

2023

The Battle Over Bostock: Dueling Presidential Administrations & The Need for Consistent and Reliable LGBT Rights

Regina L. Hillman

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Recommended Citation

Regina L. Hillman (2023) "The Battle Over Bostock: Dueling Presidential Administrations & The Need for Consistent and Reliable LGBT Rights," *American University Journal of Gender, Social Policy & the Law*. Vol. 32: Iss. 1, Article 1.

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THE BATTLE OVER *BOSTOCK*: DUELING PRESIDENTIAL ADMINISTRATIONS & THE NEED FOR CONSISTENT AND RELIABLE LGBT¹ RIGHTS

REGINA L. HILLMAN*

*“Everyone is entitled to dignity and equality,
no matter who they are, whom they love, or how they identify—
and we will continue to engage with allies and partners
to advance the human rights of LGBTQI+ people
here at home and in all corners of the world.”*

President Joseph R. Biden, Jr.

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1. “LGBT” is an acronym for Lesbian, Gay, Bisexual, and Transgender. Although “LGBTQ,” “LGBTQ+,” and “LGBTQIA+” are often used to fully recognize the diversity of the LGBT community, this article utilizes LGBT to comport with the majority of legal cases, articles, and agencies.

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INTRODUCTION

In the summer of 2020, the Supreme Court released its opinion in the landmark civil rights case, *Bostock v. Clayton County, Georgia*.² In the *Bostock* decision, the Court held that protections from employment discrimination “because of sex” under Title VII of the Civil Rights Act of 1964 (“Title VII”) include discrimination on the basis of sexual orientation and gender identity.³ Prior to the Court’s decision, millions of LGBT employees had no protection from discriminatory treatment based on sexual orientation or gender identity, and discrimination was pervasive.⁴ LGBT

2. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020).

3. *Id.* at 1737 (“Today, we must decide whether an employer can fire someone simply for being homosexual or transgender. The answer is clear. An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids.”).

4. See Kerith J. Conron & Shoshana K. Goldberg, *LGBT People in the US Not Protected by State Nondiscrimination Statutes*, WILLIAMS INST. (Apr. 2020), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-ND-Protections-Update-Apr-2020.pdf> (“An estimated 8.1 million LGBT workers age[d] 16 and older live in the United States. Nearly half of these workers—3.9 million people—live in states without statutory protections against sexual orientation and gender identity discrimination in employment.”). See also Brad Sears et. al., *LGBT People’s Experiences of Workplace Discrimination and Harassment*, WILLIAMS INST. (Sept. 2021), <https://williamsinstitute.law.ucla.edu/publications/lgbt-workplace-discrimination/> (“Our analysis indicates that employment discrimination against LGBT people continues to be persistent and widespread. Over 40% of LGBT workers (45.5%) reported experiencing unfair treatment at work, including being fired, not hired, or harassed because of their sexual orientation or gender identity at some point in their lives. This discrimination and harassment is ongoing: nearly one-third (31.1%) of LGBT respondents reported that they experienced discrimination or harassment within the past five years.”). See also Brad Sears & Christy Mallory, *Documented Evidence of Employment Discrimination and Its Effects on LGBT People*, WILLIAMS INST. (July 2011), <https://williamsinstitute.law.ucla.edu/publications/employ-discrim-effect-lgbt-people/> (“In sum, this research shows that widespread and continuing employment discrimination against LGBT people has been documented in scientific field studies,

employees exercising the recently won constitutional right to marry, granted by the Court in June 2015, could legally be fired for marrying due to the absence of workplace protections.⁵ The landmark *Bostock* decision righted that wrong, providing millions of LGBT employees with federal statutory protections from workplace discrimination for the first time in the nation's history.⁶ The Court's decision also brought an end to the imbalanced five-year legal limbo of marriage rights without related workplace protections and continued the forward momentum toward full equality nationwide for LGBT Americans.⁷

Since the Supreme Court's June 2020 Title VII decision, presidential administrations, their federal administrative agencies, states, politicians, activists, and jurists, among others, have been battling over the reach of the

controlled experiments, academic journals, court cases, state and local administrative complaints, complaints to community-based organizations, and in newspapers, books, and other media. Federal, state, and local courts, legislative bodies, and administrative agencies have acknowledged that LGBT people have faced widespread discrimination in employment.”).

5. See, e.g., Ashe McGovern et al., *Nondiscrimination Protections for LGBT Communities*, CTR. FOR AM. PROGRESS (Dec. 8, 2016), <https://www.americanprogress.org/article/nondiscrimination-protections-for-lgbtq-communities/> (“While same-sex couples now have the freedom to marry nationwide, LGBTQ people remain at risk of being fired from their job . . . simply because of who they are.”). See also Leonore F. Carpenter, *The Next Phase: Positioning the Post-Obergefell LGBT Rights Movement to Bridge the Gap Between Formal and Lived Equality*, 13 STAN. J. C.R. & C.L. 255, 266 (2017) (“Advocates understand that there is a nexus between the two issues [of marriage and employment protections], since currently, it is very possible in the majority of states for a person in a same-sex couple to be fired as a result of the compulsory visibility that marriage brings.”).

6. See *Bostock*, 140 S. Ct. at 1731 (holding Title VII prohibited discrimination on the basis of sexual orientation and gender identity).

7. See *U.S. Supreme Court Decision in Employment Discrimination Cases Will Impact Millions of LGBT Workers*, WILLIAMS INST. (Apr. 2020), <https://williamsinstitute.law.ucla.edu/press/scotus-title-vii-media-alert/> (noting in its 2020 report that of the 7.1 million estimated LGBT employees, an estimated 3.4 million “live in states without express statutory protections against sexual orientation discrimination in employment” and of the estimated 1 million transgender employees, approximately 536,000 “live in states without express statutory protections against gender identity discrimination in employment.”). It is important to note that many LGBT employees are beyond the reach of Title VII and continue to suffer from discrimination based on sexual orientation and gender identity without any recourse. See also *Coverage*, U.S. EEOC, <https://www.eeoc.gov/coverage> (last visited Apr. 10, 2023) (Title VII applies to private employers with fifteen or more employees, state and local government employers with 15 or more employees, and employees of the federal government. Title VII also applies to employment agencies and unions. Independent contractors, who are not employed by an employer, are not covered by anti-discrimination laws.).

Court's *Bostock* decision.⁸ Debates address how narrow or broad *Bostock* should be applied in the Title VII realm, the extent of the discrimination protections available to LGBT workers based on the Court's holding, and whether the Court's reasoning extends to other federal nondiscrimination statutes. Battle lines have been drawn through the use of presidential executive orders, the administrative rulemaking process, federal lawsuits filed by multiple conservative states, and rulings by activist federal jurists. Despite the legal battles taking place, a recent 2022 poll by the Public Religion Research Institute indicates that American citizen support is at an all-time high, finding that "[n]early eight in ten Americans [seventy-nine

8. Almost immediately following the Court's Title VII decision, debate began regarding whether *Bostock's* reasoning that discrimination based on sexual orientation and gender identity was prohibited sex discrimination would also apply to multiple other federal statutory sex-based protections. Less than two months after the decision was announced, the first federal appellate court weighed in, holding that *Bostock's* reasoning applied equally to Title IX. *Adams v. Sch. Bd. of St. Johns Cnty.*, 968 F.3d 1286 (11th Cir. 2020), *vacated by Adams v. Sch. Bd. of St. Johns Cnty.*, 3 F.4th 1299, 1304 (11th Cir. 2021) (*reh'g en banc, opinion vacated*). A month later, a second appellate court held the same. *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 616-19 (4th Cir. 2020), *as amended* (Aug. 28, 2020), *reh'g en banc denied, cert. denied* June 28, 2021. As a result, six weeks after the Court's June 15, 2020, *Bostock* decision, two federal circuit courts had concluded that *Bostock's* reasoning applied equally to Title IX's sex-based prohibition. The Eleventh Circuit's opinion, however, was met with opposition within the circuit. An active member of the court withheld issuance of the 2-1 mandate, halting the judgment. *See Adams by & through Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791 (11th Cir. 2022) (describing *Adams'* complicated procedural history). In an effort to obtain greater circuit support on the issue, the three-judge panel withdrew its original opinion and substituted a new one in July 2021. *Id.* *Adams* again prevailed, 2-1, in a narrowed holding addressing only the equal protection clause violation. *Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty.*, 3 F.4th 1299, 1303 (11th Cir. 2021); *see Adams*, 57 F.4th 791 (explaining *Adams'* complicated procedural history). On March 10, 2022, the Ninth Circuit remanded a case to the district court, noting in dicta that its conclusion that *Bostock's* holding applied only to Title VII was "based on a flawed [and narrow] reading" of the case. *Doe v. Snyder*, 28 F.4th 103, 114-15 (9th Cir. 2022) ("While the language in Title VII is "because of sex" and the language in Title IX is "on the basis of sex," *Bostock* used those phrases interchangeably throughout the decision."). Until December 30, 2022, when the Eleventh Circuit, in a split *en banc* decision, issued a conflicting holding, the circuit courts were unanimous that *Bostock's* reasoning applied equally to Title IX sex discrimination protections. In June 2023, the Ninth Circuit released an opinion explicitly holding that *Bostock's* reasoning equally applied to Title IX. *Grabowski v. Arizona Bd. of Regents*, 22-15714, 2023 WL 3961123, at *4 (9th Cir. June 13, 2023) ("Harmonizing the Court's holding in *Bostock* with our holding in *Snyder*, we hold today that discrimination on the basis of sexual orientation is a form of sex-based discrimination under Title IX."). For an analysis of *Bostock's* application to Title IX, *see generally*, Joe Brucker, *Beyond Bostock: Title IX Protections for Transgender Athletes*, 29 JEFFREY S. MOORAD SPORTS L.J. 327, 332 (2022).

percent] favor laws that would protect gay, lesbian, bisexual, and transgender people against discrimination in jobs, public accommodations, and housing, including forty-one percent who *strongly* support them.”⁹ Nonetheless, battles over *Bostock*’s reach continue and likely will not find resolution in the near future absent congressional or Supreme Court intervention.

Many of the current protections provided to the LGBT community, including those currently impacted by ongoing litigation,¹⁰ stem from President Biden’s efforts to provide discrimination protections to the LGBT community through his executive order powers.¹¹ Beginning on January 20, 2021, his first day in office, President Biden and his administration have taken multiple actions to provide federal discrimination protections by recognizing that the Constitution’s promise of “justice for all” includes the LGBT community.¹² When signing the first of several executive orders

9. See *Americans’ Support for LGBTQ Rights Continues to Tick Upwards*, PUB. RELIGION RSCH. INST. (Mar. 17, 2022), <https://www.prii.org/research/americans-support-for-key-lgbtq-rights-continues-to-tick-upward/> (emphasis in original) (“Most Democrats (89%), independents (82%), and almost two-thirds of Republicans (65%) favor nondiscrimination provisions for LGBTQ people. Since 2015, support increased nine percentage points among Democrats (78% to 89%) and independents (73% to 82%). Support among Republicans has also increased, but only by a few percentage points (61% to 65%)”; see Joshua Bote, *Most Americans Believe LGBTQ People are Legally Protected from Discrimination. They’re Not.*, USA TODAY (Oct. 29, 2020), <https://www.usatoday.com/story/news/nation/2020/10/29/glaad-americans-wrongly-think-lgbtq-protected-discrimination/3749368001/> (“An overwhelming number of Americans, regardless of sexuality or gender identity, believe LGBTQ people have federal protections against discrimination that are, in reality, not available to them.”) (Reporting that “the vast majority of non-LGBTQ Americans believe that discrimination against LGBTQ [people] should be illegal,” a study shortly after the *Bostock* decision was released announced that most Americans wrongly believed LGBT citizens were legally protected in multiple areas, including housing and public space).

10. See *infra* Section IV.C.

11. See *infra* Section IV.C.

12. See, e.g., Exec. Order No. 13,988, 86 Fed. Reg. 7,023 (Jan. 25, 2021). The Order references the *Bostock* holding and states that *Bostock*’s reasoning applies with equal force to other laws that prohibit sex discrimination “so long as the laws do not contain sufficient indications to the contrary.” *Id.* Five days after his inauguration, President Biden signed Exec. Order No. 14,004, which enabled all qualified Americans to serve in the military: “[I]t shall be the policy of the United States to ensure that all transgender individuals who wish to serve in the United States military and can meet all appropriate standards shall be able to do so openly and freely of discrimination.”; Exec. Order No. 14,004, 86 Fed. Reg. 7,471 (Jan. 28, 2021) (noting that “gender identity should not be a bar to military service,” the Order recognized that an “an inclusive military strengthens our national security.”). On March 8, 2021, President Biden established the White House Gender Policy Council to “advance gender equity and equality in the United States and around the world.”; Exec. Order No. 14,020, 86 Fed. Reg. 13,797 (Mar. 11, 2021). The

supporting LGBT rights and protections, the newly-inaugurated President stated, “It is now the policy of this administration that ‘[e]very person should be treated with respect and dignity and should be able to live without fear, no matter who they are or whom they love.’”¹³

Now in his third year in office, Biden and his administration have provided invaluable support to the LGBT community and have engaged in multiple efforts to advance protections against discrimination.¹⁴ However, with the next presidential election in 2024, current protections under the Biden administration, as well as anticipated future protections, are at risk. Under a future conservative Republican president,¹⁵ many of President Biden’s efforts may be erased. For that reason, this article posits that, at a minimum, the broad codification of *Bostock* is crucial to maintain current LGBT nondiscrimination prohibitions, prevent future Republican presidential administrations from withdrawing current and future protections, and to provide desperately needed clarity, stability, consistency, and reliability to LGBT citizens. The same urgent needs apply to the many organizations and businesses negatively impacted by inconsistent guidance. Immediate congressional action to, at a minimum, codify *Bostock*’s broad holding, would align with the vast majority of Americans’ support and provide clear, consistent, stable, and reliable protections from discrimination against LGBT Americans.¹⁶ Absent congressional action, LGBT rights and protections remain uncertain, unstable, inconsistent, and untenable.

following June, President Biden issued Exec. Order No. 14,035 to establish a government-wide initiative to diversity and equity in the federal workforce. Exec. Order No. 14,035, 86 Fed. Reg. 34,593 (June 30, 2021) (“As the nation’s largest employer, the federal government must be a model for diversity, equity, inclusion, and accessibility, where all employees are treated with dignity and respect.”). A year later, President Biden issued Executive Order 14075, building on prior LGBT progress and providing further steps to advance LGBT equality. Exec. Order No. 14,075, 87 Fed. Reg. 37,189 (June 21, 2022).

13. *What President Biden’s LGBTQ Executive Order Does and Doesn’t Do*, ACLU (Jan. 21, 2021), <https://www.aclu.org/news/lgbtq-rights/what-president-bidens-lgbtq-executive-order-does-and-doesnt-do>. For a detailed list of the many actions President Biden has taken in support of the LGBT community, see *President Biden’s Pro-LGBT Timeline*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/resources/president-bidens-pro-lgbtq-timeline> (last visited May 13, 2023).

14. ACLU, *supra* note 13.

15. See Danielle Kurtzleben, *Trump Announces Presidential Run*, NPR (Nov. 15, 2022), <https://www.npr.org/2022/11/15/1137052704/trump-2024-president-campaign> (on November 15, 2022, Donald Trump announced that he would be running for President in the 2024 election).

16. See *infra* Section IV.C.

I. A BRIEF REVIEW OF THE *BOSTOCK* DECISION: TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 PROVIDES DISCRIMINATION PROTECTIONS TO LGBT EMPLOYEES

Authoring the June 15, 2020, landmark Supreme Court *Bostock* opinion, Justice Neil Gorsuch concluded in a mere seventeen pages that Title VII's protection from intentional employment discrimination "on the basis of sex" includes discrimination based on sexual orientation and gender identity.¹⁷ In the 6-3 groundbreaking majority opinion, Justice Gorsuch answered the question of "whether an employer can fire someone simply for being homosexual or transgender" in the first paragraph: "The answer is clear. An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision; exactly what Title VII forbids."¹⁸

With those words, the Supreme Court extended federal workplace protections to millions of LGBT employees and advanced LGBT progress toward full equality.¹⁹ Prior to the Court's *Bostock* decision, an LGBT employee was protected from discrimination based on sexual orientation or gender identity only if their city or state of employment provided discrimination protections on its own initiative, but more than half of the states condoned intentional employment discrimination solely based on the employee's gay or transgender status.²⁰ Acknowledging that those involved with Title VII's drafting and adoption "might not have anticipated their work would lead to this particular result," Justice Gorsuch engaged in a textualist analysis of the statute's language and concluded that the statute's express terms clearly supported the Court's conclusion: "Only the written word is the law, and all persons are entitled to its benefit."²¹ Thus, "[a]n employer who fires an individual merely for being gay or transgender defies the law."²²

17. See generally *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020) (holding that under Title VII it is unlawful to discriminate against an individual based on sexual orientation or gender identity).

18. *Id.* at 1737.

19. WILLIAMS INST., *supra* note 4.

20. *Id.*

21. *Bostock*, 140 S. Ct. at 1737.

22. *Id.* at 1754.

A. TITLE VII & LGBT EMPLOYEES

Title VII²³ was enacted to address widespread employment discrimination and ensure that an employee's sex, among other characteristics, was not taken into consideration in employment decisions.²⁴ The federal statute forbids an employer from engaging in an adverse discriminatory employment action against an individual employee based on the employee's protected status in regard to "compensation, terms, conditions, or privileges of employment."²⁵ Importantly, Congress did not define "sex" in Title VII, leaving that determination largely to the courts and enforcement agencies. Prior to April 2012, the Equal Employment Opportunity Commission ("EEOC"), the federal administrative agency created by Title VII to interpret and enforce its provisions,²⁶ and the federal courts were in agreement that Title VII protections did not extend to discrimination based on gender identity or sexual orientation.²⁷ LGBT employee discrimination protections

23. Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et. seq. (1994). For an account of the events leading up to the adoption of the Civil Rights Act, see John Towers Rice, *The Road to Bostock*, 15 FIU L. REV. 423, 426-29 (2021).

24. See 42 U.S.C. §§ 2000e(b)-(n). Title VII applies to employers with fifteen employees or more and prohibits employment discrimination based on race, color, religion, sex, and national origin. Title VII protects job applicants, current employees, temporary employees, and former employees in all types of workplace scenarios, making it unlawful "to fail or refuse to hire or to discharge any individual, or to otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment." 42 U.S.C. § 2000e-2. The Civil Rights Act of 1991 amended Title VII by adding a section that recognized a violation occurs when an employer takes an adverse employment action and race, color, religion, sex, or national origin was a "motivating factor," even if other lawful factors were also considered by the employer when engaging in the unlawful practice. *Id.* For a detailed analysis of Title VII, including the 1972 and 1991 amendments, see generally Laura C. Bornstein, *Title VII of the Civil Rights Act of 1964*, 10 GEO. J. GENDER & L. 639 (2009).

