Transgender Workers*, N.Y. TIMES (Apr. 22, 2019), <https://www.nytimes.com/2019/04/22/us/politics/supreme-court-gay-transgender-employees.html> (discussing several circuit splits on the interpretations of Title VII).

<sup>39</sup> See FLA. STAT. § 760.10(1)(a)–(b) (2019).

It is an unlawful employment practice for an employer: (a) To discharge or to fail or refuse to hire any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, pregnancy, national origin, age, handicap, or marital status. (b) To limit, segregate, or classify employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities, or adversely affect any individual’s status as an employee, because of such individual’s race, color, religion, sex, pregnancy, national origin, age, handicap, or marital status.

*Id.*; see also Scott Wagner, *Bringing Claims Under the Florida Civil Rights Act or Title VII of the Civil Rights Act of 1964: What’s the Difference in Damages?*, FLA. EMP. LABOR L. (Apr. 17, 2017), <https://www.floridalaborlawyer.com/bringing-claims-under-the-florida-civil-rights-act-or-title-vii-of-the-civil-rights-act-of-1964-whats-the-difference-in-damages/> (noting “[u]nder the Florida Civil Rights Act of 1992 (FCRA), Florida employers are prohibited from discrimination against employees on the basis of race, color, religion, sex, pregnancy, national origin, age, handicap, or marital status”).

<sup>40</sup> See John Tonnison, *Column: Can Florida Compete? Florida Leadership Remains Silent.*, TAMPA BAY TIMES (May 24, 2018), <https://www.tampabay.com/opinion/columns/Column-Can-Florida-Compete-Florida-leadership-remains-silent-168476100> (explaining how the FCWA has been introduced every year for nearly a decade in Florida, and it continues to stall despite strong bipartisan support); see also Peña, *supra* note 7 (explaining how the Florida bills across the years have not been passed and despite the various expansions to the FCRA’s coverage in recent years, it still does not cover sexual orientation or gender identity).

<sup>41</sup> See Shalyn L. Caulley, *The Next Frontier to LGBT Equality: Securing Workplace-Discrimination Protections*, 2017 U. ILL. L. REV. 909, 937–938 (2017) (stating that adding the LGBT-employment discrimination protections create “special rights” for LGBT people by “unnecessarily and unjustly [violating] freedom by creating special privileges based on sexual orientation and gender identity”); see also Tonnison, *supra* note 40 (indicating that including this extra protection could possibly cause for frivolous claims to be filed claiming discrimination).

of the bill counter the disapproval by focusing on the wrongful morality behind denying such equal protection and the economic benefit that would stem from instilling such protection.<sup>42</sup>

Aside from one decision in the Northern District of Florida, the district courts in Florida have consistently ruled that Title VII does not apply to sexual orientation discrimination claims.<sup>43</sup> Despite the failure of judicial deference, many local cities have taken it into their own hands to place local ordinance requirements for businesses in their area.<sup>44</sup> These local ordinances expand the scope of the FCRA to include protection against sexual orientation discrimination within the workplace in those regions.<sup>45</sup> Further, many businesses implement their own employment policies to expand protection in the workplace and demand equality among their employees.<sup>46</sup>

<sup>42</sup> See 2019: *Business Case*, FLA. COMPETES, <https://www.flcompetes.org/business-case/> (last visited May 27, 2020) (estimating that roughly \$362 million a year is lost in lost productivity, turnover, and inability or difficulty in recruiting due to sexual orientation discrimination in the workplace); see also Gancarski, *supra* note 14 (stating how passing the Florida Competitive Workforce Act and ending discrimination will ensure recruiting the best-trained, most innovative workforce to signal that Florida is the best place in the world for workers and businesses).

<sup>43</sup> See *Winstead v. Lafayette Cty. Bd. of Cty. Comm'rs*, 197 F. Supp. 3d 1334, 1346 (N.D. Fla. 2016) (holding that the disparate treatment of an employee based on her sexual orientation was, in essence, gender stereotype discrimination: "Such animus, whatever its origin, is at its core based on disapproval of certain behaviors (real or assumed) and tendencies towards behaviors, and those behaviors are disapproved of precisely because they are deemed to be 'inappropriate' for members of a certain sex or gender"). But see *Luna v. Bridgevine, Inc.*, No. 15-22859-CIV-COOKE/TORRES, 2016 WL 128460, at \*3 (S.D. Fla. 2016) (finding that "[p]laintiff may not assert a claim for discrimination under Title VII based upon sexual orientation because courts have consistently found that Title VII does not apply to discrimination claims based on sexual orientation."); see also *Espinosa v. Burger King Corp.*, No. 11-62503-CIV, 2012 WL 4344323, at \*7 (S.D. Fla. 2012) (granting Title VII is not expanded to cover sexual orientation discrimination in Florida).

<sup>44</sup> See *Florida Competitive Workforce Act (FCWA)*, EQUALITY FLA. ACTION, INC., [https://www.eqfl.org/florida\\_competitive\\_workforce\\_act](https://www.eqfl.org/florida_competitive_workforce_act) (last visited May 27, 2020) (noting that "[t]he FCWA would amend Chapter 760 of the Florida State Statutes that currently prohibits discrimination based on race, color, religion, sex, national origin, age, handicap, or marital status"); see also Peña, *supra* note 7 (stating that there are eleven counties and thirty-four municipalities within Florida that prohibit discrimination based on both sexual orientation and gender identity).

<sup>45</sup> See Richard Celler, *Florida LGBT Employment Discrimination*, FLA. OVERTIME LAW., <https://www.floridaovertimelawyer.com/wp-content/uploads/2015/09/Florida-LGBT-Employment-Discrimination.pdf> (last visited May 27, 2020) (highlighting that many cities and communities within the State of Florida have passed local laws that make it illegal to discriminate based on sexual orientation or gender, and over half of all Florida residents live in a community with such law); see also 2019: *Business Case*, *supra* note 42 (noting over 450 Florida businesses support including prohibiting sexual orientation discrimination legislation because they know it is good for the bottom line as many of Florida's top businesses already protect their LGBT employees from discrimination).