25. 42 U.S.C. § 2000e-2. The Supreme Court has noted that "[i]n passing Title VII, Congress made the simple but momentous announcement that sex, race, religion, and national origin are not relevant to the selection, evaluation, or compensation of employees." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239 (1989).

26. 42 U.S.C. § 2000e-4. The EEOC's powers are delineated in 42 U.S.C. §§ 2000e-4(g)-(k) and include the authority to investigate, mediate, issue findings, and file federal lawsuits against covered employers that violate Title VII. *Id.* For a detailed review of the progression of LGBT rights in the EEOC and the courts, see Breanna R. Wexler, *Let's Call it What it is: Sexual Orientation Discrimination is Sex Discrimination Under Title VII*, 63 ST. LOUIS U.L.J. 133, 147 (2018). For a history of the EEOC's creation and deference to EEOC rulemaking and guidance, see generally Eric Dreiband & Blake Pulliam, *Deference to EEOC Rulemaking and Sub-Regulatory Guidance: A Flip of the Coin?*, 32 ABA J. LAB. & EMP. L. 93 (2016).

27. See Dreiband, *supra* note 26 (noting the history of the EEOC's creation and

were denied for reasons including that ‘sex’ under Title VII meant biological sex only; that the 1964 Congress did not intend to include LGBT employees within Title VII’s ambit; that the ordinary understanding of Title VII when written did not include, or even fathom, LGBT protections; and that Congress had considered but not approved such employment protections.²⁸

(1) *The Supreme Court & Title VII’s Sex-Based Prohibition Pre-Bostock*

In the years following Title VII’s enactment, ongoing challenges regarding the scope of the statute’s sex discrimination prohibition required the Supreme Court to clarify the extent of Title VII’s reach. For example, in 1971, the Court addressed whether Title VII was violated by an employer’s policy to hire men with pre-school-aged children but refusing to hire women in identical circumstances.²⁹ In *Phillips v. Martin Marietta Corp.*, the Fifth Circuit Court of Appeals affirmed a trial court’s grant of summary judgment to the employer defendant, holding the employer’s policy was not a violation of Title VII’s discrimination prohibition “based on sex,” and denied a request for *en banc* review.³⁰ The Supreme Court granted certiorari, vacated the Fifth Circuit’s opinion, and remanded the case, holding that Title VII required that employees “of like qualifications be given employment opportunities irrespective of their sex.”³¹

Seven years later, the Court considered whether Title VII permitted an employer to require female employees to make larger pension fund contributions than their male counterparts based on a longer life expectancy per mortality tables.³² In *City of Los Angeles, Dept. of Water & Power v. Manhart*, the Court noted, “It is now well recognized that employment decisions cannot be predicated on mere ‘stereotyped’ impressions about the

deference to EEOC rulemaking and guidance). For a discussion of the EEOC’s role in the development of LGBT rights under Title VII and a history of Title VII from enactment through the Supreme Court’s grant of certiorari in *Bostock*, see generally Regina Lambert Hillman, *Title VII Discrimination Protections & LGBT Employees: The Need for Consistency, Certainty & Equality Post-Obergefell*, 6 BELMONT L. REV. 1 (2019).

28. See, e.g., *Smith v. City of Salem*, 378 F.3d 566, 572-74 (6th Cir. 2004) (providing examples of arguments supporting that Title VII does not apply to transgender employees); see also *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1746-52 (2020) (addressing employer arguments regarding why Title VII does not apply to transgender employees).

29. *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 543 (1971).

30. *Id.*

31. *Id.* at 544.

32. *City of Los Angeles v. Manhart*, 435 U.S. 702, 704 (1978).

characteristics of males or females.”³³ Finding that Title VII’s “unambiguous” focus on individuals rather than groups prohibited sex-based considerations of factors or traits that are a function of sex, the *Manhart* Court held the employer’s practice violated Title VII’s prohibition on sex-based discrimination because the policy treated female employees “in a matter which but for that person’s sex would be different.”³⁴

In 1986, the Court addressed whether workplace sexual harassment was included under Title VII’s sex-based protective sphere.³⁵ In *Meritor Savings Bank, FSB v. Vinson*, the defendant bank argued that the congressional intent of Title VII’s prohibition on discrimination related to “compensation, terms, conditions, or privileges” applied only to “tangible loss” of “an economic character,” but not “purely psychological aspects of the workplace environment.”³⁶ However, the *Meritor* Court found that Title VII’s prohibition on sex-based discrimination was not so limited and that Title VII’s “phrase ‘terms, conditions, or privileges of employment’ evinces a congressional intent ‘to strike at the entire spectrum of disparate treatment of men and women’ in employment.”³⁷ The *Meritor* Court used the term “on the basis of sex” interchangeably with Title VII’s “because of . . . sex” to hold that “when a supervisor sexually harasses a subordinate because of the subordinate’s sex, that supervisor ‘discriminate[s]’ on the basis of sex.”³⁸

Three years later, the Court decided the landmark case, *Price Waterhouse v. Hopkins*, addressing whether a heterosexual female employee could successfully allege a Title VII sex discrimination claim based on sexual stereotyping.³⁹ In *Price Waterhouse*, the employee alleged she was denied a promotion because her colleagues felt she did not act or present in a feminine manner.⁴⁰ The Court addressed Title VII’s sex discrimination prohibition, focusing on discrimination based on “sex stereotypes,” using the terms “sex” and “gender” interchangeably.⁴¹ A plurality found that “in forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and

33. *Id.* at 707.

34. *See id.* at 712-13 (stating that “one cannot ‘say that an actuarial distinction based entirely on sex is ‘based on any other factor other than sex.’ Sex is exactly what it is based on.”).

35. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 59 (1986).

36. *Id.* at 64.

37. *Id.* (citing *Manhart*, 435 U.S. at 707).

38. *Meritor Sav. Bank, FSB*, 477 U.S. at 64.

39. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 232 (1989).

40. *Id.* at 234-35.

41. *Id.* at 242-46.

women resulting from sex stereotypes” when implementing Title VII.⁴² Therefore, the Court held that Title VII prohibited discrimination based on gender stereotyping, noting that “an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.”⁴³ In light of its determination, the Court announced that in order to comply with Title VII, “gender must be irrelevant to employment decisions.”⁴⁴

Finally, in 1998, the Court held that Title VII also prohibits same-sex sexual harassment.⁴⁵ In *Oncale v. Sundowner Offshore Servs., Inc.*, a male employee brought a Title VII claim, alleging severe sexual harassment and verbal abuse by male coworkers and supervisors.⁴⁶ Justice Scalia, authoring the opinion for a unanimous Court, declared that while same-sex sexual harassment was not the “principal evil” Title VII was enacted to prevent, “statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils.”⁴⁷ The Court clarified that “it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed,”⁴⁸ noting Title VII does not prohibit all forms of workplace harassment, but it does bar all types of “discriminat[ion] ‘because of sex.’”⁴⁹ Under Title VII, the key “is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.”⁵⁰ Thus, the *Oncale* Court held that same-sex sexual harassment claims were covered under Title VII’s broad ambit.⁵¹ Based on the Court’s *Price Waterhouse* and *Oncale* decisions, Title VII

42. *Id.* at 251 (citing *Manhart*, 435 U.S. at 707, n.13).

43. *Id.* at 250. The Court held that Title VII condemned even those decisions based on a mixture of legitimate and illegitimate concerns. *Id.* at 241. Thus, if an employer considered both gender and other legitimate factors when taking an adverse employment action, that decision was “because of” sex” and in violation of Title VII. *Id.*

44. *Id.* at 240. The *Price Waterhouse* Court also noted that while “stereotyped remarks can certainly be *evidence* that gender played a part” in a Title VII action, the key question is always whether “stereotyping played a motivating role in an employment decision.” *Id.* at 251-52.

45. *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 76 (1998).

46. *Id.* at 77.

47. *Id.* at 79.

48. *Id.*

49. *Id.* at 80.

50. *Id.* (citing *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 80 (1993) (Ginsburg, J., concurring)).

51. *See Oncale*, 523 U.S. at 79-80 (alterations in original) (“Title VII prohibits ‘discriminat[ion] . . . because of . . . sex,’ [which] ‘includes . . . sexual harassment of any kind that meets the statutory requirements.’”).

prohibits employers from even considering sex when making employment decisions.⁵² As a result of the two cases, transgender employees began to find some success alleging a Title VII violation based on impermissible sexual stereotyping.⁵³

(2) *The EEOC & Title VII's Sex-Based Prohibition Pre-Bostock*

Almost fifty years after Title VII was passed, the EEOC first considered whether the Court's broad application of Title VII also provided discrimination protections to transgender workers.⁵⁴ As a result, in 2012, the EEOC found that gender identity was covered based on a plain interpretation of Title VII's statutory language,⁵⁵ and in 2015, found that sexual orientation was also protected under Title VII's broad ambit.⁵⁶ The EEOC clarified that "it [did] not recognize[] any new protected characteristics under Title VII," but simply "applied existing Title VII precedent to sex discrimination claims raised by LGBT individuals" to determine that both gender identity and sexual orientation were included under Title VII's sex discrimination prohibition.⁵⁷ The EEOC's determination impacted millions

52. See Kelly M. Peña, *LGBT Discrimination in the Workplace: What Will the Future Hold?*, 92 FLA. BAR J. 35, 35-36 (2018) ("As set forth in *Price Waterhouse* and *Oncale*, Title VII prohibits an employer from taking sex into account or relying upon "sex-based considerations" when making decisions that impact an employee or prospective employee.").

53. See, e.g., *Barnes v. City of Cincinnati*, 401 F.3d 729, 737 (6th Cir. 2005) (holding that a transgender police officer's demotion because he did not "conform to sex stereotypes concerning how a man should look and behave" was a valid Title VII sex discrimination claim) (citing *Smith v. City of Salem*, 378 F.3d 566, 573-75 (6th Cir. 2004) ("Sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as 'transsexual,' is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity.")).

54. See Hillman, *supra* note 2, at 12.

55. See *Macy v. Holder*, EEOC Appeal No. 0120120821, 2012 WL 1435995, at *1, *14 (Apr. 20, 2012) ("[W]e conclude that intentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination 'based on . . . sex,' and . . . violates Title VII."); see Rice, *supra* note 20, at 429-35 (analyzing use of the word "sex" in Title VII's statutory language).

56. See *Baldwin v. Foxx*, EEOC Appeal No. 0120133080, 2015 WL 4397641, at *5 (July 15, 2015) ("[W]e conclude that sexual orientation is inherently a 'sex-based consideration,' and an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII.").

57. See, e.g., *What You Should Know About EEOC and the Enforcement Protections for LGBT Workers*, EEOC (Apr. 25, 2016), <https://content.govdelivery.com/accounts/USEEOC/bulletins/1456e7e> (noting that the EEOC did "not recognize[] any new protected characteristics under Title VII. Rather, it [] applied existing Title VII

of LGBT employees in the workforce.⁵⁸

While EEOC precedent does not bind federal courts,⁵⁹ three circuit courts addressing whether Title VII's sex discrimination protections extended to sexual orientation or gender identity were persuaded by the EEOC's reasoning, and each held in the affirmative, two in *en banc* decisions.⁶⁰ The *en banc* opinions from the Second and Seventh Circuits overturned prior contrary precedent and held that sexual orientation is included under Title VII's discrimination protections by applying precedent from *Price Waterhouse*⁶¹ and *Oncale*.⁶² The Sixth Circuit determined that gender identity was also included within Title VII's protective umbrella, utilizing similar reasoning.⁶³ The Seventh Circuit *en banc Hively* case was not

precedents to sex discrimination claims raised by LGBT individuals.”).

58. See, e.g., Tristan Akers, *At a Crossroads: LGBT Employment Protections and Religious Exemptions After Bostock v. Clayton Cnty.*, 82 OHIO ST. L.J. ONLINE 115, 117 (2021) (“The history of employment protections for LGBT individuals is, like many aspects of American history, a story of federalism. The governmental landscape pre-*Bostock* was a patchwork of state statutes, municipal ordinances, and executive orders from governors and mayors.”).

59. See *McDonald v. Santa Fe Train Transp. Co.*, 427 U.S. 271, 279 (1976) (observing Supreme Court's assertion that EEOC interpretations are “entitled to great deference.”); *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 360 (2013) (“The weight of deference afforded to agency interpretations...depends upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade.”) (internal quotations omitted).

60. See *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 107-08 (2d Cir. 2018), *aff'd sub non*; *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1754 (2020) (overruling contradictory precedent and holding Title VII does prohibit discrimination based on sexual orientation). See generally *Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339 (7th Cir. 2017) (overruling contradictory precedent and holding Title VII does prohibit discrimination based on sexual orientation); *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018), *aff'd sub nom*; *Bostock*, 140 S. Ct. at 1754 (2020) (holding Title VII does prohibit discrimination based on gender identity). See also Hillman, *supra* note 27, at 15, 24, 34 (discussing the *Zarda*, *Hively*, and *Harris* cases).

61. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 260 (1989) (holding that an employer violates Title VII if gender was a motivating factor in the employment decision).

62. See *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 79-80 (1998) (holding that Title VII does not exclude same sex harassment from the statutory language).

63. See *EEOC*, 884 F.3d at 574-75 (finding discrimination against employees because of their failure to conform to sex stereotypes or gender status is prohibited under Title VII).

appealed and became final.⁶⁴ The Eleventh Circuit, in contrast, twice held in a fifteen-month period that Title VII prohibitions based on sex did not include discrimination based on sexual orientation and denied a request for *en banc* review in each case.⁶⁵ Certiorari petitions were filed in the Second, Sixth, and Eleventh Circuit cases and, while the Second and Sixth Circuits reached similar results, the Court granted certiorari in all three cases due to the split created by the Eleventh Circuit.⁶⁶

Similar to the EEOC, the *en banc* Second and Seventh Circuits, as well as the Sixth Circuit, relied on the *Price Waterhouse* and *Oncale* decisions as a foundational basis to determine that sexual orientation and gender identity were included within Title VII's sex discrimination protections.⁶⁷ However, the Court's *Bostock* decision did not utilize *Price Waterhouse* to make the determination that Title VII's protections "because of sex" include discrimination, even in part, based on sexual orientation or gender identity.⁶⁸ Instead, the majority opinion rested on the plain language of the statute in a classic textualist approach authored by conservative Justice Gorsuch.⁶⁹

64. See *Hively*, 853 F.3d at 352, 360.

65. See generally *Evans v. Ga. Reg'l Hosp.*, 850 F.3d 1248 (11th Cir. 2017), *reh'g en banc denied, cert. denied.*; *Bostock v. Clayton Cty. Bd. of Comm'rs*, 723 F. App'x 964, 964-65 (11th Cir. 2018) (per curiam), *reh'g en banc denied*, 894 F.3d 1335 (11th Cir. 2018)); Hillman, *supra* note 27, at 8-19 (discussing *Evans* and *Bostock*).

66. See *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 107-08 (2d Cir. 2018) (holding that Title VII does prohibit discrimination based on sexual orientation); *Bostock v. Clayton Cty. Bd. of Comm'rs*, 723 F. App'x at 964-65 (holding that Title VII does not prohibit discrimination based on sexual orientation); *EEOC*, 884 F.3d at 560 (holding Title VII does prohibit discrimination based on gender identity); *Bostock*, 140 S. Ct. at 1754.

67. See generally *Zarda*, 883 F.3d at 107-08, *aff'd sub non*; *Bostock*, 140 S. Ct. at 1754 (2020) (overruling contradictory precedent and holding Title VII does prohibit discrimination based on sexual orientation); see generally *Hively*, 853 F.3d at 339 (overruling contradictory precedent and holding Title VII does prohibit discrimination based on sexual orientation); See generally *EEOC*, 884 F.3d at 560, *aff'd sub nom*; *Bostock*, 140 S. Ct. at 1754 (2020) (holding Title VII does prohibit discrimination based on gender identity).

68. *Bostock*, 140 S. Ct. at 1754 (holding that Title VII does not prohibit discrimination based on sexual orientation or gender identity).

69. See *id.* at 1731.

B. THE BOSTOCK CASE — “BECAUSE OF SEX”

The monumental *Bostock* decision plugged a hole that had existed for almost five years. While the Court held in its 2015 *Obergefell v. Hodges*⁷⁰ decision that same-sex marriage was a protected constitutional right, those who exercised that right could be legally fired from their jobs without any recourse or protection in multiple states.⁷¹ Less than two weeks shy of the five-year anniversary of *Obergefell*, the Court provided such protections when it held that an employer who fires a worker based, even in part, on sexual orientation or gender identity violates Title VII’s sex discrimination prohibition.⁷² While the significant decision itself was history making, it was especially surprising to some based on the drastic changes in the Court’s makeup in the years between the 2015 *Obergefell* marriage equality decision and the 2020 *Bostock* Title VII decision.⁷³

The year after the Court’s *Obergefell* decision, conservative Justice Scalia died and was replaced in 2017 with conservative Justice Gorsuch,⁷⁴ and in 2018, Justice Kennedy retired from the Court and was replaced with conservative Justice Kavanaugh,⁷⁵ shifting the Court’s 5-4 majority from liberal to conservative.⁷⁶ Notably, although Justice Kennedy was appointed by Republican President Reagan and primarily ruled conservatively, he had joined the liberal justices and became the swing vote in favor of LGBT rights, authoring all major majority opinions advancing rights for the LGBT community.⁷⁷ *Bostock* was the Court’s first major LGBT case following Justice Scalia’s death, Justice Kennedy’s retirement, and the appointment of two conservative justices to replace them.⁷⁸ Many LGBT civil rights activists feared the now-conservative Court would reject Title VII protections based on sexual orientation and gender identity and halt further

70. See 576 U.S. 644, 645 (2015).

71. See McGovern, *supra* note 5 (finding LGBTQA communities faced continued workplace discrimination).

72. See *Bostock*, 140 S. Ct. at 1754 (“An employer who fires an individual merely for being gay or transgender defies the law.”).

73. See *Justices 1789 – Present*, SUPREME COURT, https://www.supremecourt.gov/about/members_text.aspx (last visited Jun. 10, 2023).

74. *Id.*

75. *Id.*

76. *Id.*

77. See Scott Bomboy, *Justice Kennedy’s Legacy in the Gay Rights Decisions*, NAT’L CONST. CTR. CONST. DAILY BLOG (June 27, 2018), <https://constitutioncenter.org/blog/justice-kennedys-legacy-in-the-gay-rights-decisions> (noting Justice Kennedy’s legacy in advancing LGBT rights).

78. See *supra* note 73.

progression of LGBT rights.⁷⁹

Despite the ideological shift in the Court, on June 15, 2020, it announced in a 6-3 decision that “[a]n employer who fires an individual merely for being gay or transgender defies the law.”⁸⁰ Writing for the six-person majority, Justice Gorsuch, Justice Scalia’s replacement on the bench, reasoned that “an employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role... exactly what Title VII forbids.”⁸¹ In determining that Title VII protections against workplace discrimination apply to LGBT employees, the Court continued the LGBT community’s forward momentum toward full and equal rights and expanded workplace and hiring protections for many vulnerable LGBT employees.⁸²

The *Bostock* case consolidated three Title VII circuit court cases that involved three separate plaintiffs.⁸³ In each case an employer fired an employee based on sexual orientation or gender identity.⁸⁴ In *Bostock*, a child welfare advocate sued alleging he was illegally fired after he began participating in a gay softball league.⁸⁵ In *Zarda*, a skydiving instructor sued, alleging he was illegally fired after he told a client he was gay.⁸⁶ In *R.G. & G.R. Harris Funeral Homes, Inc.*, a transgender funeral home employee sued when she was fired after informing her employer she was transitioning from male to female and would begin presenting at work as a woman.⁸⁷ Based on the circuit split regarding the issue, the Supreme Court granted certiorari to determine the extent of Title VII’s reach.⁸⁸ In holding that Title VII’s sex-

79. See, e.g., Alexa Bradley, *Bostock v. Clayton County: An Unexpected Victory*, MARQUETTE FACULTY BLOG (July 17, 2020), <https://law.marquette.edu/facultyblog/2020/07/bostock-v-clayton-county-an-unexpected-victory/> (addressing concerns regarding whether changes to the Court’s makeup would halt further progression toward LGBT equality).

80. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1737 (2020).

81. *Id.*

82. *Id.*

83. *Id.* at 1737-38. See also Jon W. Davidson, *How the Impact of Bostock v. Clayton County on LGBT Rights Continues to Expand*, ACLU (June 15, 2022), <https://www.aclu.org/news/civil-liberties/how-the-impact-of-bostock-v-clayton-county-on-lgbtq-rights-continues-to-expand>.

84. *Bostock*, 140 S. Ct. at 1737-38.

85. *Id.*

86. *Zarda v. Altitude Express*, 883 F.3d 100, 108-09 (2d Cir. 2018).

87. *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 566-67 (6th Cir. 2018).

88. *Bostock*, 140 S. Ct. at 1737.

based protections included discrimination based on sexual orientation and gender identity, the Court extended important federal statutory protections to the LGBT community, a major step forward in protecting millions of LGBT employees from discrimination and advancing equal rights for LGBT Americans.⁸⁹

(1) *The Majority Opinion: “Only the Written Words Matter”*

In the first two sentences of the *Bostock* majority opinion, Justice Gorsuch acknowledged the magnitude of the Civil Rights Act of 1964, and observed that while “small gestures can have unexpected consequences, . . . major initiatives practically guarantee them.”⁹⁰ A strict textualist, Justice Gorsuch, joined by Chief Justice Roberts and Justices Ginsburg, Breyer, Sotomayor, and Kagan, authored the majority opinion in favor of the LGBT plaintiffs, acknowledging that “those who adopted the Civil Rights Act might not have anticipated their work would lead to this particular result.”⁹¹ Nonetheless, the Court majority held:

In Title VII, Congress adopted broad language making it illegal for an employer to rely on an employee’s sex when deciding to fire that employee. We do not hesitate to recognize today a necessary consequence of that legislative choice: An employer who fires an individual merely for being gay or transgender defies the law.⁹²

To reach this conclusion, the Court focused on Section 703(a)(1) of Title VII, the statute’s causation standard, and the ordinary public meaning of Title VII’s text at the time of its adoption in 1964 to determine the legal meaning of “because of . . . sex.”⁹³ Utilizing prior case law, the Court found that the meaning of “because of” is “by reason of” or “on account of,”⁹⁴ requiring the Court to apply the “simple” and “traditional” *per se* discrimination test to determine “but-for causation.”⁹⁵ This test determines whether a result would have occurred absent an asserted cause; so long as “sex” was one “but-for” cause of a negative employment action, Title VII is

89. *Id.*

90. *Id.* at 1737.

91. *Id.*

92. *Id.* at 1754.

93. *See id.* at 1740-42 (finding that “it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.”).

94. *Id.* (citing *Univ. of Texas Sw. Med Ctr. v. Nassar*, 570 U.S. 338, 350 (2013) (citing *Gross v. FBL Fin. Svcs., Inc.*, 557 U.S. 167, 176 (2009))).

95. *See id.* at 1738 (employing the traditional “but for” analysis).

triggered.⁹⁶ The Court then addressed the meaning of “discriminate” in 1964, determining it meant “treating that individual worse than others who are similarly situated,” and, noting precedent, added that the “difference in treatment based on sex must be intentional.”⁹⁷

Following its analysis, the Court majority noted that a “straightforward rule emerges”: “A Title VII statutory violation takes place when an employer intentionally considers, even in part, an employee’s sex when deciding to take an adverse employment action, such as firing the employee.”⁹⁸ The Court noted that because Title VII protects individuals, it is irrelevant if factors other than the plaintiff’s sex influenced the employer’s decision or if the employer treated women as a group the same as men as a group.⁹⁹ So long as the employer took an adverse action based—even in part—on “traits or actions it would not have questioned in members of a different sex,” Title VII is violated.¹⁰⁰ The Court announced that “[t]he statute’s message for our cases is equally simple and momentous: An individual’s homosexuality or transgender status is not relevant to employment decisions. That’s because it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.”¹⁰¹

96. *See id.* (“A but-for test directs us to change one thing at a time to see if the outcome changes. If it does, we have found a but for cause.”).

97. *See id.* at 1740 (citing *Watson v. Fort Worth Bank & Tr.*, 487 U.S. 977, 986 (1988)).

98. *Id.* at 1741.

99. *Id.*

100. *Id.*

101. *See id.* Justice Gorsuch provided examples of possible discrimination to determine whether sex was necessarily involved in any decision based on sexual orientation or gender identity. The first example addressed sexual orientation:

Consider, for example, an employer with two employees, both of whom are attracted to men. The two individuals are, to the employer’s mind, materially identical in all respects, except that one is a man and the other a woman. If the employer fires the male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague. Put differently, the employer intentionally singles out an employee to fire based in part on the employee’s sex, and the affected employee’s sex is a but-for cause of his discharge.

Id. at 1741. The second example provided by the court states:

[T]ake an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth. Again, the individual employee’s sex plays an unmistakable and impermissible role in the discharge decision.

Id. at 1741-42.

The Court acknowledged that it was unlikely that the 1964 Congress anticipated that Title VII would lead to LGBT workplace protections but noted that what a 1964 Congress may have anticipated was not a sufficient reason to deny protections that the plain language of the statute required.¹⁰² Utilizing Justice Scalia's *Oncale* observance, Justice Gorsuch wrote:

To be sure, the statute's application in these cases reaches 'beyond the principal evil' legislators may have intended or expected to address. But 'the fact that [a statute] has been applied in situations not expressly anticipated by Congress' does not demonstrate ambiguity; instead, it simply 'demonstrates [the] breadth' of a legislative command. And 'it is ultimately the provisions of' those legislative commands 'rather than the principal concerns of our legislators by which we are governed.'¹⁰³

Focusing on the broad language utilized and adopted by the 1964 Congress, the Court majority noted that the enacting Congress could have selected limiting language that would have precluded outcomes not considered at the time of enactment, but it chose instead to enact the statute with expansive language in its efforts to broadly prevent workplace discrimination.¹⁰⁴ Gorsuch wrote that by focusing on individual discrimination and finding employers in violation of Title VII whenever sex is a but-for cause of the employee's harm, Congress all but guaranteed unexpected applications would emerge over time.¹⁰⁵

The Court identified the three leading cases that supported its holding,

102. *Id.* at 1751.

103. *Id.* at 1751-52 (internal citations omitted) (noting that "[t]he employer's position also proves too much. If we applied Title VII's plain text only to applications some (yet-to-be-determined) group expected in 1964, we'd have more than a little law to overturn."). The Court specifically addressed *Oncale*, noting, "How many people in 1964 could have expected that the law would turn out to protect male employees? Let alone to protect them from harassment by other male employees? As we acknowledged at the time, 'male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. Yet the Court did not hesitate to recognize that Title VII's plain terms forbade it.'" *Id.* at 1751 (citing *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 79 (1998)).

104. *See* *Bostock*, 140 S. Ct. at 1749 (noting that the broad language in Title VII could lead to unexpected results).

105. *Id.* at 1753. Justice Gorsuch addressed the broad language used in Title VII: "Title VII's prohibition of sex discrimination in employment is a major piece of federal civil rights legislation. It is written in starkly broad terms. It has repeatedly produced unexpected applications, at least in the view of those on the receiving end of them. Congress's key drafting choices—to focus on discrimination against individuals and not merely between groups and to hold employers liable whenever sex is a but-for cause of the plaintiff's injuries—virtually guaranteed that unexpected applications would emerge over time." *Id.*

Phillips v. Martin Marietta Corp.,¹⁰⁶ *Los Angeles Dept. of Water and Power v. Manhart*,¹⁰⁷ and *Oncale v. Sundowner Offshore Services, Inc.*,¹⁰⁸ to illustrate three key lessons supporting its *Bostock* holding. The majority opinion rejected counterarguments articulated in the dissenting opinions and those advanced by the employers, recognizing (1) how an employer labels a discriminatory action is irrelevant, (2) that sex need not be the primary cause of an adverse action if it is “a” cause, and (3) that it is irrelevant how an employer treats “groups” of employees because Title VII’s focus is on the individual.¹⁰⁹

By finding the text of the statute broad and unambiguous, the *Bostock* majority determined that a person’s sexual orientation or transgender status is inextricably tied with a person’s sex such that an employer cannot discriminate on those bases without discriminating “because of sex,” which Title VII forbids.¹¹⁰ Thus, while historical treatment of the definition of “sex” in Title VII did not include protections based on either sexual orientation or gender identity, the Court’s decision held that the broad language of Title VII included protections to both.¹¹¹ Justice Gorsuch concluded by confirming that his textualist approach was correct in a final concise summary of the holding:

Ours is a society of written laws. Judges are not free to overlook plain statutory commands on the strength of nothing more than suppositions about intentions or guesswork about expectations. In Title VII, Congress adopted broad language making it illegal for an employer to rely on an employee’s sex when deciding to fire that employee. We do not hesitate to recognize today a necessary consequence of that legislative choice: An employer who fires an individual merely for being gay or transgender defies the law.¹¹²

(2) *Alito’s Dissent*:

Justice Alito, joined by Justice Thomas, wrote a fifty-three-page dissent, with an additional eighty-nine pages in appendices, in which he claimed to

106. 400 U.S. 542 (1971).

107. 435 U.S. 702 (1978).

108. 523 U.S. 75 (1998).

109. *Bostock*, 140 S. Ct. at 1754.

110. *See id.* at 1737.

111. *See id.* at 1755 (Alito, J., dissenting) (noting ordinary public meaning of sex discrimination in 1964 would not include discrimination on the basis of sexual orientation).

112. *Id.* at 1754.

assess the plain language of Title VII utilizing a textualist approach.¹¹³ His assessment resulted in a conclusion in direct contrast to the majority opinion. Finding that the term “sex” referred to in Title VII had a different meaning than sexual orientation and gender identity, Alito’s dissent reached the conclusion that this “difference in meaning” excluded sexual orientation and gender identity from Title VII’s reach.¹¹⁴ In his terse dissent, Alito labeled the Court’s decision as “arrogant” and accused the majority of legislating from the bench.¹¹⁵ Arguing that only Congress had the ability to extend workplace discrimination protections based on sexual orientation and/or gender identity, he dismissed the majority’s analysis that discrimination based on sexual orientation or gender identity is not possible without considering a person’s sex.¹¹⁶

Like Justice Gorsuch’s textualist approach to Title VII’s language, Justice Alito agreed the proper approach required an analysis of the plain meaning of the statute without consideration of legislative history or the subjective intent of the drafters at the time the statute was enacted.¹¹⁷ However, unlike the majority approach, he focused on the dictionary definition of “sex” at the time the statute was enacted and concluded that “sexual orientation” was not included in any definition of sex.¹¹⁸ Thus, Alito determined that the “discrimination” prohibited in Title VII meant “equal treatment for men and women,” and that “[i]n 1964, ordinary Americans reading the text of Title VII would not have dreamed that discrimination because of sex meant discrimination because of sexual orientation, much less gender identity.”¹¹⁹

While Alito found that the legislators enacting Title VII in 1964 did not intend to include discrimination protections based on sexual orientation or gender identity, he did not resolve why other likely unforeseen protections were determined to be covered under Supreme Court precedent such as

113. *See id.* (Alito, J., dissenting) (arguing that the majority opinion was legislating and not interpreting the statutory language).

114. *See id.* at 1755 (Alito, J., dissenting) (“Title VII’s prohibition of discrimination because of “sex” still means what it has always meant. But the Court is not deterred by these constitutional niceties. Usurping the constitutional authority of the other branches, the Court has essentially taken H.R. 5’s provision on employment discrimination and issued it under the guise of statutory interpretation. A more brazen abuse of our authority to interpret statutes is hard to recall.”).

115. *See id.* at 1758 (Alito, J., dissenting) (arguing that the Court’s decision is not only arrogant but also wrong).

116. *See id.* (arguing that an employer can discriminate on the grounds of sexual orientation and gender identity without accounting for the employee’s sex).

117. *See id.* at 1756 (Alito, J., dissenting).

118. *Id.*

119. *Id.* at 1767 (Alito, J., dissenting).

discrimination based on motherhood, same-sex sexual harassment, or sexual stereotypes.¹²⁰ In his dissent, Alito criticized the majority's use of Justice Scalia's words and rationale to support its holding as an accurate textualist reading of the statute:¹²¹

The Court attempts to pass off its decision as the inevitable product of the textualist school of statutory interpretation championed by our late colleague Justice Scalia, but no one should be fooled. The Court's opinion is like a pirate ship. It sails under a textualist flag, but what it actually represents is a theory of statutory interpretation that Justice Scalia excoriated—the theory that courts should ‘update’ old statutes so that they better reflect the current values of society.¹²²

Despite Justice Alito's dissenting comments, Justice Scalia clearly advocated that courts should “reject judicial speculation about both the drafters’ extra-textually derived purposes and the desirability of the fair reading’s anticipated consequences.”¹²³ Scalia, as a loyal textualist, was committed to the belief that when a law's plain language implies a result that its drafters did not imagine, courts should follow the words of the statute.¹²⁴ Nonetheless, Alito's dissent chastised the majority and accused them of failing to fully consider the far-reaching implications of the *Bostock* holding.¹²⁵

The far-reaching implications Alito referred to included threats to “freedom of religion, freedom of speech, and personal privacy and safety,” along with an impact on the transgender military ban, transgender school bathroom policies, transgender students competing in sports based on their identified gender, health plan coverage for sex reassignment surgery, transgender prisoners, and gender changes on drivers' licenses and birth

120. See *id.* at 1768 (Alito, J., dissenting).

121. See *id.* at 1755-56 (Alito, J., dissenting) (stating that majority opinion's statutory interpretation was an abuse of power and preposterous).

122. *Id.*

123. See ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 23 (2012) (“We look for meaning in the governing text, ascribe to that text the meaning that it has borne from its inception, and reject judicial speculation about both the drafters’ extra-textually derived purposes and the desirability of the fair reading’s anticipated consequences.”).

124. See *Onacle v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 79 (1998) (announcing that “it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.”).

125. See *Bostock*, 140 S. Ct. at 1778 (Alito, J., dissenting) (“What the [C]ourt has done today—interpreting discrimination because of “sex” to encompass discrimination because of sexual orientation or gender identity—is virtually certain to have far-reaching consequences.”).

certificates.¹²⁶ Alito correctly noted that it would be difficult to distinguish *Bostock* when interpreting similar federal statutes that prohibit sex-based discrimination such as Title IX, the Fair Housing Act, and the Affordable Care Act (“ACA”).¹²⁷ And, like Justice Scalia’s dissent in *United States v. Windsor*, in which he exasperatedly noted that it was only a matter of time before the marriage equality “state-law shoe” would drop¹²⁸ and provided a helpful “script” for such arguments,¹²⁹ Justice Alito noted that “[o]ver 100 federal statutes prohibit discrimination because of sex”¹³⁰ and provided a “script” of laws vulnerable to *Bostock* in Appendix C.¹³¹ In this way, Justice Alito effectively assisted LGBT civil rights attorneys, courts, and presidential administrations evaluating federal statutes with discriminatory prohibitions similar to Title VII.¹³² Like Scalia’s *Windsor* prediction, Alito’s forecast in *Bostock* was similarly prophetic.¹³³

126. *Id.* at 1778-79 (Alito, J., dissenting).

127. *See id.* at 1783 (Alito, J., dissenting) (noting “.... today’s decision may have effects that extend well beyond antidiscrimination statutes.”).

128. *See United States v. Windsor*, 570 U.S. 744, 792 (2013) (“My guess is that the majority, while reluctant to suggest that defining the meaning of ‘marriage’ in federal statutes is unsupported by any of the Federal Government’s enumerated powers, nonetheless needs some rhetorical basis to support its pretense that today’s prohibition of laws excluding same-sex marriage is confined to the Federal Government (leaving the second, state-law shoe to be dropped later, maybe next Term). But I am only guessing.”).

129. *See id.* at 799 (noting “the real rationale of today’s opinion, whatever disappearing trail of its legalistic argle-bargle one chooses to follow, is that DOMA is motivated by ‘bare . . . desire to harm’ couples in same-sex marriages. How easy it is, indeed how inevitable, to reach the same conclusion with regard to state laws denying same-sex couples marital status. Consider how easy (inevitable) it is to make . . . substitutions in a passage from today’s opinion . . .”).

130. *See Bostock*, 140 S. Ct. at 1778 (Alito, J., dissenting) (“What the [C]ourt has done today—interpreting discrimination because of “sex” to encompass discrimination because of sexual orientation or gender identity—is virtually certain to have far-reaching consequences.”).

131. *Id.*

132. *See id.* (Alito, J., dissenting) (noting, “What the Court has done today—interpreting discrimination because of “sex” to encompass discrimination because of sexual orientation or gender identity—is virtually certain to have far-reaching consequences. Over 100 federal statutes prohibit discrimination because of sex.”).

133. *See id.* (Alito, J., dissenting) (stating “Although the Court does not want to think about the consequences of [*Bostock v. Clayton County*], we will not be able to avoid those issues for long. The entire Federal Judiciary will be mired for years in disputes about the reach of the Court’s reasoning.”).

(3) *Kavanaugh's Dissent*

Rather than join Justice Alito's dissent, Justice Kavanaugh authored his own.¹³⁴ Claiming to follow the same textualist approach as the majority, Kavanaugh accused it of violating separation of powers and justified his dissent on the fact that Congress had addressed the issue, considered "numerous bills," and had not "shouldered a bill over the legislative finish line."¹³⁵ Accusing the majority of "expanding" Title VII's reach and legislating from the bench, he postulated that only Congress had the authority to amend Title VII to reach LGBT employees: "Judges may not rewrite the law simply because of their own policy views. Judges may not update the law merely because they think that Congress does not have the votes or the fortitude. Judges may not predictively amend the law just because they believe that Congress is likely to do it soon anyway."¹³⁶ However, Kavanaugh does not account for the Court's Title VII jurisprudence finding that sex-related prohibitions were not likely considered by the enacting Congress.¹³⁷ As the majority points out, "[W]hen Congress chooses not to include any exceptions to a broad rule, courts apply the broad rule. And that is exactly how this Court has always approached Title VII. 'Sexual harassment' is conceptually distinct from sex discrimination, but it can fall within Title VII's sweep. Same with 'motherhood discrimination.' . . . As enacted, Title VII prohibits all forms of discrimination because of sex, however they may manifest themselves or whatever other labels might attach to them."¹³⁸

Instead, Kavanaugh's dissent highlights other types of employment discrimination that were not included in Title VII, including age and disability discrimination.¹³⁹ He notes that to provide those protections,

134. *Id.* at 1822 (Kavanaugh, J., dissenting).