<sup>46</sup> See Peña, *supra* note 7 (stating "many employers . . . have sought to prohibit discrimination based on gender identity and sexual orientation within the workplace, by updating their employment policies and initiating relevant workplace trainings"); see also *Sexual Orientation Discrimination: Protecting Employees and Your Business*, MIGHTY RECRUITER, <https://www.mightyrecruiter.com/recruiter-guide/sexual-orientation-discrimination-protecting-employees-your-business/> (last visited May 27, 2020) (noting that enforcing company policies is important to keep discrimination absent

### III. DISCUSSION

#### A. MODERNIZING THE FCRA

The FCRA should be amended to include sexual orientation under its discriminatory employment practice provision.<sup>47</sup> Although it has continually failed in the past, the FCWA should be raised to the House and Senate in 2019 to create consistency in the rights assigned to individuals, promote a more balanced and morally sound workplace, and create a business environment suitable for optimal competitive development.<sup>48</sup> Although the FCWA has been knocked down for nearly a decade, the legislatures should consider both the great value of passing the bill and the negative ramifications of failing to follow the national trend against sexual orientation discrimination.<sup>49</sup>

History has continuously indicated that all individuals deserve to have their human rights protected.<sup>50</sup> America's growth as a nation is

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in the workplace because there is no legal protection on the federal level).

<sup>47</sup> See Tonnison, *supra* note 40 (stating that "Florida Competes and its members are committed to strengthening Florida's economy by supporting the Florida Competitive Workforce Act (FCWA), which modernizes the Florida Civil Rights Act of 1992 to include sexual orientation and gender identity among the existing protections such as race, religion and disability~~YYYY~~"); see also Orlando Sentinel Editorial Board, *Long-stalled Campaign for Equality Deserves More GOP Support*, ORLANDO SENTINEL (May 18, 2018, 6:00 PM), <https://www.orlandosentinel.com/opinion/os-ed-outlaw-lgbt-discrimination-20180514-story.html> (noting the Competitive Workforce Act should be passed to promote fairness, opportunity and economic growth, as both parties must take a stand for equality in Florida).

<sup>48</sup> See 2019: *Business Case*, *supra* note 42 (noting "[n]on-discrimination laws foster new investments and enable businesses to attract and retain top talent—that's why 82% of the nation's largest companies have adopted comprehensive non-discrimination policies that protect LGBT people"); see also Celler, *supra* note 45.

For over a decade, advocates have also been working at the state level in Florida to pass legislation that would prohibit discrimination in employment based on sexual orientation and gender. So far, those efforts have been unsuccessful . . . however . . . many cities and communities within the State of Florida have passed local laws that make it illegal to discriminate based on sexual orientation or gender.

*Id.*

<sup>49</sup> See Gancarski, *supra* note 14 (highlighting how passing such law will ensure that Florida remains as "one of the top places in the nation to live, work and play, and by promising equal opportunity employment, and affirming basic human rights to the LGBT community, we can be confident in continued business growth"); see also Peña, *supra* note 7 (finding that the "national trend in the last decade generally points to greater protections for the LGBT community, including a host of state laws enacted to prevent employment discrimination on the basis of gender identity and sexual orientation").

<sup>50</sup> See *Human Rights*, UNITED NATIONS, <http://www.un.org/en/sections/issues-depth/human-rights/> (last visited May 27, 2020) (stating that all individuals across the world are entitled to the following rights without discrimination: "the right to life and liberty, freedom from slavery and torture, freedom of opinion and expression, the right to work and education"); see also Craig Gosling, *All People Born with Equal Rights*, INDYSTAR (Nov. 14, 2015, 12:08 AM), <https://www.indystar.com/story/opinion/readers/2015/11/14/equal-rights-regardless-race-religion-gender/75753062/> (stating all people deserve human rights, regardless whether they are a minority as it

credited to learning from its prior faults, as rights have been given to those unjustly discriminated against in the past, such as African Americans, women, and those that practice certain religions.<sup>51</sup> One should not be punished or discriminated against for the way they were born.<sup>52</sup> Similarly here, the LGBT community in Florida should not be penalized and at a disadvantage in the workplace for being who they are.<sup>53</sup>

## B. ECONOMIC GROWTH

As a business owner in the modern era, one must adhere to any national regulations since the competitiveness of the market constantly separates those who are profitable from those who face economic turmoil.<sup>54</sup> The ongoing trend is to promote employee diversity and stimulate new ideas by specifically prohibiting sexual orientation discrimination in the workplace.<sup>55</sup> Research has shown that failure to observe these practices

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was one of the major reasons why our Constitution was written).

<sup>51</sup> See *Race/Color Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, [https://www.eeoc.gov/laws/types/race\\_color.cfm](https://www.eeoc.gov/laws/types/race_color.cfm) (last visited May 27, 2020) (highlighting that discrimination in the workplace is now entirely accepted as an illegal practice, whether it is from a co-worker or supervisor, and regardless of whether it applies to the entire workforce or a specific group); see also *Facts About Equal Pay and Compensation Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <https://www.eeoc.gov/eeoc/publications/fs-epa.cfm> (last visited May 27, 2020) (highlighting that The Equal Pay Act of 1963 “requires that men and women be given equal pay for equal work in the same establishment”); *Religious Discrimination*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, <https://www.eeoc.gov/laws/types/religion.cfm> (last visited May 27, 2020) (noting that the action of religious discrimination involving someone’s employment, “including hiring, firing, pay, job assignments, promotions, layoff, training, fringe benefits, and any other term or condition of employment,” were included into the Civil Rights Act of 1964).