135. *Id.* at 1824 (Kavanaugh, J., dissenting) (referencing subsequent legislative history although the practice has been described as "particularly dangerous" during statutory interpretation).

136. *Id.* (Kavanaugh, J., dissenting) (accusing the Court of rewriting the law).

137. The majority addressed examples the Court found were Title VII sex discrimination violations likely not considered by the enacting Congress, noting:

How many people in 1964 could have expected that the law would turn out to protect male employees? Let alone to protect them from harassment by other male employees? As we acknowledged at the time, 'male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. Yet the Court did not hesitate to recognize that Title VII's plain terms forbade it. *Id.* at 1751 (citing *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 79 (1998)).

138. *Bostock*, 140 S. Ct. at 1747 (internal citations omitted.).

139. *Id.* at 1824. (Kavanaugh, J., dissenting).

Congress did not “unilaterally rewrite or update the law,” but “enacted new employment discrimination laws.”¹⁴⁰ However, Kavanaugh does not consider or address that sexual orientation and gender identity are sex-related, unlike age and disability discrimination. Perhaps due to this omission, Kavanaugh’s dissent erroneously focuses on failed attempts by Congress to pass related laws providing sexual orientation discrimination prohibitions.¹⁴¹ Again, Kavanaugh does not address the fact that congressional history should have no impact on a court’s interpretation of existing law, as pointed out in the majority opinion: “[S]peculation about why a later Congress declined to adopt new legislation offers a ‘particularly dangerous’ basis on which to rest an interpretation of existing law a different and earlier Congress did adopt,”¹⁴² including a quote from Justice Scalia, “Arguments based on subsequent legislative history . . . should not be taken seriously, not even in a footnote.”¹⁴³

Along with a focus on legislative history, Kavanaugh’s dissent focuses on literal versus ordinary meaning to support his position, even though both the majority and Kavanaugh agree that the meaning of “discriminate because of sex” was substantially the same when the statute was enacted and when deciding the case.¹⁴⁴ Further, Kavanaugh avoids policy, other than acknowledging that LGBT employees “have advanced powerful policy arguments and can take pride in the result.”¹⁴⁵ Although his dissent does not

140. *Id.* (Kavanaugh, J., dissenting).

141. *Id.* (Kavanaugh, J., dissenting). Of note, Justice Kavanaugh’s dissent addresses only sexual orientation and not gender identity, although both issues were before the Court.

142. *Id.* at 1747 (“All we can know for certain is that speculation about why a later Congress declined to adopt new legislation offers a “particularly dangerous” basis on which to rest an interpretation of an existing law a different and earlier Congress did adopt). *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990); *see also* *United States v. Wells*, 519 U.S. 482, 496 (1997).

143. *Bostock*, 140 S. Ct. at 1747 (quoting Scalia’s concurrence in *Sullivan v. Finkelstein*, 496 U.S. 617, 632 (1990) (Scalia, J., concurring). “All we can know for certain is that speculation about why a later Congress declined to adopt new legislation offers a “particularly dangerous” basis on which to rest an interpretation of an existing law a different and earlier Congress did adopt.” *Pension Benefit Guar.*, 496 U.S. at 650; *see also* *United States*, 519 U.S. at 496; *Sullivan*, 496 U.S. at 632 (Scalia, J., concurring) (“Arguments based on subsequent legislative history . . . should not be taken seriously, not even in a footnote.”).

144. Compare Kavanaugh’s observations that “in this case . . . the ordinary meaning of ‘discriminate because of sex’ was the same in 1964 as it is now,” *Bostock*, 140 S. Ct. at 1778 (Alito, J., dissenting) with the majority’s observation that “[a]s it turns out, [discriminate] meant . . . roughly what it means today.” *Id.* at 1740.

145. *Id.* at 1837 (Kavanaugh, J., dissenting).

refer to transgender employees, it does recognize “the important victory achieved . . . by gay and lesbian Americans.”¹⁴⁶ In contrast with his fellow dissenters, Kavanaugh attempts to soften his opinion by acknowledging that “[m]illions of gay and lesbian Americans have worked hard for many decades to achieve equal treatment in fact and in law.”¹⁴⁷

(4) *Issues Left Unaddressed in Bostock*

The *Bostock* majority acknowledged that there were several Title VII issues that were raised but left unaddressed in its opinion and specifically identified the reason for the omission: those issues were not before the Court. The majority opinion did, however, address the employers’ stated concerns regarding those issues, including a potentially broad application of *Bostock* beyond Title VII’s employment realm:

[W]e do not purport to address bathrooms, locker rooms, or anything else of the kind. The only question before us is whether an employer who fires someone simply for being homosexual or transgender has discharged or otherwise discriminated against that individual ‘because of such individual’s sex.’ As used in Title VII, the term ‘discriminate against’ refers to ‘distinctions or differences in treatment that injure protected individuals.’¹⁴⁸ Firing employees because of a statutorily protected trait surely counts. Whether other policies and practices might or might not qualify as unlawful discrimination or find justifications under other provisions of Title VII are questions for future cases, not these.¹⁴⁹

The majority also did not address whether the *Bostock* opinion would be impacted by the Religious Freedom Restoration Act of 1993 (“RFRA”) or

146. *Id.* (Kavanaugh, J., dissenting).

147. *Id.* (Kavanaugh, J., dissenting).

148. *Id.* at 1753.

149. *Id.* While the *Bostock* Court did not address these issues, the EEOC had addressed sex-segregated bathrooms prior to the *Bostock* case. See *Lusardi v. McHugh*, EEOC DOC 0120133395, 2015 WL 1607756, at *8 (Apr. 1, 2015). In *Lusardi*, the Commission held that denying a transgender employee access to the bathroom corresponding to the employee’s gender identity is a violation of Title VII that is not resolved by providing access to a single-use bathroom. *Id.* Further, the Commission clarified that an agency could not condition facility access, or any other “terms, conditions, or privileges of employment,” on whether the employee had undergone medical steps in order to prove their gender identity. *Id.* (“Nothing in Title VII makes any medical procedure a prerequisite for equal opportunity (for transgender individuals, or anyone else). An agency may not condition access to facilities — or to other terms, conditions, or privileges of employment — on the completion of certain medical steps that the agency itself has unilaterally determined will somehow prove the bona fides of the individual’s gender identity.”).

the First Amendment's Free Exercise Clause.¹⁵⁰ However, Justice Gorsuch, along with the other five justices in the majority opinion, noted that RFRA is a "kind of a super statute, displacing the normal operation of other federal laws," and commented that "it *might* supersede Title VII's commands" in "appropriate cases."¹⁵¹ It also left unaddressed issues related to how the case would impact other federal statutes that provide discrimination protections based on sex, clarifying that those were not issues before the Court and were "questions for future cases, not these."¹⁵²

II. *BOSTOCK'S* IMPACT ON EMPLOYMENT LAW

On June 15, 2020, when the Court announced the *Bostock* decision, millions of LGBT Americans received first-time protections from intentional sex discrimination in the workplace.¹⁵³ Prior to *Bostock*, LGBT employees were at the mercy of a "complicated patchwork of local and state laws and a mixed bag of conflicting federal court interpretations of Title VII" to determine whether legal protections from workplace discrimination were available.¹⁵⁴ In *Bostock's* wake, LGBT employees in all fifty states

150. See *Bostock*, 140 S. Ct. at 1753-54 (noting "[U]nder Title VII itself, [the employers] say sex-segregated bathrooms, locker rooms, and dress codes will prove unsustainable after our decision today. But none of these other laws are before us . . . and we do not prejudge any such question today. . . . Whether other policies and practices might or might not qualify as unlawful discrimination or find justifications under other provisions of Title VII are questions for future cases, not these.").

151. *Id.* at 1754 (emphasis added).

152. *Id.* at 1753. While the Court majority remained neutral while acknowledging future issues that would likely arise, Justice Alito's dissent forecasted that *Bostock's* holding would be used to extend LGBT protections well beyond Title VII to other federal sex-based nondiscrimination statutes such as Title IX, the Fair Housing Act, and the Affordable Care Act. *Id.* at 1778 (Alito, J., dissenting).

153. See Conron, *supra* note 4 ("In 2019, the year prior to the *Bostock* decision, only 21 states provided employment discrimination protections to LGBT employees, while other states provided some but less extensive protections."). See also *Freedom for All Americans*, SUP. CT. ACTION CTR. <https://freedomforallamericans.org/supreme-court/> (last visited May 21, 2023) ("The [*Bostock*] ruling will directly improve the lives of the 11.5 million gay, lesbian, and bisexual Americans, and the 1.5 million transgender Americans, for whom workplace discrimination is a daily threat. And it is urgent relief for LGBTQ people living in the 29 states without comprehensive nondiscrimination protections.").

154. Cory Collins, *A Landmark Supreme Court Case for LGBTQ Educators and Students*, LEARNING FOR JUST. (June 17, 2020), <https://www.learningforjustice.org/magazine/a-landmark-supreme-court-case-for-lgbtq-educators-and-students>. While the *Bostock* Court's landmark decision was a vital step forward in the battle for LGBT rights, substantial gaps in employment-related discrimination remain, particularly for employees who do not fall under Title VII's ambit and live in jurisdictions without state

employed by “private-sector employers with 15 or more employees, . . . state and local government employers with 15 or more employees, [or] the federal government” were covered by Title VII’s sex-based nondiscrimination prohibition.¹⁵⁵

In the days and months following the Court’s decision, there was a general lack of response by Trump and his administration, other than to disregard or minimize its import and move forward with administrative rulemaking that directly contradicted the Court’s *Bostock* holding.¹⁵⁶ Fortunately, just over seven months after the decision’s release, President Biden was sworn into office and immediately initiated steps to undo Trump-era damage and direct the broad application of *Bostock*.¹⁵⁷ On his first day in office, Biden issued Executive Order 13988 advising administrative agencies that the *Bostock* decision should be applied broadly to include other similar federal nondiscrimination statutes.¹⁵⁸

A. *The Immediate Impact of the Bostock Decision in the Workplace*

With over an estimated eight million LGBT employees in the American workforce, *Bostock*’s impact was enormous.¹⁵⁹ In April 2020, two months before the *Bostock* decision was announced, almost half of the estimated 8.1 million LGBT employees, 3.9 million, lived in states without any LGBT

nondiscrimination protections. See *Freedom for All Americans*, *supra* note 153 (“[The *Bostock* decision is a major step forward—and yet, even with the decision on the books, there are still shocking gaps in our nation’s nondiscrimination laws. In 29 states, stores, restaurants and hotels can still deny LGBTQ people service, adoption agencies can still refuse to help LGBTQ couples, and transgender people can still essentially be banished from public life. Under federal law, just about anyone can be turned away from a wide range of public places, institutions and services.”).

155. See *Protections Against Employment Discrimination Based on Sexual Orientation or Gender Identity*, EEOC, [hereinafter EEOC Discrimination Protection Fact Sheet], <https://www.eeoc.gov/laws/guidance/protections-against-employment-discrimination-based-sexual-orientation-or-gender> (last visited July 2, 2023) (noting Title VII also applies to unions and employment agencies).

156. See, e.g., *Walker v. Azar*, 480 F. Supp. 3d 417, 424 (E.D.N.Y. 2020) (holding a proposed set of rules by HHS intended to discriminate based on one’s transgender status violates the Supreme Court’s holding in *Bostock* prohibiting discrimination based on sex).

157. See, e.g., Alice Ollstein et al., *The 17 Things Joe Biden Did on Day One*, POLITICO (Jan. 21, 2021), https://www.politico.com/interactives/2021/interactive_biden-first-day-executive-orders/.

158. See Exec. Order No. 13,988, 86 Fed. Reg. 7,023-25 (Jan. 20, 2021) (enforcing prohibitions on sex discrimination on the basis of sexual orientation or gender identity).

159. See Conron, *supra* note 4.

employment discrimination protections.¹⁶⁰ Thus, the *Bostock* decision immediately provided first-ever workplace discrimination protections based on sexual orientation or gender identity to millions of vulnerable LGBT employees.¹⁶¹

The Court's *Bostock* holding also provided LGBT employees with a litany of additional federal employment protections covered under Title VII's broad umbrella.¹⁶² While the issue before the *Bostock* Court addressed Title VII's discrimination prohibition when firing employees based on their sexual orientation or gender identity, Title VII's statutory protections have a much broader reach.¹⁶³ In addition to protection from discriminatory firing, the statute also prohibits employers from failing or refusing to hire "or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment,"¹⁶⁴ which includes wages and benefits such as insurance, retirement, sick time, and vacation.¹⁶⁵ Title VII also does not permit employers to "limit, segregate, or classify employees or applicants for employment in any way which would deprive or tend to deprive [them] of employment opportunities or otherwise adversely affect [their] status as an employee" based on the person's protected status.¹⁶⁶

The historical *Bostock* decision immediately provided millions of LGBT employees with a wide range of employment protections and dramatically altered the American workforce.¹⁶⁷ To assist employers implementing *Bostock*, the EEOC provided guidance documents regarding its enforcement of Title VII in relation to LGBT employees and provided examples of

160. Conron, *supra* note 4 ("In 2019, the year prior to the *Bostock* decision, only 21 states provided employment discrimination protections to LGBT employees, while other states provided some but less extensive protections.").

161. Conron, *supra* note 4.

162. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1754 (2020) ("In Title VII, Congress adopted broad language making it illegal for an employer to rely on an employee's sex when deciding to fire that employee. We do not hesitate to recognize today a necessary consequence of that legislative choice: An employer who fires an individual merely for being gay or transgender defies the law.").

163. *See generally* Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et. seq. (1994).

164. 42 U.S.C. § 2000e(b)-(n).

165. *Id.*

166. *Id.*

167. Prior to the *Bostock* decision, millions of employees lived in states without explicit statewide laws providing employment sex discrimination protections based on sexual orientation or gender identity. *See* Conron, *supra* note 4 (addressing states without protection from discrimination on the basis of sexual orientation or gender identity in employment, housing, and public accommodations).

employment actions that would likely violate Title VII post-*Bostock*.¹⁶⁸ Since then, the EEOC has continued to provide multiple resources to assist both employers and employees regarding actions constituting Title VII sex discrimination violations, laws enforced by the Commission, and information regarding the complaint process.¹⁶⁹

B. The EEOC Post-Bostock: Title VII LGBT Discrimination Protections

Along with the immediate guidance provided by the EEOC to assist employers regarding *Bostock*'s impact on the enforcement of Title VII, the EEOC has continued its commitment to support LGBT workers and enforce Title VII's protective reach under *Bostock*. For example, on June 15, 2021, in observance of LGBT Pride Month and the *Bostock* one-year anniversary, the EEOC announced the issuance of new online resources "to educate employees, applicants, and employers" about employee rights, including the right of LGBT employees "to be free from sexual orientation and gender identity discrimination in employment."¹⁷⁰ The announcement introduced a new landing page and technical assistance document ("June 15 Guidance") that provided pertinent information, including detailed explanations of workplace protections under Title VII in light of the *Bostock* decision and a dedicated webpage to educate employees regarding federal enforcement of protections based on sexual orientation and gender identity discrimination utilizing "accessible, plain language."¹⁷¹

168. See EEOC Discrimination Protection Fact Sheet, *supra* note 155 (noting prohibition of discrimination based on sex stereotypes and not allowing LGBTQ members in public facing positions). In July 2022, a Trump-appointed Tennessee federal district court preliminarily enjoined the EEOC from implementing this document as to plaintiffs in *Tennessee v. U.S. Dep't of Educ.*, Case No. 3:21-cv-308 (E.D. Tenn. 2022), which is currently noted on the EEOC's website. *Id.* Further, in October 2022, a Trump-appointed Texas federal district court vacated the EEOC guidance documents in *Texas v. EEOC*, 2:21-CV-194-Z (N.D. Tex. 2022), which is also reflected on the EEOC website. *Id.* See also *infra* notes 411-415 and accompanying text.

169. See, e.g., *Moving Towards Equality in the Workplace for LGBTQI+ Employees*, EEOC, <https://www.eeoc.gov/moving-towards-equality-workplace-lgbtqi-employees> (last visited May 21, 2023) (recognizing the work remaining to make the real promise of equality embodied in the *Bostock* decision).

170. *EEOC Announces New Resources about Sexual Orientation and Gender Identity Workplace Rights*, EEOC (June 15, 2021), <https://www.eeoc.gov/newsroom/eeoc-announces-new-resources-about-sexual-orientation-and-gender-identity-workplace-rights>.

171. *Sexual Orientation and Gender Identity ("SOGI") Discrimination*, EEOC, https://www.eeoc.gov/sexual-orientation-and-gender-identity-sogi-discrimination?utm_content=&utm_medium= (last visited May 21, 2023). The new landing page addressed workplace activities prohibited under Title VII, unlawful

The EEOC materials, unlike the *Bostock* opinion, include its position that “employers may not deny an employee equal access to a bathroom, locker room, or shower that corresponds to the employee’s gender identity,” clarifying that “if an employer has separate bathrooms, locker rooms, or showers for men and women, all men (including transgender men) should be allowed to use the men’s facilities and all women (including transgender women) should be allowed to use the women’s facilities.”¹⁷² The same month, the EEOC also posted an announcement on its website titled, “A Message from EEOC Chair Charlotte A. Burrows for Pride Month and the Anniversary of the Supreme Court’s Decision in *Bostock v. Clayton County*.”¹⁷³ In it, EEOC Chair Burrows recognized both Pride Month and the one year anniversary of the *Bostock* decision,¹⁷⁴ acknowledging the “struggle, sacrifice, and vision of the many brave LGBTQ+ individuals and allies who had the courage to champion civil rights for LGBTQ+

discrimination and harassment, retaliation, and employment practices. *Id.* The materials note that the *Bostock* decision “did not address various religious liberty issues, such as the RFRA, and exemptions Title VII provides for religious employers.” *Id.* See also EEOC, *supra* note 155.

172. See EEOC Discrimination Protection Fact Sheet, *supra* note 155 (“Courts have long recognized that employers may have separate bathrooms, locker rooms, and showers for men and women, or may choose to have unisex or single-use bathrooms, locker rooms, and showers. The Commission has taken the position that employers may not deny an employee equal access to a bathroom, locker room, or shower that corresponds to the employee’s gender identity. In other words, if an employer has separate bathrooms, locker rooms, or showers for men and women, all men (including transgender men) should be allowed to use the men’s facilities and all women (including transgender women) should be allowed to use the women’s facilities.”). In its statement, the EEOC provided a link to its earlier pre-*Bostock* position in *Lusardi v. McHugh*, EEOC DOC 0120133395, 2015 WL 1607756 (Apr. 1, 2015) (“[W]e find that Complainant proved that she was subjected to disparate treatment on the basis of sex when she was denied equal access to the common female restroom facilities. We further find that the Agency is liable for subjecting Complainant to a hostile work environment based on sex by preventing her from using the common female restroom facilities and allowing a team leader intentionally and repeatedly to refer to her by male names and pronouns and make hostile remarks well after he was aware that Complainant’s gender identity was female.”).

173. *A Message from EEOC Chair Charlotte A. Burrows for Pride Month and the Anniversary of the Supreme Court’s Decision in Bostock v. Clayton County*, EEOC (June 2021), <https://www.eeoc.gov/wysk/message-eeoc-chair-charlotte-burrows-pride-month-and-anniversary-supreme-courts-decision>.

174. See *id.* (The message also noted that the *Bostock* decision came “several years after” the EEOC had made the same determination that sexual orientation and gender identity were covered under Title VII’s prohibition on discrimination “because of sex.”).

communities.”¹⁷⁵ The announcement concluded by reaffirming the EEOC’s commitment to “moving forward” in the spirit of those who courageously “advanced the cause of justice for LGBT+ persons.”¹⁷⁶

The following year, in June 2022, the EEOC released another message in honor of Pride Month and the second anniversary of the *Bostock* decision.¹⁷⁷ In it, Chair Burrows acknowledged the ongoing discrimination and violence directed toward the LGBT community “despite decades of advocacy and struggle,” noting that “[f]or generations, members of the LGBTQI+ community and their allies have maintained their passion and commitment while working to combat injustice.”¹⁷⁸ Invoking the Commission’s leadership role in recognizing Title VII protections from employment discrimination based on gender identity¹⁷⁹ and sexual orientation,¹⁸⁰ the statement reaffirmed the EEOC’s commitment to enforce LGBT protections and highlighted some of its accomplishments from fiscal year 2021.¹⁸¹ Chair Burrows concluded by announcing a continued commitment to advancing LGBT equality in the workplace and ensuring that LGBT employees “receive the dignity, respect, and support they deserve . . . to live authentically and fully contribute to our economy and society.”¹⁸² Through its continued support and actions taken on behalf of the LGBT community, including filing lawsuits, obtaining claim resolutions, and filing amicus briefs, the EEOC has solidly evidenced its ongoing commitment to LGBT

175. *Id.*

176. *Id.*

177. *A Message from EEOC Chair Charlotte A. Burrows on Pride Month 2022 and the Anniversary of the Supreme Court’s Decision in Bostock v. Clayton County*, EEOC (June 2022), <https://www.eeoc.gov/message-eeoc-chair-charlotte-burrows-pride-month-2022-and-anniversary-supreme-courts-decision>.

178. *Id.*

179. *See Macy v. Holder*, EEOC Appeal No. 0120120821, 2012 WL 1435995, at *2 (Apr. 20, 2012) (holding transgender complainant was discriminated against on the basis of gender identity and sex stereotype).

180. *See Baldwin v. Foxx*, EEOC Appeal No. 0120133080, 2015 WL 4397641, at *1 (July 15, 2015) (finding complainant was discriminated against on the basis of sexual orientation).

181. *See* EEOC Discrimination Protection Fact Sheet, *supra* note 155 and accompanying text. Examples included engaging in listening sessions nationwide to learn current challenges and needs in the LGBT community, providing resources in those areas, and adding a non-binary option as part of the demographic questionnaire used when filing a discrimination charge. The letter included instances of “severe or pervasive harassment, retaliation, and constructive discharge” where the EEOC found Title VII violations based on sexual orientation or gender identity discrimination.

182. EEOC Discrimination Protection Fact Sheet, *supra* note 155.

equality in the workforce.¹⁸³

III. PRESIDENTIAL TREATMENT OF THE LGBT COMMUNITY & THE USE OF EXECUTIVE ORDERS TO PROVIDE (OR TAKE AWAY) LGBT RIGHTS & PROTECTIONS PRE- AND POST-*BOSTOCK*

An executive order, issued by the President of the United States as the leader of the executive branch, can effectively direct a federal administrative agency or federal official to engage in or refrain from engaging in a particular course of action.¹⁸⁴ Presidents often use executive orders, which do not require approval by Congress, to manage government operations and to implement and advance policy.¹⁸⁵ So long as the executive order directs an

183. For a list of federal sector actions taken by the EEOC related to employment discrimination based on sexual orientation and gender identity, see *Federal-Sector EEO Cases Involving Sexual Orientation or Gender Identity ("SOGI") Discrimination*, EEOC, <https://www.eeoc.gov/federal-sector/federal-sector-eeo-cases-involving-sexual-orientation-or-gender-identity-sogi> (last visited May 15, 2023). Of note, as of November 18, 2022, when Janet Dhillon's term with the Commission ended, the EEOC no longer had a Republican majority and was deadlocked with two Democrats and two Republicans. See Robina Shea & Constangy, Brooks, *Janet Dhillon Leaving EEOC*, JDSUPRA (Nov. 15, 2022), <https://www.jdsupra.com/legalnews/janet-dhillon-leaving-eeoc-8726574/> On April 1, 2022, President Biden nominated civil rights attorney Kalpana Kotagal to succeed Commissioner Dhillon. More than a year later, on July 13, 2023, Kotagal was confirmed in the senate with a vote of 49-47, making her "the fifth commissioner on the agency tasked with prohibiting employment discrimination" and giving the democratic party a majority on the EEOC for the first time since Biden became President. See G. Weycamp & D. Areas Munhoz, *Senate Confirms Kotagal for EEOC, Giving Democrats Majority*, BLOOMBERG L. (July 13, 2023), <https://news.bloomberglaw.com/daily-labor-report/senate-confirms-kotagal-for-eeoc-giving-democrats-a-majority>.

184. See Andrew M. Wright, *Presidential Executive Orders*, 52 ARK. L. 30, 31 (2017). For a detailed analysis of the history and use of presidential executive orders, see Tara L. Branum, *President or King? The Use and Abuse of Executive Orders in Modern-Day America*, 28 J. LEGIS. 1, 3 (2002). See also Joshua D. Smeltzer, *Should Faith-Based Initiatives Be Implemented by Executive Order?*, 56 ADMIN. L. REV. 181, 184 (2004). An executive memorandum is very similar to an EO, except they are not legally required to be published in the *Federal Register*, do not require a citation to legal authority, and they do not require the issuance of a budgetary impact statement by the Office of Management and Budget. See *Research Guide, Executive Order, Proclamation, or Executive Memorandum?*, LIBR. OF CONG., <https://guides.loc.gov/executive-orders/order-proclamation-memorandum> (last visited May 21, 2023).

185. See generally Branum, *supra* note 184, at 2-5; see also Abigail A. Graber, *Executive Orders: An Introduction*, (Executive Orders), CONG. RSCH. SERV. (Mar. 29, 2021), <https://crsreports.congress.gov/product/pdf/R/R46738> (noting that "[n]ot all presidential directives take the form of an executive order....Some directives take the form of presidential proclamations and executive memoranda" and there is "no clear substantive distinction between these forms of executive action" and "[r]egardless of the

action within the president's authority under the Constitution and represents a valid exercise of power, the president's unilateral order exerts the force of law.¹⁸⁶ Once an executive order has been issued, it remains in effect unless it is revoked, canceled, challenged, or expires by its terms.¹⁸⁷ An executive order can be amended or revoked at any time by the issuing president or by an incumbent president, who can amend or revoke his own or a predecessor's executive order.¹⁸⁸ It was not until the mid-1990s that a presidential executive order was first utilized as a shield to provide protections to the LGBT community.¹⁸⁹ Prior to that time, executive orders were used as a sword to harm and marginalize thousands of LGBT American workers.

A. *The Initial Use of Presidential Executive Orders to Harm LGBT Employees*¹⁹⁰

On March 21, 1947, at the beginning of the Cold War and in response to increased fears of communists infiltrating the federal government, President Truman issued Executive Order 9835, the "Loyalty Order."¹⁹¹ The Order established a government loyalty program that directed the investigation of federal government employees and applicants, requiring the removal of or prevention from hiring any suspected communists and other "subversives."¹⁹² In effect, the Loyalty Order provided government leaders

form of directive, each must be issued pursuant to one of the President's powers to have legal effect.").

186. Branum, *supra* note 184, at 6. See also Graber, *supra* note 185 ("To have legal effect, [presidential] directives must be issued pursuant to one of the President's sources of power: either Article II of the Constitution or a delegation of power from Congress.").

187. Branum, *supra* note 184, at 17 (Although "[t]here is no specific provision in the United States Constitution for Executive Orders," the Executive Power provided under Section 1, Article II of the Constitution is "generally viewed as granting authority for such orders.").

188. Branum, *supra* note 184, at 69 (Congress also has the power to overturn an Executive Order by passing legislation that invalidates it).

189. See *infra* notes 185-190 and accompanying text.

190. For a detailed analysis on the history of federal institutionalized government discrimination of LGBT employees, including the use of executive orders to harm and, later, help LGBT employees, see generally Susan Tsui Grundmann, et al., *Sexual Orientation and the Federal Workplace, Policy and Perception*, U.S. MERIT SYS. PROT. BD. (May 2014), https://www.mspb.gov/studies/studies/Sexual_Orientation_and_the_Federal_Workplace_Policy_Perception_1026379.pdf.

191. Exec. Order No. 9,835, 12 Fed. Reg. 1,935 (Mar. 21, 1947).

192. *Id.* (The Order directed the Federal Bureau of Investigation ("FBI") to investigate the backgrounds, beliefs, and associations of federal executive branch employees and to fire anyone found with ties to communism or questionable loyalty to the United States

unreviewable power to instantly suspend civilian employees and prevent hiring applicants for employment if it was deemed to be in the country's national interest.¹⁹³ Although not specifically identified in the executive order, gay and lesbian federal employees, deemed subversive and subject to blackmail, constituted the majority of those who lost their jobs, with some figures estimating that more than ten thousand employed in the civil service were impacted.¹⁹⁴ On April 27, 1951, Truman issued Executive Order 10237 to extend the provisions of his earlier order to the Panama Canal and the Panama Railroad Company.¹⁹⁵ The following day, Truman amended Executive Order 9835 via Executive Order 10241, which made it easier to

and prevent the hiring of such applicants). *See also* Robert Longley, *President Truman's Executive Order 9835 Demanded Loyalty, A Response to the Red Scare of Communism*, THOUGHTCO. (July 11, 2022), <https://www.thoughtco.com/truman-1947-loyalty-order-4132437> (It has been estimated that “[b]etween 1948 and 1958, the FBI ran initial reviews of 4.5 million government employees and, on an annual basis, another 500,000 applicants for government positions.”).

193. Judith Adkins, *These People Are Frightened to Death—Congressional Investigations and the Lavender Scare*, 48 PROLOGUE MAG. (2016), <https://www.archives.gov/publications/prologue/2016/summer/lavender.html>. On February 20, 1950, while speaking on the senate floor, Senator McCarthy spoke of his earlier report that 205 known communists were employed by the federal government and made a “link” between communism and gay and lesbian people, implying that they “were susceptible to Communist recruitment because as homosexuals they had what he called ‘peculiar mental twists.’” Shortly after McCarthy’s statement, on June 7, 1950, the Hoey Committee was formed to thoroughly investigate allegations that “homosexuals and other moral perverts” were federal government employees. *Id.* The committee’s final report, *Employment of Homosexuals and Other Sex Perverts in Government*, announced that “during the preceding three years, close to 5,000 homosexuals had been detected in the military and civilian workforces,” concluding that gay and lesbian employees were “‘generally unsuitable’ and constituted ‘security risks.’” *Id.* Along with finding gay and lesbian employees were vulnerable to blackmail, “[t]he report asserted also that gay people lacked emotional stability, had weak ‘moral fiber,’ were a bad influence on the young, and attracted others of their kind to government service,” pointing out that “[o]ne homosexual can pollute a Government office.” *Id.* The Hoey report made a major impact and was used to prove the “threat” that gay and lesbian employees posed to national security, to “justify discrimination,” and helped “lay[] the groundwork for President . . . Eisenhower’s 1953 Executive Order 10450. *Id.*

194. *See* James Gleason, *LGBT History: The Lavender Scare*, NAT’L LGBT CHAMBER OF COM. (Oct. 3, 2017), <https://nglcc.org/blog/lgbt-history-the-lavender-scare/> (“Because of [. . .] Executive Order [10450], it is estimated that at least ten thousand civil servants lost their jobs.”). *See also* Grundmann, *supra* note 190, at 6 (A senate subcommittee determined that “homosexuals and other sex perverts were not proper persons to be employed in Government for two reasons—first, they [were] generally unsuitable, and second, they constitute[d] security risks.”).

195. Exec. Order No. 10,237, 16 Fed. Reg. 3,627 (Apr. 27, 1951).

question and remove civil employees by changing the standard from a “reasonable ground for belief” of disloyalty based on all of the evidence to a “reasonable doubt” of loyalty, effectively shifting the burden of proof to the accused.¹⁹⁶

Two years later, on April 27, 1953, President Eisenhower issued Executive Order 10450, *Security Requirements for Government Employment*, effective on May 27, 1953, which revoked Truman’s Loyalty Program under Executive Order 9835, and expanded grounds for dismissal beyond mere loyalty.¹⁹⁷ Under Executive Order 10450, all federal government employees were required to be “reliable, trustworthy, of good conduct and character,” and demonstrate “unswerving loyalty to the United States.”¹⁹⁸ The Order was released when anti-gay discrimination was widespread, including in the federal government.¹⁹⁹ It also followed the 1950 release of a Senate subcommittee report that found gays to be unsuitable as federal employees.²⁰⁰ Executive Order 10450 directed that an individual’s employment with the federal government must be “clearly consistent with the interests of the national security,” and added “sexual perversion,” a term that included gays and lesbians, as a reason for removal from government employment.²⁰¹ It also expanded prior coverage to include

196. Exec. Order No. 10,241, 16 Fed. Reg. 3,690 (May 1, 1951).

197. Exec. Order No. 10,450, 18 Fed. Reg. 2,489 (Apr. 27, 1953). Section 8(a)(iii) of the Executive Order states that “sexual perversion” was a legitimate reason to terminate an individual’s government employment. *Id.* In 1953 when the order was issued, “homosexuality” was considered not only a sexual perversion, but also both a crime and a mental illness. See Jennifer R. Covais, *Baby, We Were Born This Way: The Case for Making Sexual Orientation a Suspect Classification Under the Equal Protection Clause of the Fourteenth Amendment*, 38 *TOURO L. REV.* 283, 321 (2022). Eisenhower’s order stayed in place until Congress passed, and President Clinton signed “Don’t Ask, Don’t Tell.” However, the order was not explicitly repealed until 2017, when President Obama signed Executive Order No. 13764, the last of his administration. Exec. Order No. 13,764, 82 Fed. Reg. 8,115 (Jan. 23, 2021).

198. 18 Fed. Reg. 2,489.

199. See *supra* notes 183-185 and accompanying text. See also Grundmann, *supra* note 190, at 6 (noting that a senate subcommittee found that “homosexuals and other sex perverts were not proper persons to be employed in Government for two reasons—first, they [were] generally unsuitable, and second, they constitute[d] security risks.”); Covais, *supra* note 197, at 297 (“The increasing awareness of a vulnerable population in the post-war era informed Senator Joseph McCarthy’s belief that gay people constituted security risks to the nation and queer people needed to be purged from government jobs.”).

200. See *Employment of Homosexuals and Other Sex Perverts in Government (1950)*, PBS, <https://www.pbs.org/wgbh/pages/frontline/shows/assault/context/employment.html> (last visited Oct. 10, 2023).

201. 18 Fed. Reg. 2,489 at Sec. 8 (a)(1)(iii); see *supra* Covias, note 197; see also

“all other departments and agencies of the Government,” and subjected all government employees to re-investigation.²⁰² As a result, gay men and lesbians were banned from federal government employment under the rationale that they presented a national security risk via blackmail even if they were loyal to the United States.²⁰³ The toll on LGBT federal government workers was immense. Some studies estimate that “[i]n the 1950s alone, the government terminated 7,000 to 10,000 federal employees based on suspicions of homosexuality.”²⁰⁴

During the last year of Eisenhower’s presidency, he issued Executive Order 10865, on February 20, 1960, which established the Industrial Security Program.²⁰⁵ This Executive Order provided protection from security breaches by non-governmental employees working on confidential and restricted government defense matters.²⁰⁶ Order 10865 allowed the federal government’s anti-LGBT policy to reach into the private sector, resulting in job loss to private sector gay and lesbian employees.²⁰⁷ It was not until 1969

Grundmann, *supra* note 190, at 11; Mathew S. Nosanchuk, *The Endurance Test: Executive Power and the Civil Rights of LGBT Americans*, 5 ALB. GOVT. L. REV. 440, 442 (2012) (“Disqualifying conduct included ‘sexual perversion,’ a term that included homosexuals.”). For a detailed analysis of Executive Order 10450, see *Security Clearances: Consideration of Sexual Orientation in the Clearance Process* U.S. GEN. ACCOUNT. OFF., GAO REPORT (Mar. 1995), <https://www.gao.gov/assets/nsiad-95-21.pdf> (“Federal agencies used the sexual perversion criteria in the early 1950s to categorize homosexuals as security risks and separate them from government service. Agencies could deny homosexual men and women employment because of their sexual orientation until 1975, when the Civil Service Commission issued guidelines prohibiting the government from denying employment on the basis of sexual orientation.”); *Id.* at 4.

202. 18 Fed. Reg. 2,489.

203. See Grundmann, *supra* note 190, at 6 (noting that not only did the senate subcommittee determine that gay and lesbian employees were vulnerable to blackmail, it also determined that gay and lesbian employees were not suitable for government employment because “it was generally believed that those who engaged in acts of perversion lacked the emotional stability of other persons and those perversions weakened the moral fiber to such an extent that they were not suitable for positions of responsibility.”) (citing S. Rep. No. 81-241, op. cit., p. 4).

204. See Gleason, *supra* note 194 (noting allegations that “[i]n the 1950s alone, the government terminated 7,000 to 10,000 federal employees based on suspicions of homosexuality.”). In *Cole v. Young*, the Court held that in order for a federal agency to utilize unreviewable dismissal power, a government employee had to have access to classified or top-secret material to show he posed an “immediate threat of harm” to national security. 351 U.S. 536, 543-46 (1956).

205. *Safeguarding Classified Information Within Industry*, 25 Fed. Reg. 1,583 (Feb. 24, 1960).