<sup>52</sup> See *Disability Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <https://www.eeoc.gov/laws/types/disability.cfm> (last visited May 27, 2020) (explaining that the law prohibits discrimination in the workplace for a disability); see also Gosling, *supra* note 50 (stating that “all people are born with equal rights”).

<sup>53</sup> See Michael S. Pepper & Beverley Kramer, *The Science Behind A More Meaningful Understanding of Sexual Orientation*, THE CONVERSATION (June 10, 2015, 1:16 PM), <https://theconversation.com/the-science-behind-a-more-meaningful-understanding-of-sexual-orientation-42641> (finding that individuals “who are attracted to others of the same sex develop their orientation before they are born,” highlighting that it “is not a choice”); see also Tia Ghose, *Being Gay Not a Choice: Science Contradicts Ben Carson*, LIVE SCI. (Mar. 6, 2015), <https://www.livescience.com/50058-being-gay-not-a-choice.html> (finding that people do not have the ability to change their sexual orientation, and that sexual orientation may have a genetic or biological basis).

<sup>54</sup> See Tonmison, *supra* note 40 (finding that “[e]conomic prosperity is dependent upon businesses growing and a skilled workforce available to fill jobs”); see also M.V. Lee Badgett, et al., *Links Between Economic Development and New Measures of LGBT Inclusion*, WILLIAMS INST. UCLA SCH. L. (Mar. 2018), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/GDP-and-LGBT-Inclusion-April-2018.pdf> (stating that “studies have found that countries with more inclusion, measured as an index of inclusive laws related to homosexuality, had higher levels of GDP per capita after controlling for other economic variables that predict GDP”).

<sup>55</sup> See *2018: The Year We Pass the Florida Competitive Workforce Act*, *supra* note 10 (stating that “business leaders worry that without a modernized, statewide nondiscrimination law, Florida will fall behind” all the other states implementing such practices); see also Gancarski, *supra* note 14

through modernization can scare off new business development.<sup>56</sup> These new businesses looking to expand and grow, such as Amazon and Apple, can lead to an influx of local jobs within the state, and a substantial increase in investment, development, and revenue.<sup>57</sup>

#### i. Lack of LGBT Protection in the Workplace

Several conservative states have repealed laws which protected the LGBT community, immediately causing a backlash that decreased economic development.<sup>58</sup> North Carolina passed House Bill 2 (“H.B. 2”) in 2016 which discriminated against the LGBT community in public accommodations by requiring transgender individuals to use bathrooms and locker rooms which correspond to their birth certificate rather than the gender they identify with.<sup>59</sup> The new law also nullified all local ordinances within the state which extended protection to the LGBT

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(stating how critical it is to Florida’s economy the passing of the Florida Competitive Workforce Act because businesses, employees, and families need to know that “Florida is open for business.”).

<sup>56</sup> See Ellen Riggle, *Need for Non-Discrimination Laws Protecting LGBT People in Kentucky*, CTR FOR EQUALITY & SOC. JUST. (Sept. 2017), <https://cesj.as.uky.edu/need-non-discrimination-laws-protecting-lgbt-people-kentucky> (noting that “[s]tates with inclusive laws are more attractive to businesses, especially innovative companies that are human-capital intensive (e.g., high tech companies); for example, inclusive statewide laws are positively associated with an increased number of patents in a state after the passage of state anti-discrimination protections for LGBT people”); see also 2019: *Business Case*, *supra* note 42 (demonstrating how after North Carolina passed a law targeting LGBT individuals for discrimination, “[t]he state has forfeited approximately \$350 million in conventions and tourism revenue according to the Charlotte Chamber, Greater Raleigh Convention and Visitors Bureau, and officials in Greensboro and Asheville”).

<sup>57</sup> See 2018: *The Year We Pass the Florida Competitive Workforce Act*, *supra* note 10 (highlighting how “[t]he law would also help attract new business and investment, which is particularly important in 2018 as Amazon seeks a home for its second world headquarters . . . [in] [which] the host city will gain an initial investment of \$5 billion, and over 50,000 high-paying jobs”); see also 2019: *Business Case*, *supra* note 42 (stating that “[s]trong businesses lead to strong communities[,] [and] [w]hen Florida’s communities are stronger, our state is a healthier,” more vibrant and a thriving place to live, work, and raise a family).

<sup>58</sup> See 2019: *Business Case*, *supra* note 42 (highlighting how North Carolina passed the hostile H.B. 2 law in March of 2016, targeting LGBT people for discrimination, which caused the state to forfeit millions of dollars in business); see also Michael Gordon, et al., *Understanding HB2: North Carolina’s Newest Law Solidifies State’s Role in Defining Discrimination*, THE CHARLOTTE OBSERVER (Mar. 26 2016, 11:00 AM), <https://www.charlotteobserver.com/news/politics-government/article68401147.html> (noting that the H.B. 2 repealed laws in North Carolina that protected transgender people who use public restrooms based on their gender identity and nullified local ordinances around the state that would have expanded protections for the LGBT community).

<sup>59</sup> See Will Doran, *HB2 Has Cost North Carolina Hundreds of Millions of Dollars. Dan Forest Says That Isn’t Very Much*, POLITIFACT (Mar. 7, 2017), <https://www.politifact.com/factchecks/2017/mar/07/dan-forest/hb2-has-cost-north-carolina-hundreds-millions-doll/> (finding that the law stated “transgender people [cannot] use the bathrooms or locker rooms of the gender with which they identify [within] government facilities like schools or parks,” and continued North Carolina’s policy of not giving protection from anti-LGBT discrimination); see also Gordon, *supra* note 58 (stating that North Carolina’s new law “sets a statewide definition of classes of people who are protected against discrimination: race, religion, color, national origin, age, handicap or biological sex as designated on a person’s birth certificate”).

community.<sup>60</sup> H.B. 2 was buffeted by a business boycott as many prosperous businesses relocated to another state, with major sporting events and concert events also being canceled.<sup>61</sup> As a result, North Carolina lost between \$450 to \$650 million in revenue, along with hundreds of jobs.<sup>62</sup>

The North Carolina non-inclusive law forced the NBA all-star game to relocate to another location with more accepting laws towards the LGBT community: New Orleans, Louisiana.<sup>63</sup> Although Louisiana lacks a state-wide law that prohibits sexual orientation discrimination in the workplace, New Orleans has a local protection.<sup>64</sup> Consequently, New Orleans' acknowledgement of the LGBT community generated over \$100 million from hosting the event.<sup>65</sup> As a result, Louisiana congressman decided to propose legislation to ban sexual orientation discrimination because the relocation demonstrated how businesses and corporations avoid states that are hostile towards LGBT rights.<sup>66</sup>

<sup>60</sup> See Gordon, *supra* note 58 (highlighting how “[t]he new law also nullified local ordinances around the state that would have expanded protections for the LGBT community”); see also Doran, *supra* note 59 (finding that the H.B. 2 law banned any city or county from extending local nondiscrimination rules).

<sup>61</sup> See Mark Berman & Amber Phillips, *North Carolina Governor Signs Bill Repealing and Replacing Transgender Bathroom Law Amid Criticism*, WASH. POST (Mar. 30, 2017, 8:31 PM), [https://www.washingtonpost.com/news/post-nation/wp/2017/03/30/north-carolina-lawmakers-say-theyve-agreed-on-a-deal-to-repeal-the-bathroom-bill/?utm\\_term=.b472752e9eca](https://www.washingtonpost.com/news/post-nation/wp/2017/03/30/north-carolina-lawmakers-say-theyve-agreed-on-a-deal-to-repeal-the-bathroom-bill/?utm_term=.b472752e9eca) (stating that the backlash of North Carolina's bill has caused “economic boycotts, job losses and public criticism, as sports leagues have relocated games, companies have canceled expansions and some tourists decided to spend their money elsewhere”); see also Gordon, *supra* note 58 (noting that “[o]n July 21, the National Basketball Association announced it [would] move its All-Star Game from Charlotte in 2017, which [would] cost the city an estimated \$100 million . . . [followed] [by] [other] cancellations of business expansions and entertainment events by companies and performers protesting H.B. 2”).

<sup>62</sup> See Doran, *supra* note 59 (stating that “economists and analysis of other studies, has shown H.B. 2 probably cost the state between \$450 million and \$630 million” in lost revenue); see also Berman & Phillips, *supra* note 61 (finding that over a twelve year period following enactment of the law, H.B. 2 losses for the state could be at least \$3.7 billion).

<sup>63</sup> See Sarah Gamard, *LGBT Workplace Discrimination Forbidden Under Louisiana Proposal, But Prospects Seem Dim*, NOLA.COM (May 8, 2017, 11:28 PM), [https://www.nola.com/politics/index.ssf/2017/05/lgbt\\_discrimination.html](https://www.nola.com/politics/index.ssf/2017/05/lgbt_discrimination.html) (explaining how New Orleans was the NBA's second choice to host the game because of how more accepting it is of lesbian, gay, bisexual and transgender people than North Carolina); see also Berman & Phillips, *supra* note 61 (stating that the NBA Allstar game will be relocated as a result of North Carolina's new law).

<sup>64</sup> See Gamard, *supra* note 63 (highlighting how non-discrimination advocates want to see a statewide ban similar to local laws in New Orleans, as they prohibit discrimination based on sexual orientation and gender identity beyond just the workplace); see also Sarah Gamard, *Bill Would Prohibit Discrimination Based on Sexual Orientation, Gender Identity*, HOUMA TODAY (May 7, 2017, 6:53 PM), <https://www.houmatoday.com/news/20170507/bill-would-prohibit-discrimination-based-on-sexual-orientation-gender-identity> (finding how currently “it is ‘perfectly legal’ for Louisianans to be denied jobs or fired for being transgender or homosexual”).

<sup>65</sup> See Gamard, *supra* note 64 (stating “[t]he city of New Orleans estimates it gained an extra \$100 million from hosting the 2017 NBA All-Star Game in February”); see also Gamard, *supra* note 63 (stating how due to the NBA Allstar game relocation the hotels were over 99 percent occupancy and over \$100 million in revenue was generated).

<sup>66</sup> See Elizabeth Crisp, *Legislation Aimed at Combating LGBT Workplace Discrimination Advances*

## ii. LGBT Rights in the Workplace

Protecting the LGBT community is vital to a thriving state economy.<sup>67</sup> There have been numerous studies which provide evidence that inclusion is positively correlated to economic development.<sup>68</sup> The most persuading of them being that employment discrimination against the LGBT community ultimately means those individuals work ethic and talents are not being used to their maximum potential.<sup>69</sup> The harassment and discrimination in the workplace that LGBT workers are enduring deters their work efficiency and prevents businesses from hiring employees solely based on their merits for optimal business contribution.<sup>70</sup> Further, laws against employee discrimination based on sexual orientation indicates, to other potential business and employees, an environment conducive to acceptance of diversity; creative, open-minded thinking; and modern innovation.<sup>71</sup> Ultimately, these laws make use of the full

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*in Senate*, THE ADVOCATE (Mar. 15, 2018, 2:47 PM), [https://www.theadvocate.com/baton\\_rouge/news/politics/article\\_e9602534-2886-11e8-8051-a3abee547648.html](https://www.theadvocate.com/baton_rouge/news/politics/article_e9602534-2886-11e8-8051-a3abee547648.html) (stating how the new proposed law would make it illegal for “most employers to fire someone or refuse to hire someone because they are gay or transgender, with limited exceptions based on religion and other special circumstances”); *see also* Gamard, *supra* note 63 (highlighting how many large corporations and businesses avoid states they perceive to have an “‘antagonistic climate’ to LGBT people, as was the case with the North Carolina’s law that lost Charlotte the NBA All-Star Game”).