206. *Id.*

207. William N. Eskridge, Jr., *Privacy Jurisprudence and the Apartheid of the Closet*,

that a federal court held that sexual orientation was not sufficient as the sole reason for terminating a federal employee's job.²⁰⁸ In 1975 the U.S. Civil Service Commission determined that applications by gays and lesbians would be considered on a case-by-case basis.²⁰⁹ Three years later, the U.S. Civil Service Reform Act of 1978 prohibited the federal government from discriminating against job applicants or employees "on the basis of conduct that does not adversely affect employee performance."²¹⁰ While the Act did not specifically address gay or lesbian federal employees, it was interpreted in 1980 to prohibit discrimination due to sexual orientation.²¹¹

In all, it took nearly four decades after Truman and Eisenhower's executive orders were issued before a president utilized his executive power to begin to undo the damage inflicted by repealing those orders and issuing the first-ever executive order to extend rather than restrict rights and protections of LGBT citizens.

1946-1961, 24 FLA. ST. U.L. REV. 703, 742-43 (1997). Private sector employees were also harmed "from the federal government's willingness to share police records and grounds for discharge" with employers, creating the possibility that a federal employee who was fired and labeled "a homosexual or sex pervert" could be unemployable in the private sector as well. *Id.* at 743.

208. *Norton v. Macy*, 417 F.2d 1161, 1162 (D.C. Cir. 1969). In *Norton*, a veteran eligible NASA analyst who could only be dismissed for cause that promoted service efficiency challenged his firing for alleged "homosexual activity." *Id.* at 1163. The court held that private sexual conduct alone was not sufficient to justify the discharge. *Id.* at 1166. Instead, if an agency could show a rational basis for determining that a discharge based on sexual orientation was necessary to promote the efficiency of service, it was permissible. *Id.* Because the court found that there was no "reasonably foreseeable, specific connection between [the NASA analyst's sexual orientation] and the efficiency of [his] service," it held that the ground for dismissal was arbitrary. *Id.* at 1168. It was not until December 1973 when the Civil Service Commission informed all agencies that they could not "find a person unsuitable for Federal employment merely because that person is a homosexual," but that they could dismiss or refuse to hire a person whose "homosexual conduct affects job fitness-excluding from such considerations." Gregory B. Lewis, *Lifting the Ban on Gays in the Civil Service: Federal Policy Toward Gay and Lesbian Employees Since the Cold War*, 57 PUB. ADMIN. REV. 387, 392 (1997).

209. See Grundmann, *supra* note 190, at 11 ("The tenth Prohibited Personnel Practice codified in 1978 [barred] discrimination in Federal personnel actions based on conduct that does not adversely affect job performance. This prohibition was first interpreted to bar sexual orientation discrimination in 1980 by the U.S. Office of Personnel Management.") (internal citations omitted).

210. 5 U.S.C. § 2302(b)(10) (1978).

211. See Grundmann, *supra* note 190, at 19 ("That 1980 memorandum stated that Federal employees or applicants for employment were protected from actions based on or inquiries into matters such as religious, community, or social affiliations or sexual orientation.").

B. The Shift Forward: Providing LGBT Rights Via Executive Order Pre-Bostock

On August 2, 1995, President Bill Clinton took a substantial step on behalf of LGBT government employees when he signed Executive Order 12968, *Access to Classified Information*, which included sexual orientation in the order's nondiscrimination statement.²¹² The Executive Order, which established uniform rules and policies regarding federal government employee access to classified information, provided a first-ever sex discrimination prohibition and directed that "no inference" about suitability for access to classified information "may be raised solely on the basis of the sexual orientation of the employee."²¹³ Clinton's Executive Order was also an important first-step toward dispelling the decades-old false belief that members of the LGBT community were not suitable for holding a security clearance granting access to classified government information, despite studies that found the opposite was true.²¹⁴

Three years later, on May 28, 1998, President Clinton signed Executive Order 13087, which amended President Nixon's August 8, 1969, Executive Order 11478, *Equal Employment Opportunity in the Federal Government*.²¹⁵

212. The Executive Order's nondiscrimination language stated, "The United States Government does not discriminate on the basis of race, color, religion, sex, national origin, disability, or sexual orientation in granting access to classified information." Exec. Order No. 12,968, 60 Fed. Reg. 40,245, 40,250 (Aug 7, 1995).

213. *Id.* Clinton's executive order also included details regarding standards for disclosure, eligibility requirements, levels of access, and administrative procedures for granting or denying access and appealing determinations. *Id.* at 40,249.

214. *Id.* at 40,250 ("The United States Government does not discriminate on the basis of race, color, religion, sex, national origin, disability, or sexual orientation in granting access to classified information."). Prior to President Clinton's EO, for decades the federal government had denied LGBT employees access to classified information based on the false belief that homosexuality posed an automatic security risk, despite a federal study that proved otherwise. See U.S. NAVY CRITTENDEN REPORT, REPORT OF THE BOARD APPOINTED TO PREPARE AND SUBMIT RECOMMENDATIONS TO THE SECRETARY OF THE NAVY FOR THE REVISION OF POLICIES, PROCEDURES AND DIRECTIVES DEALING WITH HOMOSEXUALS (Dec. 21, 1966-March 15, 1967) (concluding that there was "no sound basis for the belief that homosexuals posed a security risk"). Six years prior to Clinton's EO, a 1990 U.S. Appeals Court decision, *High Tech Gays v. Defense Industrial Security Clearance Office*, upheld the denial of security clearances to homosexual employees of government contractors. 895 F.2d 563, 580 (9th Cir. 1988).

215. Exec. Order No. 13,087, 63 Fed. Reg. 30,097, 30,097 (June 2, 1998), amending Exec. Order No. 11,478, 34 Fed. Reg. 12,985 (Aug. 12, 1969) (originally issued by President Richard Nixon on August 8, 1969. Nixon's EO prohibited employment discrimination in the federal civilian workforce on the basis of race, color, religion, sex, national origin, handicap, and age).

The original executive order prohibited employment discrimination in the federal civilian workforce on the basis of race, color, religion, sex, national origin, handicap, and age.²¹⁶ President Clinton's executive order added sexual orientation to the list of protected classes, officially and expressly prohibiting discrimination based on sexual orientation in the federal civilian workforce.²¹⁷

The two executive orders issued by President Clinton provided first-ever protections to the LGBT community via executive power and, importantly, prohibited discrimination based on sexual orientation in the granting of security clearances and in the federal civilian workforce. It would be another fifteen years before a United States President issued the next executive order in support of the LGBT community.

Following his swearing in on January 20, 2009, President Barack Obama and his administration made great strides in the progression of LGBT rights.²¹⁸ By June 17, 2009, he issued a Presidential Memorandum directing department and agency heads to determine how to extend legally available benefits to same sex partners of federal employees.²¹⁹ President Obama recognized that "[l]eading companies in the private sector" provided same-sex benefits to employees, which impacted the federal government's ability to compete for "the best and brightest employees."²²⁰ Acknowledging that his administration was "not authorized by Federal law to extend a number of available Federal benefits to the same-sex partners of Federal employees," he announced some identified areas that would permit an extension of benefits, such as foreign service employees and civil service employees serving overseas, and directed his administration to extend benefits to "qualified same-sex domestic partners of Federal employees where doing so

216. *Id.* (It also required federal agencies and departments to employ affirmative measures to promote employment opportunities and assigned the EEOC the responsibility to direct its implementation and issue rules accordingly).

217. Exec. Order No. 13,087, 63 Fed. Reg. 30,087 (June 2, 1998), *amending* Exec. Order No. 11,478, 34 Fed. Reg. 12,985 (Aug. 12, 1969).

218. See *FACT SHEET: Obama Administration's Record and the LGBT Community*, WHITE HOUSE OFF. PRESS SEC'Y (June 9, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/06/09/fact-sheet-obama-administrations-record-and-lgbt-community> [hereinafter *Obama Admin 6/9/16 Fact Sheet*].

219. See *Memorandum for the Heads of Executive Departments and Agencies on Federal Benefits and Non-Discrimination*, WHITE HOUSE (June 19, 2009) [hereinafter *Obama 6/19/09 Memo re Non Discrimination*], <https://obamawhitehouse.archives.gov/the-press-office/memorandum-heads-executive-departments-and-agencies-federal-benefits-and-non-discrimi>.

220. *Id.*

can be achieved and is consistent with Federal law.”²²¹

The following year, on May 28, 2010, Obama issued *Proclamation, Lesbian, Gay, Bisexual, and Transgender Pride Month, 2010*.²²² The proclamation declared June 2010 as Lesbian, Gay, Bisexual, and Transgender Pride Month and called on “all Americans to observe [the] month by fighting prejudice and discrimination in their own lives and everywhere it exists.”²²³ Five days later, President Obama issued a June 2, 2010, memorandum, which extended specific benefits to same-sex domestic partners of federal employees, whether married or not.²²⁴ The extended benefits resulted from federal authorizing statutes that did not limit or define recipients as a “spouse” and were available immediately.²²⁵ The June 2010 memorandum also extended child care and sick leave benefits, allowing federal employees to care for their partners and “non-biological, non-adopted” children.²²⁶

On December 6, 2011, Obama issued a memorandum directed to the heads of executive departments and agencies, *Presidential Memorandum – International Initiatives to Advance the Human Rights of Lesbian, Gay, Bisexual, and Transgender Persons*, noting that “[t]he struggle to end discrimination against lesbian, gay, bisexual, and transgender (LGBT) persons is a global challenge, and one that is central to the United States commitment to promoting human rights.”²²⁷ Addressing concerns for the harsh, violent, and discriminatory treatment of LGBT individuals in the United States and abroad, Obama directed all agencies abroad to “promote

221. *Id.*

222. Proclamation No. 8529, 75 Fed. Reg. 32,079 (May 28, 2010) (“As Americans, it is our birthright that all people are created equal and deserve the same rights, privileges, and opportunities.”).

223. *Id.*

224. *Presidential Memorandum-Extension of Benefits to Same-Sex Domestic Partners of Federal Employees*, WHITE HOUSE PRESS Release (June 2, 2010), <https://obamawhitehouse.archives.gov/the-press-office/presidential-memorandum-extension-benefits-same-sex-domestic-partners-federal-emplo> (“For far too long, many of our Government’s hard-working, dedicated LGBT employees have been denied equal access to the basic rights and benefits their colleagues enjoy. This kind of systemic inequality undermines the health, well-being, and security not just of our Federal workforce, but also of their families and communities.”).

225. *Id.*

226. *Id.*

227. *International Initiatives to Advance the Human Rights of Lesbian, Gay, Bisexual, and Transgender Persons*, WHITE HOUSE (Dec. 6, 2011), <https://obamawhitehouse.archives.gov/the-press-office/2011/12/06/presidential-memorandum-international-initiatives-advance-human-rights-l>.

and protect the human rights of LGBT persons.”²²⁸ President Obama’s efforts set an example for the international community by opposing criminalization of LGBT status abroad and protecting LGBT refugees and those seeking asylum.²²⁹ In the memorandum, Obama also addressed the importance of treating LGBT people with respect and he included steps to engage the international community in the fight against LGBT discrimination.²³⁰ Obama’s memorandum marked the first time a U.S. President directed executive departments and agencies engaged abroad to take efforts to promote and protect the human rights of LGBT people worldwide.²³¹

While he took multiple steps toward LGBT equality in his first term, it was not until his second term that President Obama utilized the power of an executive order to provide federal LGBT discrimination protections.²³² A year and a half into his second term, Obama signed Executive Order 13672 on July 21, 2014.²³³ Obama’s single order titled *Further Amendments to Executive Order 11478, Equal Employment Opportunity in the Federal Government, and Executive Order 11246, Equal Employment Opportunity*, served dual purposes by amending two prior orders to expand their existing protections to the LGBT workforce.²³⁴

First, Obama’s Executive Order 13672 amended President Nixon’s August 8, 1969, Executive Order 11478, *Equal Employment Opportunity in the Federal Government*, which was later amended by President Clinton on May 28, 1998, to add “sexual orientation.”²³⁵ Obama’s executive order

228. *Id.*

229. *Id.*

230. *Id.*

231. *See, e.g., President Obama’s Remarkable and Inspiring Leadership*, THE COUNCIL FOR GLOBAL EQUALITY, <http://www.globalequality.org/component/content/article/222-president-obamas-remarkable-and-inspiring-leadership> (last visited Jun. 13, 2023) (describing Obama’s leadership in advancing respect and freedom for LGBT people around the world as nothing short of remarkable and inspiring).

232. *See, e.g., German Lopez, “We Were Heard for the First Time”: President Obama Leaves an Incredible Legacy on LGBTQ Rights*, VOX (Jan. 17, 2017), <https://www.vox.com/policy-and-politics/2017/1/17/14214522/obama-lgbtq-legacy>.

233. *Id.*

234. Exec. Order No. 13,672, 79 Fed. Reg. 42,971 (July 23, 2014).

235. *Id.*; Exec. Order No. 13,087, 63 Fed. Reg. 30,097 (June 2, 1998), amended Executive Order 11478 to add “sexual orientation.” Order 11478 was issued by President Richard Nixon on August 8, 1969, and prohibited employment discrimination in the federal civilian workforce on the basis of race, color, religion, sex, national origin, handicap, and age. Exec. Order No. 11,478, 34 Fed. Reg. 12,985 (Aug. 12, 1969). *See supra* note 187 and accompanying text.

added “gender identity” to the existing classifications, prohibiting employment discrimination in the federal civilian workforce, including the U.S. Postal Service and civilian employees of the U.S. Armed Forces. As a result, employment discrimination protections in the federal workforce included a prohibition on discrimination on the basis of race, color, religion, sex, national origin, handicap, age, sexual orientation, and gender identity.²³⁶ Notably, by adding “gender identity,” President Obama explicitly included transgender workers among those protected.²³⁷

Second, Obama’s Executive Order 13672 amended President Johnson’s September 24, 1965, Executive Order 11246, *Equal Employment Opportunity*, which established requirements for non-discriminatory hiring and employment practices of U.S. government contractors.²³⁸ Johnson’s initial executive order prohibited federal contractors from employment discrimination because of race, creed, color, or national origin, and required government contractors to take affirmative measures to ensure equal employment opportunity.²³⁹ Two years later, Johnson expanded Executive Order 11246 to prohibit discrimination on the bases of sex and religion.²⁴⁰ Obama’s executive order added “sexual orientation” and “gender identity” to the list of protected classifications, extending employment protections to LGBT employees of the federal government and federal contractors,

236. Exec. Order No. 13,672, 79 Fed. Reg. 42,971 (July 23, 2014). Nixon’s EO included the U.S. Postal Service and civilians working for the U.S. Armed Forces. *Id.* It also required federal agencies and departments to employ affirmative measures to promote employment opportunities and tasked the EEOC with directing its implementation and issuing rules accordingly. *Id.*

237. *Id.*

238. *Id.* President Obama’s EO 13672, *Further Amendments to Executive Order 11478, Equal Employment Opportunity in the Federal Government, and Executive Order 11246, Equal Employment Opportunity*, 79 Fed. Reg. 42,971 (July 23, 2014) amended President Johnson’s EO 11246, *Equal Employment Opportunity*, 30 Fed. Reg. 12,319 (Sept. 24, 1965) by adding “sexual orientation” and “gender identity” to the existing protected classes. *Id.* For a detailed history of the numerous amendments to EO 11246 from Johnson’s issuance in 1965 to present, see *History of Executive Order 11246*, U.S. DEP’T OF LAB., <https://www.dol.gov/agencies/ofccp/about/executive-order-11246-history> (last visited June 10, 2023). While the Department of Labor initially enforced EO 11246, the Office of Federal Contract Compliance Programs (OFCCP) currently enforces the Order. *Id.*

239. 30 Fed. Reg. 12,319, 12,320. For a detailed analysis of Executive Order 11246, see *Fair Pay and Safe Workplaces Executive Order: Questions and Answers*, CONG. RSCH. SERV. (June 15, 2015), <https://www.everycrsreport.com/reports/R44106.html#fn61>.

240. See Exec. Order No. 11,375, 32 Fed. Reg. 14,303 (Oct. 17, 1967).

estimated at “roughly one-fifth of U.S. workers.”²⁴¹ Along with setting strong discrimination prohibitions, Obama’s Order explicitly included transgender federal employee protections for the first time among an executive order’s protected classes, and put sexual orientation and gender identity on equal footing with other protected classes.²⁴²

On July 31, 2014, Obama issued Executive Order 13673, *Fair Pay and Safe Workplaces*, to “promote economy and efficiency in procurement” through engaging with contractors that are responsible and legally compliant.²⁴³ The stated policy of the order was to ensure that federal contractors understand and obey labor laws to “promote safe, healthy, fair, and effective workplaces.”²⁴⁴ The Order also assisted government agencies to identify, comply, and work with contractors that comply with the labor laws, including Executive Order 11246, *Equal Employment Opportunity*.²⁴⁵ Just ten days earlier, Obama’s Executive Order 13672 added sexual orientation and gender identity to the existing classification prohibiting employment discrimination.²⁴⁶

Three days before President Obama left the White House, he issued his last executive order. Executive Order 13764 amended the civil service rules and earlier executive orders in line with “continuing efforts to modernize the overarching executive branch enterprise,” addressing issues including federal employee security clearances, credentialing, and fitness for employment.²⁴⁷ Obama’s January 17, 2021, executive order explicitly repealed Eisenhower’s Executive Order 10450, which led to the Lavender Scare and resulted in the discriminatory termination of thousands of LGBT federal employees.²⁴⁸ In his final executive order, President Obama

241. See Maureen McCarty, *With Executive Order, Obama Takes His Place in History*, HUM. RTS. CAMPAIGN (July 20, 2014), <https://www.hrc.org/press-releases/with-executive-order-obama-takes-his-place-in-history>.

242. 63 Fed. Reg. 30,097.

243. Exec. Order No. 13,673, 79 Fed. Reg. 45,309 (Aug. 5, 2014).

244. *Id.*

245. The Order requires federal contractors contracting for supplies and services exceeding \$500,000 to report violations from the prior three years of selected labor laws and executive orders, including Executive Order 11246. See *supra*, note 204 and accompanying text.

246. See *supra* note 208 and accompanying text.

247. Exec. Order No. 13,764, 82 Fed. Reg. 8,115 (Jan. 23, 2021).

248. *Id.* See also Gleason, *supra* note 194 (“Because of [. . .] Executive Order [10450], it is estimated that at least ten thousand civil servants lost their jobs.”). See also Grundmann, *supra* note 190, at 11 (“Although we will never know the exact number of individuals who [due to Executive Order 10450] were denied employment or who had their employment terminated based on their actual or assumed sexual orientation, one

officially closed the door on Eisenhower's highly destructive executive order almost seventy years after it was implemented.²⁴⁹

President Obama made significant and crucial contributions to the LGBT community and its forward advancement in addition to his historic Executive Order. Following his efforts to extend benefits to federal employees' same-sex partners,²⁵⁰ the Office of Personnel Management similarly "expanded federal benefits for same-sex partners of federal employees and allowed same-sex domestic partners to apply for long-term care insurance,"²⁵¹ and the U.S. Department of Health and Human Services ("HHS") required hospitals receiving federal funds to allow visitation rights for LGBT patients.²⁵² President Obama was fundamental to both the repeal of the Don't Ask, Don't Tell policy²⁵³ and the implementation of policy to allow transgender service members to serve openly in the military, overturning the prior ban.²⁵⁴ Obama also worked with Congress to pass the Matthew

estimate places this number between 7,000 and 10,000 in the 1950's alone. It is impossible to determine the number of individuals who may not have sought Federal employment due to the knowledge that their sexual orientation made them ineligible for selection.").