<sup>67</sup> *See* M.V. Lee Badgett, et al., *The Relationship Between LGBT Inclusion and Economic Development: An Analysis of Emerging Economies*, WILLIAMS INST. UCLA SCH. L. (Nov. 2014), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/lgbt-inclusion-and-development-november-2014.pdf> (stating that “[g]reater rights and freedoms might improve individual well-being by expanding individuals’ capabilities to be and do what they value . . . .”); *see also* Badgett, *supra* note 54 (noting the discrimination, social stigma, and violence LGBT people face limit their access to jobs and schooling).

<sup>68</sup> *See* Badgett, *supra* note 54 (defining inclusion as opportunities that might stem from laws which prohibit sexual orientation discrimination); *see also* Riggle, *supra* note 56 (noting that “[s]tate non-discrimination laws that include sexual orientation and gender identity are associated with better health outcomes and better business outcomes in communities”).

<sup>69</sup> *See* Badgett, *supra* note 54 (stating that sexual orientation employment discriminations means that LGBT people lack equal opportunities to non-LGBT people in the workplace); *see also* Monivette Cordeiro, *Florida Lawmakers Push for LGBTQ Workplace Protections*, ORLANDO WEEKLY (Jan. 19, 2018, 1:45 AM), <https://www.orlandoweekly.com/Blogs/archives/2018/01/19/florida-lawmakers-push-for-lgbtq-workplace-protections> (stating all hard-working people should be treated fairly and equally in the workplace regardless of their sexual preference).

<sup>70</sup> *See* Badgett, *supra* note 54 (noting employment discrimination against LGBT workers means they are not being used to their full capacity, and it “hinders the efficiency of LGBT workers, stopping them from making the economic contributions they are capable of”); *see also* Eskridge Jr., *supra* note 4, at 334 (defining a merit-based workplace as an ideal “where all people would have and retain jobs based upon their ability to perform and would not be excluded from jobs or harassed at work because of personal characteristics irrelevant to their capabilities”).

<sup>71</sup> *See* Badgett, *supra* note 54 (noting “[a] recent study of the United States found that states that passed laws against employment discrimination based on sexual orientation attracted the most productive inventors, potentially giving their employers and state economy a boost”); *see also* Huasheng Gao & Wei Zhang, *Employment Non-Discrimination Acts and Corporate Innovation*, MANAGEMENT SCIENCE (2016) (finding that laws that prohibit discrimination based on sexual

business potential for LGBT workers which warrants for a stronger functioning economy.<sup>72</sup>

As aforementioned, several states have implemented their own Employment Non-Discrimination Acts (“ENDA”) which prohibit discrimination based on sexual orientation and gender identity.<sup>73</sup> Research has shown that such states which have inclusive ENDA laws are home to corporations with the strongest innovation performance.<sup>74</sup> California, New York, New Jersey, Connecticut, Illinois, and Massachusetts are all states that explicitly prohibit discrimination based on sexual orientation in the workplace; spurring innovation.<sup>75</sup> For instance, these states are attractive to businesses as studies have revealed that they have an increase in market capitalization and patents.<sup>76</sup>

This positive correlation between states with ENDAs and economic innovation validates the notion that LGBT protection in the workplace is essential to economic growth.<sup>77</sup> Florida should incorporate the FCWA

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orientation and gender identity spur innovation).

<sup>72</sup> See Tonnison, *supra* note 40 (highlighting that economic prosperity is dependent upon businesses growing and a skilled workforce available to fill jobs which can be achieved through an equal opportunity workforce); see also Riggle, *supra* note 56 (explaining that states with inclusive laws are more attractive to businesses and call for stronger working economies).

<sup>73</sup> See Ed O’Keefe, *ENDA, Explained*, WASH. POST (Nov. 4, 2013), [https://www.washingtonpost.com/news/the-fix/wp/2013/11/04/what-is-the-employment-non-discrimination-act-enda/?utm\\_term=.f3d285069bde](https://www.washingtonpost.com/news/the-fix/wp/2013/11/04/what-is-the-employment-non-discrimination-act-enda/?utm_term=.f3d285069bde) (defining the Employment Non-Discrimination Act as federal law that would ban employers from firing, refusing to hire or discriminating against workers or job applicants based on their sexual orientation or gender identity); see also *Non-Discrimination Laws, MOVEMENT ADVANCEMENT PROJECT*, [http://www.lgbtmap.org/equality-maps/non\\_discrimination\\_laws](http://www.lgbtmap.org/equality-maps/non_discrimination_laws) (last visited May 27, 2020) (providing a map of the U.S with states that have ENDA laws and shows that 26 states still lack protection for Sexual Orientation employees).

<sup>74</sup> See Gao & Zhang, *supra* note 71, at 1 (stating that the adoption of ENDAs “leads to a significant increase in innovation output”); see also Badgett, *supra* note 54 (finding that countries with inclusive laws had higher levels of GDP per capita than those who lacked such laws).

<sup>75</sup> See Gao & Zhang, *supra* note 71, at 16 (noting that California, New York, New Jersey, Massachusetts, Connecticut, Texas, and Illinois are states which have corporations with the strongest innovation performance and are states more likely to have anti-discrimination laws); see also Caulley, *supra* note 41, at 917 (stating that the “economy functions best when workers are matched to the jobs with the best fit, maximizing their productivity, increasing wages and helping the bottom line for businesses”).