In *Cole v. Young*, Eisenhower's Executive Order was weakened when the Supreme Court held that only when a government employee was in a position where he had access to classified or top-secret material such that he could pose an "immediate threat of harm" to national security was an agency permitted to utilize unreviewable dismissal power. 351 U.S. 536, 543-46 (1956).

249. 82 Fed. Reg. at 8,128. ("Sec. 3. General Provisions. (a) Executive Order 13381 of June 27, 2005, as amended, and Executive Order 10450 of April 27, 1953, as amended, are revoked."). While the passage of "Don't Ask, Don't Tell" under President Clinton effectively put an end to the Order, it was explicitly repealed by Obama's EO. *Id.*

250. *Memorandum for the Heads of Executive Departments and Agencies on Federal Benefits and Non-Discrimination*, WHITE HOUSE (June 17, 2009) [hereinafter *Obama 6/17/09 Nondiscrimination Memo*], <https://obamawhitehouse.archives.gov/the-press-office/memorandum-heads-executive-departments-ad-agencies-federal-benefits-and-non-discrimi>. See also *Presidential Memorandum-Extension of Benefits to Same-Sex Domestic Partners of Federal Employees*, WHITE HOUSE (June 2, 2010) [hereinafter *Obama 6/2/10 Domestic Benefits Memo*], <https://obamawhitehouse.archives.gov/the-press-office/presidential-memorandum-extension-benefits-same-sex-domestic-partners-federal-emplo>; *Obama Admin. 6/9/16 Fact Sheet*, *supra* note 218 and accompanying text.

251. See *Obama 6/2/10 Domestic Benefits Memo*, *supra* note 250.

252. See *Obama Admin. 6/19/16 Fact Sheet*, *supra* note 218.

253. See *id.* ("The President signed bipartisan legislation to repeal Don't Ask Don't Tell on December 22, 2010, allowing gay, lesbian, and bisexual Americans to serve openly in the Armed Forces without fear of being dismissed from service because of who they are and who they love, putting in motion the end of a discriminatory policy that ran counter to American values.").

254. *Transgender Service Members Can Now Serve Openly, Carter Announces*, U.S.

Shepard and James Byrd, Jr. Hate Crimes Prevention Act, extending coverage of federal hate crimes law to a victim's actual or perceived sexual orientation or gender identity.²⁵⁵

During Obama's presidency, the EEOC, for the first time ever, recognized federal Title VII protections based on gender identity and, shortly thereafter, based on sexual orientation.²⁵⁶ Additionally, Obama's Attorney General, Eric Holder, issued a memorandum on December 15, 2014, to U.S. attorneys, reversing the Department of Justice ("DOJ")'s prior position and informing U.S. attorneys and DOJ Department Heads that Title VII's "because of . . . sex" discrimination prohibition applied to discrimination based on gender identity, including transgender status.²⁵⁷ Further, under Obama, several other federal agencies also adopted the position that applicable federal nondiscrimination statutes prohibited discrimination on the basis of sexual orientation or gender identity.²⁵⁸

DEPT. DEF. (June 30, 2016), <https://www.defense.gov/News/News-Stories/Article/Article/822235/transgender-service-members-can-now-serve-openly-carter-announces/>. See also *Transgender Policy*, U.S. DEPT. DEF., https://dod.defense.gov/News/Special-Reports/0616_transgender-policy-archive/ (last visited May 13, 2023) (noting that "[e]ffective immediately, transgender Service members may serve openly, and they can no longer be discharged or otherwise separated from the military solely for being transgender individuals" and that subsequent training and admission of transgender recruits would take place over the following year).

255. See *Obama Admin. 6/9/16 Fact Sheet*, *supra* note 218.

256. See *infra* Section I.A.(2), *The EEOC & Title VII's Sex-Based Prohibition Pre-Bostock*.

257. *Memorandum from the Atty Gen. Eric Holder to United States Attorneys and Heads of Department Components*, OFF. ATT'Y GEN. (Dec. 15, 2014) ("[T]he straightforward reading of Title VII is that discrimination 'because of . . . sex' includes discrimination because an employee's gender identification is as a member of a particular sex, or because the employee is transitioning, or has transitioned, to another sex."). Obama's Attorney General also committed in the memorandum that the Department of Justice (DOJ) would stop making arguments in litigation suggesting that Title VII does not cover transgender people. *Id.*

258. See, e.g., *Nondiscrimination in Health Programs and Activities*, 81 Fed. Reg. 31,376, 31,390 (May 18, 2016) ("[Office of Civil Rights (OCR)] concludes that [ACA] Section 1557's prohibition of discrimination on the basis of sex includes, at a minimum, sex discrimination related to an individual's sexual orientation where the evidence establishes that the discrimination is based on gender stereotypes."). Further, under Obama, the Department Of Education issued gender-affirming guidance announcing its position that Title IX prohibited sex discrimination based on a student's gender identity in educational programs and activities receiving federal funding and advising schools to allow transgender students to use the restroom of their identifying gender. *Dear Colleague Letter*, Letter from Catherine E. Lhamon, Ass't Sec. for Civil Rights, U.S. Dep't of Educ. and Vanita Gupta, Principal Dep. Ass't Attorney for Civil Rights, U.S. Dep't of Justice (May 13, 2016) ("Title IX. . .and its implementing regulations prohibit

In response to the Supreme Court's *United States v. Windsor* decision, which struck down Section 3 of the federal Defense of Marriage Act as unconstitutional and required the federal government to recognize the rights of married same-sex couples, President Obama directed his administration to review over one thousand federal statutes and regulations so that the Court's decision would be promptly implemented.²⁵⁹ Obama's administration also refused to enforce the federal Defense of Marriage Act,²⁶⁰ the DOJ submitted an amicus brief supporting marriage equality²⁶¹ and the U.S. Solicitor General presented oral argument to the Supreme Court on behalf of the plaintiffs in *Obergefell*.²⁶² Following the Supreme Court's *Obergefell v. Hodges* decision holding that same-sex marriage was constitutionally protected, the White House was lit up in rainbow colors in a show of support,²⁶³ the U.S. Department of the Treasury proposed regulations implementing the *Obergefell* decision so that same-sex married couples could file federal taxes as married,²⁶⁴ and the Social Security Administration recognized same-sex married couples for determining Social Security benefits and Supplemental Security income.²⁶⁵

Along with the many significant actions taken by the Obama

sex discrimination in educational programs and activities operated by recipients of Federal financial assistance. This prohibition encompasses discrimination based on a student's gender identity, including discrimination based on a student's transgender status."'). Finally, the Director of the Consumer Financial Bureau issued a letter interpreting the Equal Credit Opportunity Act's nondiscrimination language to include sexual orientation and gender identity. Letter from Richard Cordray, Dir. Of the Consumer Fin. Prot. Bureau, to Michael Adams, Chief Exec. Officer of Servs. & Advocacy for GLBT Elders (Aug. 30, 2016), <https://www.consumerfinance.com/wp-content/uploads/sites/14/2016/09/SAGE-Letter.pdf>.

259. See *Obama Admin. 6/9/16 Fact Sheet*, *supra* note 218.

260. *Id.*

261. See Brief for the United States as Amicus Curiae Supporting Petitioners, *Obergefell v. Hodges*, Nos. 14-556, 14-562, 14-571 and 14-574, filed May 6, 2015. See also Lyle Dennison, *U.S. Joins Fight for Same-Sex Marriage*, SCOTUSBLOG (Mar. 6, 2015), <https://www.scotusblog.com/2015/03/u-s-joins-fight-for-same-sex-marriage/>.

262. See, e.g., Mark Joseph Stern, *Listen to the Outgoing Solicitor General's Poignant, Passionate Arguments for Marriage Equality*, SLATE (June 3, 2016), <https://slate.com/human-interest/2016/06/solicitor-general-don-verrilli-at-obergefell-v-hodges-arguments.html>.

263. See, e.g., Adam Lerner, *White House Set Aglow with Rainbow Pride*, POLITICO (June 26, 2015), <https://www.politico.com/story/2015/06/white-house-set-aglow-with-rainbow-pride-119490>.

264. See *Obama Admin. 6/9/16 Fact Sheet*, *supra* note 218.

265. *Id.*

administration to provide federal protections to the LGBT community, Obama's historic Executive Order 13672 provided federal protection from sex-based employment discrimination to an estimated fourteen million LGBT workers²⁶⁶ and provided many members of the LGBT community a first taste of the constitutional promise of equality and justice. As illustrated by the civil rights advancements and historical achievements that occurred during President Obama's eight years in the White House, the progression of LGBT rights was full steam ahead.

C. Into Reverse: Trump's Dismantling of LGBT Rights, the Bostock Decision & Efforts to Limit Bostock's Reach

Donald Trump immediately put a screeching halt to the forward advancement of LGBT rights; and then, he hit "reverse." Upon taking office in January 2017, Trump and his administration set about dismantling years of progress made for LGBT Americans.²⁶⁷ As a harbinger of things to come, on the day he was sworn in as President, all information addressing LGBT rights was removed from the White House website.²⁶⁸ Then, in one of his first actions as President, on February 22, 2017, Trump rescinded guidance issued by the Obama administration interpreting Title IX to include discrimination against transgender students.²⁶⁹ That action alone resulted in

266. See *With Executive Order, Obama Takes His Place in History*, *supra* note 241.

267. See, e.g., Kirsten Berg and Moiz Syed, *Under Trump LGBT Progress is Being Reversed in Plain Sight*, PROPUBLICA (Nov. 22, 2019), <https://projects.propublica.org/graphics/lgbtq-rights-rollback> (providing thirty-one examples of the Trump administration's systematic undoing of LGBT gains in rights and protections); Selena Simmons-Duffin, *'Whiplash' Of LGBTQ Protections And Rights, From Obama To Trump*, NPR (Mar. 2, 2020), <https://www.npr.org/sections/health-shots/2020/03/02/804873211/whiplash-of-lgbtq-protections-and-rights-from-obama-to-trump> ("The Obama administration was working to advance LGBTQ rights within the scope of what the law permitted," says Anthony Kreis, a law professor who studies LGBTQ discrimination. "The Trump administration is—fit for tat—going back and trying to reverse-engineer every single one of those advances.").

268. See *Moments After Donald Trump Became President, the White House's LGBT Rights Page Disappeared*, CBS NEWS (Jan. 20, 2017), <https://www.cbsnews.com/news/moments-after-donald-trump-became-president-the-white-houses-lgbt-rights-page-disappeared/>.

269. See *Letter to U.S. Supreme Court Clerk Harris from U.S. DOJ Deputy Assistant General Kneidler informing the Court clerk that the Trump administration rescinded Obama-era Title IX guidance*, SCOTUSBLOG (Feb. 22, 2017), <https://www.scotusblog.com/wp-content/uploads/2017/02/16-273-2.22.17-DOJ-Cover-Letter-Guidance.pdf>. See, e.g., Logan Casey, *After Trump Rescinds Title IX Guidance, What's Next for Transgender Students' Rights?*, BROOKINGS (Mar. 1, 2017), <https://www.brookings.edu/blog/brown-center-chalkboard/2017/03/01/after-trump-rescinds-title-ix-guidance-whats-next-for-transgender-students-rights/>. On October 28,

the Supreme Court's withdrawal of a certiorari grant just months earlier to address Title IX's sex discrimination prohibitions in relation to a transgender student denied bathroom access, and the Fourth Circuit's determination that the district court erred by failing to give deference to the Obama administration's Title IX guidance.²⁷⁰

During his single term in the White House, Trump and his administration systematically nullified numerous LGBT rights and advancements secured under President Obama, including reinstating a ban on transgender military service through his Twitter account²⁷¹ and removing healthcare nondiscrimination protections for LGBT people, effectively allowing the denial of care or treatment during a nationwide healthcare epidemic.²⁷²

It took only two months for Trump to issue his first executive order inflicting further harm on the LGBT community by eliminating protections

2016, the Supreme Court had granted certiorari to an interlocutory appeal in a Fourth Circuit Title IX case and set oral argument for March 28, 2017. *See generally* G.G. ex rel. Grimm v. Gloucester Cnty. Sch. Bd., 822 F.3d 709 (4th Cir. 2016), *vacated and remanded*, 137 S. Ct. 1239 (2017). The lawsuit alleged Title IX and Equal Protection violations based on a transgender male student's denial of access to the male bathroom. *Id.*

270. The Fourth Circuit reversed the trial court's grant of the defendant school district's motion to dismiss, holding that Obama-era Title IX guidance requiring schools to treat transgender students consistent with their gender identity should have been accorded deference by the trial court. *Grimm*, 822 F.3d at 715. On remand, the district court granted the plaintiff's preliminary injunction. *G.G. v. Gloucester Cnty. Sch. Bd.*, No. 4:15CV54, 2016 WL 3581852, at *1 (E.D. Va. June 23, 2016). The school board appealed to the Fourth Circuit, requesting a stay of the decision pending appeal to the Supreme Court and the Fourth Circuit denied the stay. *G.G. ex rel. Grimm v. Gloucester Cnty. Sch. Bd.*, 654 F. App'x 606, 606 (4th Cir. 2016). The Supreme Court granted certiorari, vacating the decision. *Gloucester Cnty. Sch. Bd. v. G.G. ex rel. Grimm*, 136 S. Ct. 2442, 2442 (2016). When the Trump administration withdrew the Obama administration's Title IX interpretation, the Supreme Court rescinded its certiorari grant. *Gloucester Cnty. Sch. Bd. v. G.G. ex rel. Grimm*, 137 S. Ct. 1239, 1239 (2017).

271. *See, e.g.*, Matt Thompson, *How to Spark Panic and Confusion in Three Tweets*, THE ATLANTIC, (Jan. 13, 2019), <https://www.theatlantic.com/politics/archive/2019/01/donald-trump-tweets-transgender-military-service-ban/579655/> (analyzing the impact of the unexpected announcement).

272. Margot Sanger-Katz & Noah Weiland, *Trump Administration Erases Transgender Civil Rights Protections in Health Care*, N.Y. TIMES (June 12, 2020), <https://www.nytimes.com/2020/06/12/us/politics/trump-transgender-rights.html>. *See also* *Nondiscrimination in Health & Health Education Programs or Activities, Delegation of Authority*, 85 Fed. Reg. 37,160 (June 19, 2020), <http://www.federalregister.gov/documents/2020/06/19/2020-11758/non-discrimination-in-health-and-health-education-programs-or-activities-delegation-of-authority> (issuing the rule).

provided by his predecessor. On March 27, 2017, Trump issued Executive Order 13782, revoking Obama's July 31, 2014, Executive Order 13673, section 3 of Obama's Executive Order 13683, and Obama's August 23, 2016, Executive Order 13738, all of which related to Obama's *Fair Pay and Safe Workplaces* Order.²⁷³ Obama's Executive Order 13672 incorporated discrimination protections based on sexual orientation and gender identity to the prior protected classes of President Johnson's *Equal Employment Opportunity* Order 11246.²⁷⁴ Executive Order 13673, *Fair Pay and Safe Workplaces*, required federal contractors to report labor violations, including violations of Executive Order 11246's equal employment opportunity requirements, received in the prior three years as part of the federal contracting process.²⁷⁵ Trump's revocation removed those protections, permitting federal contractors to discriminate against LGBT workers.²⁷⁶ While Trump did not revoke Obama's Executive Order 13672, the revocation of Executive Order 13673 impeded its impact as discrimination violations by contractors were no longer required to be disclosed.²⁷⁷ It was estimated that Trump's action in revoking Executive Order 13673 removed the sole legal protection provided to "more than 1 million LGBTQ workers."²⁷⁸

On April 26, 2017, Trump issued Executive Order 13791, limiting the federal government's role in education.²⁷⁹ Announcing his administration's policy to "protect and preserve State and local control over the curriculum, program of instruction, administration, and personnel of educational institutions, schools, and school systems," the Order directed the Secretary

273. Exec. Order No. 13,782, 82 Fed. Reg. 15,607 (Mar. 30, 2017); Exec. Order No. 13,673, 79 Fed. Reg. 45,309 (Aug. 5, 2014); Exec. Order No. 13,683, 79 Fed. Reg. 75,041 (Dec. 16, 2014); Exec. Order No. 13,738, 81 Fed. Reg. 58,807 (Aug. 26, 2016).

274. Exec. Order No. 13,672, 79 Fed. Reg. 42,971 (July 23, 2014); U.S. Dep't of Labor, *supra* note 208.

275. Exec. Order No. 13,673, 79 Fed. Reg. 45,309 (Aug. 5, 2014). *See supra* notes 208-212 and accompanying text.

276. Exec. Order No. 13,782, 82 Fed. Reg. 15,607 (Mar. 30, 2017).

277. *See, e.g.,* Jenny Kutner, *Trump Rolls Back Protections for LGBTQ Workers, Despite Recent Promises*, VOGUE (Mar. 29, 2017), <https://www.vogue.com/article/trump-executive-order-rolls-back-lgbtq-protections> ("By removing the requirement that companies prove their compliance with federal law, the government has no way to ensure they're also following the nondiscrimination requirements Obama explicitly laid out. In other words, [Trump] has created a major loophole that could allow companies to deny LGBTQ people opportunities or otherwise treat them unequally—and those organizations can still receive massive federal contracts.").

278. *Id.*

279. Exec. Order No. 13,791, 82 Fed. Reg. 20,427 (May 1, 2017).

of Education to review regulations and guidance documents to confirm they prohibit the Department of Education (“DOE”) from “exercising any direction, supervision, or control over areas subject to State and local control,” rescinding or revising any that did not.²⁸⁰ Trump’s Order did not reference Title IX, sexual orientation, or gender identity, but the Order was ominous following his February 2017 rescission of the Obama administration’s Title IX guidance providing protection to transgender students in federal fund recipient educational facilities.²⁸¹ Additionally, the definition section of Executive Order 13791 identified “guidance documents” applicable to the Order, as “any written statement issued by the Department to the public that sets forth a policy on a statutory, regulatory, or technical issue or an interpretation of a statutory or regulatory issue,” expressly including “Dear Colleague letters,” referencing guidance from the Obama administration directing that Title IX’s sex nondiscrimination protections include sexual orientation and gender identity.²⁸²

President Trump issued Executive Order 13798, *Promoting Free Speech and Religious Liberty*, on May 4, 2017, directing “all executive departments and agencies . . . to the greatest extent practicable and to the extent permitted by law, [to] respect and protect the freedom of persons and organizations to engage in religious and political speech.”²⁸³ The Order also instructed the Attorney General to “issue guidance interpreting religious liberty protections in Federal law to guide all agencies.”²⁸⁴ The ACLU, a national civil rights organization, sent a letter to U.S. senators that had introduced legislation to nullify the Order stating concern that Trump’s mandate to federal agencies to explore religious-based exceptions provided a foundation for the “potential discrimination against LGBTQ people [among others] under the guise of religious liberty.”²⁸⁵

On July 26, 2017, just seven months into his presidency, Trump announced via Twitter that transgender troops could no longer serve in the

280. *Id.*

281. *See* Gloucester Cnty. Sch. Bd. v. G.G. *ex rel.* Grimm, 137 S. Ct. 1239, 1239 (2017) (discussing case history).