<sup>76</sup> See *Lesbian, Gay, Bisexual, and Transgender Workplace Issues: Quick Take*, CATALYST (June 17, 2019), <https://www.catalyst.org/knowledge/lesbian-gay-bisexual-transgender-workplace-issues> (explaining that more fortune 500 companies are including policies which cover sexual orientation discrimination in the workplace); see also Riggle, *supra* note 56 (noting that “inclusive statewide laws are positively associated with an increased number of patents in a state after the passage of state anti-discrimination protections for LGBT people”).

<sup>77</sup> See Karen Higginbottom, *U.S Economy Could Save \$9B Annually by Creating Inclusive Environment For LGBT Employees*, DIVERSITY NOW (Jan. 30, 2015), <https://diversitynowbyeglobal-learning.blogspot.com/2015/02/us-economy-could-save-9b-annually-by.html?m=0>. (last visited May 27, 2020) (stating the US economy could save \$9 billion annually if organizations effectively had inclusion and diversity policies for their LGBT staff). *But see* Caulley, *supra* note 41, at 917 (finding that “discrimination hinders qualified workers from maximizing on their potential, and keeps many workers out of positions they are qualified for,” negatively impacting the economy).



as many large companies have already joined the movement and included sexual orientation discrimination within their work policies, and failure to adhere to their regulations will direct these large prosperous companies away from Florida to do business and headquarter elsewhere.<sup>78</sup> Further, such discrimination can cause customers to redirect their business as they prefer corporations that treat LGBT workers fairly and equally.<sup>79</sup>

### C. SOCIAL IMPACT

The possibility of passing such legislation as the FCWA would have major social implications on the entire state.<sup>80</sup> First off, employment policies which lack support for discrimination against the LGBT employees can cause the employees to withhold their sexual orientation in fear.<sup>81</sup> Studies have shown that concealing one's sexual orientation or behavior can have a detrimental psychological effect on the individual.<sup>82</sup> Consequently, supporting disclosure in the workplace and including non-

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<sup>78</sup> See 2019: *Business Case*, *supra* note 42 (stating that “The Competitive Workforce Act would bring Florida’s state law in line with business best practices and ensure our innovative and fast-growing industries continue to thrive”); see also Tonnison, *supra* note 40 (explaining that many Fortune 500 companies “have explicit policies in place prohibiting discrimination based on sexual orientation and gender identity”).

<sup>79</sup> See Caulley, *supra* note 41, at 916–917 (stating “LGBT policies can impact a consumer's choice of whether or not to support a business—with LGBT consumers preferring corporations that treat LGBT employees well”); see also Michael Krejcova, *The Value Of LGBT Equality In The Workplace*, GLAAD (Feb. 26, 2015), <https://www.glaad.org/blog/value-lgbt-equality-workplace> (explaining that adopting inclusive policies would avoid the negative public image discrimination is associated with, “attracting customers who are eager to do business with socially responsible companies”).

<sup>80</sup> See Neil Buddel, *Queering the Workplace*, 23 J. OF GAY & LESBIAN SOC. SERV. 131, 142 (2011) (explaining the “benefits of full participation are numerous for GLB workers, both personally and professionally, which include positive psychosocial adjustment, reduced stress and anxiety, and enhanced job and life satisfaction”); see also Lawrence Mower, *Will Florida Legislators Pass a Bill in 2020 Prohibiting LGBTQ Discrimination?*, MIAMI HERALD (Oct. 4, 2019, 5:00 AM), <https://www.miamiherald.com/news/politics-government/state-politics/article235769332.html> (stating that without the legislation, “the state will fall behind in its ability to attract and keep ‘qualified, hardworking people’”).

<sup>81</sup> See Emir Ozeren, *Sexual Orientation Discrimination in the Workplace: A Systematic Review of Literature*, 109 PROCEDIA - SOC. & BEHAV. SCI. 1203, 1206 (2014) (revealing that “homosexual men were the most likely employees to be fired once identity disclosure occurred,” therefore they are inclined to not come out); see also M.V. Lee Badgett et al., *The Business Impact of LGBT-Supportive Sexual Orientation And Gender Identity Policies*, WILLIAMS INST. (2013), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Business-Impact-LGBT-Policies-Full-May-2013.pdf> (stating that LGBT employees who are out at work also “report being psychologically healthier than those who conceal their sexual orientation or gender identity”).

<sup>82</sup> See Bob Powers, *The Impact of Gay, Lesbian, and Bisexual Workplace Issues on Productivity*, 4 J. OF GAY & LESBIAN SOC. SERV. 79, 79 (2008) (stating when employees devote energy to hiding as LGBT employees in order to protect themselves, their livelihood performance is negatively impacted); see also Ozeren, *supra* note 81, at 1213 (stating the “greater cognitive efforts made by GLBT employees in order to be seen ‘acceptable’ by the majority of society, the greater the psychological costs they will have to pay”).

discriminatory policies can improve the health and well-being of LGBT employees.<sup>83</sup>

In opposition of such inclusive laws, religious activists argue that compliance with nondiscriminatory laws interferes with their religious or moral beliefs and demand to be exempted from adhering to such laws.<sup>84</sup> In addition, others oppose inclusive laws by expressing how such law would place an unnecessary burden on businesses by having them adhere to greater restrictions than required by federal law.<sup>85</sup> Further, many who advocate for a free society argue that one should not be obliged to hire an individual under law, rather they should hire who they please.<sup>86</sup> Despite these challenges, the new amendment would warrant a greater working environment – one that is financially and morally fair.<sup>87</sup>

<sup>83</sup> See Badgett, *supra* note 81 (finding that “[r]esearch also shows that experiencing discrimination can affect an individual’s mental and physical health”); see also Ozeren, *supra* note 81, at 1209 (stating that “sexual orientation disclosure at work and perceived gay supportiveness in the workplace are related to higher job satisfaction and lower job anxiety”).

<sup>84</sup> See *All We Want is Equality: Religious Exemptions and Discrimination Against LGBT People in the United States*, HUM. RTS. WATCH (Feb. 2018), [https://www.hrw.org/sites/default/files/report\\_pdf/lgbt0218\\_web\\_1.pdf](https://www.hrw.org/sites/default/files/report_pdf/lgbt0218_web_1.pdf).

The freedom of religion, as well as nondiscrimination, is a significant rights issue, and it is important that governments do not unnecessarily burden the exercise of religious conscience. This is especially important to minority religious groups, whose practices are all too easily trampled on by laws and policies enacted by majorities. But when exemptions to laws to accommodate religious beliefs or practices impinge on the rights of others or core societal values like nondiscrimination, lawmakers should proceed with caution.

*Id.*; see also Gamard, *supra* note 63 (explaining how passage of laws prohibiting sexual orientation discrimination would be a great challenge to religious freedom and would punish religious liberty advocates).

<sup>85</sup> See Gamard, *supra* note 63 (noting states prohibiting discrimination in the workplace based on sexual orientation “would place greater restrictions and burdens on businesses than federal law,” and challenge religious freedom); see also Peña, *supra* note 7 (stating how federal laws, although they do not encourage it, do not prohibit sexual orientation discrimination),

<sup>86</sup> See Laurence M. Vance, *The Right to Fire and Hire*, FUTURE FREE FOUND. (July 1, 2016), <https://www.fff.org/explore-freedom/article/right-hire-fire/> (stating that “because no one has the right to any particular job, a free society must include the right of employers to hire and fire employees at will, without any interference from the government”); see also Sandhya Somashekhar, *Ending Discrimination in Workplace, Other Areas is Next Gay Rights Battle*, WASH. POST (June 5, 2015), [https://www.washingtonpost.com/politics/the-next-gay-rights-battle-ending-discrimination-in-the-workplace/2015/06/05/a4d86da0-00a1-11e5-8b6c-0dcce21e223d\\_story.html?utm\\_term=.710f33a63324](https://www.washingtonpost.com/politics/the-next-gay-rights-battle-ending-discrimination-in-the-workplace/2015/06/05/a4d86da0-00a1-11e5-8b6c-0dcce21e223d_story.html?utm_term=.710f33a63324) (explaining how “governments do not need to coerce businesses by creating special privileges based on sexual orientation and gender identity”).

<sup>87</sup> See Buddel, *supra* note 80, at 142 (stating that inclusion of LGBT employees provide great benefits to work environment such as “improved recruiting, enhanced problem solving, and increased consumer support”); see also Ozeren, *supra* note 81, at 1208–1209 (noting that “productivity losses caused by discrimination against gay and lesbian employees in the workplace totaled \$1.4 billion” in recent years).

## IV. SOLUTION

There are an abundance of valid reasons why the national ongoing trend is to include protections for the LGBT community.<sup>88</sup> LGBT employees have dealt with career difficulties, unequal wages, verbal harassments, and unjust dismissals for far too long.<sup>89</sup> The FCWA, first introduced in 2009, has continuously failed in amending Florida's laws to prohibit discrimination based on sexual orientation and gender identity discrimination.<sup>90</sup> Perhaps, the blanket method of amending the entire FCRA to cover all sexual orientation discrimination rather than solely the employment discrimination section, was far too broad and prejudicial for the Florida House of Representatives to pass into law.<sup>91</sup>

Consequently, this Comment proposes to the Florida Legislature, the following amendment to FCRA, specifically Section 760.10 and its following provisions, to include sexual orientation and gender identity or

<sup>88</sup> See *supra* notes 13–14 and accompanying text (explaining how many states are following after each other and setting laws to protect their employees regardless of their sexual preference); see also Somashekhar, *supra* note 86 (noting many argue that “a national right to same-sex marriage would highlight a fundamental injustice [as] newly legal marriages could get the brides and grooms fired”).

<sup>89</sup> See Ozeren, *supra* note 81, at 1208 (explaining how experiences of discrimination in the workplace among LGBT individuals “involve firing or failing to hire an individual solely because of his/her sexual orientation, career difficulties, barriers such as decisions not to promote, unequal wages between homosexual and heterosexual employees, and GLBT employees exclusion from other benefits”); see also Crosby Burns, *The Gay and Transgender Wage Gap*, CTR. FOR AM. PROGRESS (Apr. 16, 2012, 9:00 AM), <https://www.americanprogress.org/issues/lgbt/news/2012/04/16/11494/the-gay-and-transgender-wage-gap/> (noting “many gay and transgender workers receive unequal pay for equal work in the United States today”).

<sup>90</sup> See *Florida Competitive Workforce Act (FCWA)*, EQUALITY FLA. (last visited May 27, 2020), [https://www.eqfl.org/florida\\_competitive\\_workforce\\_act](https://www.eqfl.org/florida_competitive_workforce_act) (highlighting that the FCWA was first introduced in 2009 and has failed to become law); see also John Lucas, *Lawmaker Says Passing Competitive Workforce Act is Right Thing to do Morally and Economically*, THE CAPITOLIST (Nov. 9, 2017), <http://thecapitolist.com/lawmaker-says-passing-competitive-workforce-act-is-right-thing-to-do-morally-and-economically/> (stating the FCWA has been introduced year-after-year in Florida's Legislature “only to come up short in the legislative process”).

<sup>91</sup> See Katy Bergen, *Florida Competitive Workforce Act Fails to Pass*, HT POL. (Feb. 9, 2016), <http://politics.heraldtribune.com/2016/02/09/florida-competitive-workforce-act-fails-to-pass/> (stating that the bill which would ban discrimination in the areas of employment, housing, and public accommodations based on sexual orientation or gender identity, failed due to concerns about sharing bathrooms and not the workforce provision); see also S.B. 120, 2016, 118th Reg. Sess. (Fla. 2016) (noting an amendment to the following provision of the FCWA as impermissible grounds for discrimination:

To discharge or to fail or refuse to hire any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of, or based on the perception of such individual's race, color, religion, sex, pregnancy, national origin, age, sexual orientation, gender identity or expression, handicap, or marital status.

*Id.*

expression as impermissible grounds for discrimination with respect to employment practices.<sup>92</sup>

It is critical that the Florida Legislature understand the importance of passing such legislation; if not, they risk falling behind and leaving interpretation to the courts.<sup>93</sup> Have we not learned our lesson after *Obergefell*?<sup>94</sup> It is a long and tedious process to have such a serious and controversial legal matter go through the pipeline.<sup>95</sup> Florida's House of Representatives and Senate must come together to halt this prejudicial misinterpretation, which comes at the expense of its working citizens.<sup>96</sup>

## V. CONCLUSION

As it stands, it is currently legal in Florida to fire an employee based on their sexual orientation.<sup>97</sup> Therefore, the proposed amendment to Section 760.10 of the Florida Statutes should become law of the state in order to promote a balanced and morally sound workplace, and ensure fair and equal treatment of all employees regardless of sexual orientation.<sup>98</sup>

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<sup>92</sup> See FLA. STAT. § 760.10; see also *S.B. 120: Florida Competitive Workforce Act of 2016*, *supra* note 91 (defining Gender identity or expression as “gender-related identity, appearance, or behavior, regardless of whether such gender-related identity, appearance, or behavior is different from that traditionally associated with the person’s physiology or assigned sex at birth”).

<sup>93</sup> See *supra* notes 26–38 and accompanying text (explaining how inconsistent the courts have been in deciding on the issue of sexual orientation discrimination in the workplace); see also Tonnison, *supra* note 40 (stating that Florida’s legislative leadership has failed on this matter, and our state is now behind).

<sup>94</sup> See *Obergefell v. Hodges*, 135 U.S. 2585 (2015) (ruling on the controversial same-sex marriage issue); see also *supra* notes 34–35 and accompanying text (stating how judicial misinterpretation and conflicts are sent to the supreme courts).

<sup>95</sup> See Adam Liptak, *Supreme Court Ruling Makes Same-Sex Marriage a Right Nationwide*, N.Y. TIMES (June 26, 2015), <https://www.nytimes.com/2015/06/27/us/supreme-court-same-sex-marriage.html> (explaining how the *Obergefell* decision was a collection of decades of litigation and activism); see also Kathryn Moody, *Supreme Court Again Asked To Rule on Sexual Orientation Discrimination*, HR DRIVE (June 1, 2018), <https://www.hrdrive.com/news/supreme-court-again-asked-to-rule-on-sexual-orientation-discrimination/524736/> (noting how it is “inevitable that the issue of sexual orientation discrimination will come before the Courts time and time again”).

<sup>96</sup> See *Florida Competitive Workforce Act Enjoys Historic Bipartisan Support as Legislative Session Begins*, FREEDOM FOR ALL AM. (Mar. 7 2017, 10:53 AM), <https://www.freedomforallamericans.org/florida-competitive-workforce-act-enjoys-historic-bipartisan-support-as-legislative-session-begins/> (“The bipartisan, business-led coalition behind this legislation should serve as a model for advancing equality in other southern states.”); see also Jerry Iannelli, *LGBT Publix Employee Says He Was Fired for Reporting Anti-Gay Harassment*, MIAMI NEW TIMES (Feb. 7, 2018, 8:00 AM), <https://www.miamiherald.com/news/publix-sued-for-firing-lgbtq-worker-10059174> (demonstrating how many Florida citizens are harassed daily due to their sexual preference).

<sup>97</sup> See *supra* notes 8–14 and accompanying text (stating that although many cities have their own ordinances, Florida lacks state law prohibiting sexual orientation based discrimination); see also Kyle Munzenrieder, *Reminder: People Can Still Be Fired in Florida Simply For Being Gay*, MIAMI NEW TIMES (Jan. 14, 2015, 1:27 PM), <https://www.miamiherald.com/news/remind-people-can-still-be-fired-in-florida-simply-for-being-gay-6554759> (explaining how it is “still perfectly legal for an employer to fire someone simply for being gay in the state of Florida unless there are local protections in place”).

<sup>98</sup> See FLA. STAT. § 760.10; see also Tonnison, *supra* note 40 (demonstrating how the FCWA would

Florida is currently behind the national trend, and will risk falling behind economically and socially if they do not act swiftly and amend the statute.<sup>99</sup> The time has come for the Florida Legislature to provide for all of its citizens with the proper redress by amending Section 760.10 of the FCRA.<sup>100</sup>

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promote equal opportunity and economic prosperity for all of Florida).

<sup>99</sup> See Bergen, *supra* note 91 (highlighting that banning LGBT workplace discrimination will help improve equal opportunity in the workplace and make Florida more globally competitive); see also Ozeren, *supra* note 81, at 1210 (explaining how the adoption of LGBT supportive policies can “facilitate the development of a firm’s strong corporate image and reputation because of its fair and equal treatment of all individuals regardless of sexual orientation”).

<sup>100</sup> See Madeline Buckley, *Appeals Court: Sexual-orientation Discrimination is Legal*, USA TODAY (July 29, 2016, 5:47 PM), <https://www.usatoday.com/story/news/nation-now/2016/07/29/sexual-orientation-discrimination-court/87746732/> (explaining how it is “unlikely that our society can continue to condone a legal structure in which employees can be fired, harassed, demeaned, singled out for undesirable tasks, paid lower wages, demoted, passed over for promotions, and otherwise discriminated against solely based on who they date, love or marry”); see also *Florida Competitive Workforce Act Enjoys Historic Bipartisan Support as Legislative Session Begins*, *supra* note 96 (stating how amending the statute would extend “critical nondiscrimination protections to approximately 692,000 LGBT people living and working” in Florida).