282. Exec. Order No. 13,791, 82 Fed. Reg. 20,427 (May 1, 2017).

283. Exec. Order No. 13,798, 82 Fed. Reg. 21,675 (May 9, 2017).

284. *Id.*

285. Letter from F. Shakir, National Political Director, I. Thompson, Legislative Representative, and G. Usova, Legislative Counsel, ACLU, Sent to U.S. Sens. Dianne Feinstein, Patty Murray, and Ron Wyden, (May 10, 2017), <https://www.aclu.org/letter/aclu-letter-praising-introduction-legislation-nullify-executive-order-13798-promoting-free>.

military,²⁸⁶ undoing a major victory achieved under President Obama only a year prior.²⁸⁷ On August 25, 2017, Trump issued a memorandum making his announcement official, banning openly transgender individuals from military service and ending gender-affirming care for transgender military members by preventing federal fund use for such procedures.²⁸⁸ Not surprisingly, the Order resulted in multiple lawsuits,²⁸⁹ ultimately preventing the ban from taking effect until April 12, 2019,²⁹⁰ after Trump rescinded his initial challenged Order and issued a revised watered-down version to avoid

286. See Matt Thompson, *How to Spark Panic and Confusion in Three Tweets*, THE ATLANTIC (Jan. 13, 2019), <https://www.theatlantic.com/politics/archive/2019/01/donald-trump-tweets-transgender-military-service-ban/579655/> (showing the series of three tweets, posted on July 26, 2017, which declared: (1) “After consultation with my Generals and military experts, please be advised that the United States Government will not accept or allow....[sic]”; (2) “Transgender individuals to serve in any capacity in the U.S. Military. Our military must be focused on decisive and overwhelming....[sic]”; (3) “. . . victory and cannot be burdened with the tremendous medical costs and disruption that transgender in the military would entail. Thank you.”). Trump’s announcement reportedly was unexpected by military leaders. Barbara Starr et al., *US Joint Chiefs Blindsided by Trump’s Transgender Ban*, CNN, (July 17, 2017, 5:40 PM), <https://www.cnn.com/2017/07/27/politics/trump-military-transgender-ban-joint-chiefs/index.html>.

287. See *supra* note 242 and accompanying text.

288. 82 Fed. Reg. 41,319, Presidential Documents, *Military Service by Transgender Individuals*, (Aug. 30, 2017) (“In my judgment, the previous Administration failed to identify a sufficient basis to conclude that terminating the Departments’ longstanding policy and practice would not hinder military effectiveness and lethality, disrupt unit cohesion, or tax military resources, and there remain meaningful concerns that further study is needed to ensure that continued implementation of last year’s policy change would not have those negative effects.”).

289. Julie Moreau, *Years After Trans Military Ban, Legal Battle Rages On*, NBC NEWS (Apr. 11, 2020), <https://www.nbcnews.com/feature/nbc-out/year-after-trans-military-ban-legal-battle-rages-n1181906> [hereinafter *Years After Ban*]. See also Julie Moreau, *‘Nothing Short of a Ban’: Transgender Troops, Advocates React to New Military Policy*, NBC NEWS (Mar. 14, 2019), <https://www.nbcnews.com/feature/nbc-out/nothing-short-ban-transgender-troops-advocates-react-new-military-policy-n983166?cid=related> (“The legal battle is “far from over,” according to Shannon Minter, legal director of the National Center for Lesbian Rights. “All four cases are proceeding,” he said. “Just because an injunction is lifted, doesn’t mean [the] case is over.”).

290. Hallie Jackson & Courtney Kube, *Trump’s Controversial Transgender Military Policy Goes Into Effect*, NBC NEWS (Apr. 12, 2019), <https://www.nbcnews.com/feature/nbc-out/trump-s-controversial-transgender-military-policy-goes-effect-n993826> (“The Pentagon on Friday began to implement a controversial new policy that critics say is essentially a “don’t ask, don’t tell” policy for trans service members.”).

preliminary injunctions issued against the initial version.²⁹¹ While the revised memorandum permitted some active duty transgender service members to continue military service, the Order required new recruits to serve in their sex assigned at birth and excluded applicants with a gender dysphoria history or diagnosis.²⁹²

On October 5, 2017, three months after his transgender military tweets, Trump took aim at civilian LGBT employees by rescinding DOJ guidance issued under the Obama administration, reversing its position that Title VII's prohibition on sex-based discrimination included discrimination based on sexual orientation and gender identity.²⁹³ To announce his administration's policy U-turn, Trump's attorney general issued a memorandum notifying all U.S. Attorneys and DOJ leadership that "Title VII's prohibition on sex discrimination encompasses discrimination between men and women but does not encompass discrimination based on gender identity per se."²⁹⁴ The memorandum declared that "Title VII is not properly construed to proscribe employment practices (such as sex-specific bathrooms) that take account of the sex of employees but do not impose different burdens on similarly

291. See *Years After Ban*, *supra* note 289 ("The current policy allows service members who received a diagnosis of gender dysphoria prior to April 2019 to continue to serve in their preferred gender. Any currently serving troops diagnosed after that date must serve according to their sex as assigned at birth and are prohibited from seeking transition-related care."); see also Ariane de Vogue & Zachary Cohen, *Supreme Court Allows Transgender Military Ban to go Into Effect*, CNN (Jan. 22, 2019), <https://cnn.com/2019/01/22/politics/scotus-transgender-ban/index.html> (the Supreme Court, in an unsigned 5-4 opinion that did not address the legality of the ban, allowed the ban to move forward on January 22, 2019).

292. See *Years After Ban*, *supra* note 289; Jackson, *supra* note 290. Under the revised policy, active duty transgender servicemembers with a gender dysphoria diagnosis could remain in the military, serve in their identified gender, and receive gender-affirming treatment, including use of hormones. However, transgender individuals wishing to enlist are prohibited if the person has a gender dysphoria diagnosis and is taking hormones or has already undergone gender transition. Any new recruits were required to serve in their sex assigned at birth and is prohibited from gender-affirming care.

293. See Memorandum from Attorney General to U.S. Attorneys, Implementation of Memorandum on Federal Law Protections for Religious Liberty (Oct. 5, 2017). See also Ryan Thoreson, *U.S. Justice Department Reverses Position on Transgender Discrimination*, HUMAN RTS. WATCH (Oct. 5, 2017), <https://www.hrw.org/news/2017/10/05/us-justice-department-reverses-position-transgender-discrimination> ("Sessions' memorandum is the latest instance where the Justice Department has adopted positions that weaken nondiscrimination protections for LGBT people.").

294. Laura Jarrett, *Sessions Says Civil Rights Law Doesn't Protect Transgender Workers*, CNN (Oct. 5, 2017), <https://www.cnn.com/2017/10/05/politics/jeff-sessions-transgender-title-vii/index.html>.

situated members of each sex.”²⁹⁵ The memorandum also informed that the DOJ would maintain Trump’s policy change “in all pending and future matters,”²⁹⁶ effectively erasing the government’s support for transgender American employees extended under Obama.

Trump’s Title VII U-turn also extinguished the DOJ and EEOC’s cooperative working relationship in support of the LGBT community. In September 2014, while Obama was in office, the EEOC filed a lawsuit asserting that gender identity was covered under Title VII’s protective ambit.²⁹⁷ When the trial court granted summary judgment to the defendant,²⁹⁸ the EEOC appealed to the Sixth Circuit, filing its appellate brief in February 2017, shortly after Trump came into office.²⁹⁹ A year earlier, a similar issue was in front of the Second Circuit: whether Title VII’s sex discrimination prohibition extended to sexual orientation.³⁰⁰ On January 14, 2016, the Clerk of the Second Circuit notified the Acting Solicitor General that the court invited the EEOC to brief and argue whether Title VII’s sex discrimination prohibition extended to sexual orientation.³⁰¹ Following an April 18, 2017, panel decision holding that the court was bound by precedent that Title VII did not cover sexual orientation discrimination, the circuit granted an *en banc* review on May 25, 2017.³⁰² At that time, the DOJ engaged in a highly controversial move. Knowing that the EEOC was actively engaged in the Sixth Circuit litigation and would be filing an amicus brief at the invitation of the Second Circuit arguing that Title VII did provide such protection, the DOJ filed a separate amicus brief, opposing and publicly contesting the EEOC’s position.³⁰³ On February 26, 2018, the *en banc* court

295. *Id.*

296. *Id.*

297. See *EEOC Sues Detroit Funeral Home Chain for Sex Discrimination Against Transgender Employee*, EEOC (Sept. 25, 2014), <https://www.eeoc.gov/newsroom/eeoc-sues-detroit-funeral-home-chain-sex-discrimination-against-transgender-employee>.

298. See generally *EEOC v. R.G. & G.R. Harris Funeral Homes Inc.*, 201 F. Supp. 3d 837 (E.D. Mich. 2016).

299. Opening Brief of the Equal Employment Opportunity Commission as Appellant, *EEOC v. R.G. & G.R. Harris Funeral Homes Inc.*, No. 16-2424 (Feb. 10, 2017).

300. *Zarda v. Altitude Express*, 883 F.3d 100, 107 (2d Cir. 2018) (explaining that plaintiff brought a sex discrimination claim under Title VII because he was fired for “fail[ing] to conform to male sex stereotypes by referring to his sexual orientation.”).

301. Letter from Catherine O’Hagen Woolf, Second Circuit Court of Appeals Clerk of Court to U.S. Acting Solicitor General (Jan. 14, 2016), <https://static.reuters.com/resources/media/editorial/20170727/zardavalitude--clerkletter.pdf>.

302. 883 F.3d at 109 (discussing the case’s procedural history).

303. See, e.g., Alison Frankel, *Once Again, Trump DOJ Busts Convention, Splits Government in High-Profile Employment Case*, REUTERS (July 27, 2017),

agreed with the EEOC, holding that Title VII's sex discrimination prohibitions did include sexual orientation.³⁰⁴

On December 7, 2018, in what was described as “the latest of a series of rollbacks of transgender rights” under Trump, he also revoked guidance issued by the Office of Personnel Management, (“OPM”) effectively removing federal protections for transgender employees.³⁰⁵ The former OPM guidance, with the express goals of preventing “an unwelcoming work environment” and “treating all employees with dignity and respect,” instructed federal employees to use employee-requested names and pronouns and to permit restroom use consistent with gender identity, regardless of an employee’s transition status and without any request for proof.³⁰⁶ In its place, OPM posted *Guidance Regarding Non-Discriminatory Practices in Federal Employment*.³⁰⁷ The new guidance did not address transgender employees, other than to “compel agencies to only change the gender or name on employees’ personnel files after obtaining legal documentation,” which the earlier guidance explicitly did not require due to potential difficulties.³⁰⁸

The Trump administration’s established policy was to define sex biologically as determined at birth and to narrowly tailor civil rights laws to

<https://www.reuters.com/article/us-otc-doj/once-again-trump-doj-busts-convention-splits-government-in-high-profile-employment-case-idUSKBN1AC32U> (noting that the EEOC brief was signed by EEOC lawyers, but not any from the DOJ). *See also, DOJ and EEOC File Opposing Amicus Briefs Addressing Whether Sexual Orientation Is a Protected Characteristic Under Title VII*, SULLIVAN & CROMWELL, LLP (Aug. 1, 2017), <https://www.sullcrom.com/doj-and-eeoc-file-opposing-amicus-briefs-addressing-whether-sexual-orientation-is-a-protected-characteristic-under-title-vii> (noting that the EEOC’s brief argues “that sexual orientation discrimination claims ‘fall squarely within Title VII’s prohibition against discrimination on the basis of sex’” while the DOJ “pointed to precedent ‘settled for decades’ that Title VII does not prohibit sexual orientation discrimination ‘as a matter of law.’”).

304. *Zarda*, 855 F.3d at 131-32 (concluding that sexual orientation discrimination is a form of sex discrimination).

305. *See* Eric Katz, *Trump Administration Removes Guidance Supporting Transgender Feds*, GOV’T EXEC. (Dec. 7, 2018), <https://www.govexec.com/pay-benefits/2018/12/trump-administration-removes-guidance-supporting-transgender-feds/153384/>.

306. *Id.*

307. *Guidance Regarding Non-Discriminatory Practices in Federal Employment*, U.S. OFF. PERS. MGMT., <https://www.opm.gov/policy-data-oversight/diversity-equity-inclusion-and-accessibility/reference-materials/guidance-regarding-gender-identity-and-inclusion-in-the-federal-workplace.pdf> (last visited Jun. 13, 2023).

308. *Id.*

its definition.³⁰⁹ On April 22, 2019, the Supreme Court granted certiorari in the *Bostock* case, agreeing to determine whether Title VII's sex discrimination prohibitions included discrimination on the basis of sexual orientation and gender identity.³¹⁰ Trump's DOJ filed an amicus brief in the case in response, again opposing the EEOC's position and urging the Court to permit employer discrimination against LGBT American workers.³¹¹ The brief stated, "Title VII's prohibition on discrimination because of sex does not bar discrimination because of sexual orientation."³¹² The ordinary meaning of "sex" is biologically male or female; it does not include sexual orientation."³¹³

Despite its awareness that the Court would be addressing Title VII's definition of sex in the *Bostock* case, on June 14, 2019, Trump's HHS gave notice of its proposed rule "to repeal the novel definition of 'sex'" in Section 1557 of the Affordable Care Act.³¹⁴ Under Obama, Section 1557, which incorporates the nondiscrimination protections from Title IX, among others, was interpreted to include sexual orientation and gender identity under its "sex" discrimination prohibition.³¹⁵ Trump and his administration intended

309. See Erica L. Green et al., *'Transgender' Could be Defined Out of Existence Under Trump Administration*, N.Y. TIMES (Oct. 21, 2018), <https://www.nytimes.com/2018/10/21/us/politics/transgender-trump-administration-sex-definition.html> ("The Trump administration is considering narrowly defining gender as a biological, immutable condition determined by genitalia at birth, the most drastic move yet in a governmentwide effort to roll back recognition and protections of transgender people under federal civil rights law."). See also Margot Sanger-Katz & Erica L. Green, *Supreme Court Expansion of Transgender Rights Undercuts Trump Restrictions*, N.Y. TIMES (Aug. 6, 2020), <https://www.nytimes.com/2020/06/15/upshot/transgender-rights-trump.html> ("The administration has been working to pursue a narrow definition of sex as biologically determined at birth, and to tailor its civil rights laws to meet it. Access to school bathrooms would be determined by biology, not gender identity. The military would no longer be open to transgender service members. Civil rights protections would not extend to transgender people in hospitals and ambulances.").

310. Order Granting Writ of Certiorari, *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020) (No. 17-1618).

311. Brief for the United States as Amicus Curiae Supporting Affirmance in No. 17-1618 and Reversal in No. 17-1623, *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020) (No. 17-1623) 2019 WL 4014070.

312. *Id.*

313. *Id.*

314. Nondiscrimination in Health and Health Education Programs or Activities, 84 Fed. Reg. 27,846 (proposed June 14, 2019) (to be codified at 42 C.F.R. pts. 438, 440, 460 and 45 C.F.R. pts. 86, 92, 147, 155, and 156).

315. Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31,376 (proposed May 18, 2016) (to be codified at 45 C.F.R. pt. 92).

to roll back those protections by repealing Obama's interpretation for the stated purpose of making Section 1557 "more consistent with the Title IX regulations of other Federal agencies."³¹⁶ The proposed legislation would result in eliminating, during a worldwide pandemic, specific transgender patient healthcare coverage protections and provisions that prohibited doctors, hospitals, and health insurance companies from discriminating based on gender identity and from varying benefits available to LGBT patients.³¹⁷

While the issue before the *Bostock* Court addressed the definition of "sex" in relation to Title VII, Title VII jurisprudence is also often used by the courts to inform legal issues related to interpretation of Title IX.³¹⁸ In support of a repeal, Trump's administration claimed its proposed change incorporated Title IX's plain meaning of the term "sex."³¹⁹ The Trump administration also acknowledged that the Court's interpretation of Title VII's sex discrimination prohibition in its soon-to-be-released *Bostock* decision would similarly impact Title IX's sex discrimination provision.³²⁰ Thus, HHS explicitly recognized that the Court's interpretation of the term "sex" or "on the basis of sex" in its *Bostock* holding could impact its changes to the HHS rule.³²¹ Yet, on June 12, 2020, knowing that the Supreme Court would release its decision at any time interpreting "sex" under Title VII, Trump nonetheless moved forward and issued a final HHS administrative rule, announcing that Title IX's sex discrimination prohibition did not provide LGBT protections.³²²

316. Nondiscrimination in Health and Health Education Programs or Activities, 84 Fed. Reg. at 27,856.

317. See Sanger-Katz & Weiland, *supra* note 272.

318. See, e.g., *Jennings v. Univ. of N.C.*, 482 F.3d 686, 695 (4th Cir. 2007) ("We look to case law interpreting Title VII of the Civil Rights Act of 1964 for guidance in evaluating a claim brought under Title IX.").

319. Nondiscrimination in Health and Health Education Programs or Activities, 84 Fed. Reg. at 27,856.

320. *Id.*

321. *Id.* at 37,168 ("Because Section 1557 incorporates Title IX's prohibition on discrimination 'on the basis of sex,' it presupposes that the executive and judicial branches can recognize the meaning of the term 'sex.'"). "[HHS] continues to expect that a holding by the U.S. Supreme Court on the meaning of 'on the basis of sex' under Title VII will likely have ramifications for the definition of 'on the basis of sex' under Title IX." *Id.* "[T]o the extent that a Supreme Court decision is applicable in interpreting the meaning of a statutory term, the elimination of such term would not preclude application of the Court's construction." *Id.*

322. *Nondiscrimination in Health & Health Education Programs or Activities, Delegation of Authority*, 85 Fed. Reg. 37,160 (June 19, 2020), <https://www.govinfo.gov/content/pkg/FR-2020-06-19/pdf/2020-11758.pdf>. See also

When the *Bostock* decision was released three days later, on June 15, 2020, the Trump administration's narrow definition and application of "sex" and "sex discrimination" were firmly at odds with the Supreme Court's *Bostock* holding that Title VII's definition of "sex" and its prohibition on "sex discrimination" included discrimination based on sexual orientation and gender identity.³²³ Shortly after the Court's decision was announced, the United States Commission on Civil Rights issued a letter to President Trump calling on his administration to fully comply with the *Bostock* opinion stating, "Given the Court's unequivocal holding, the Trump Administration must drop its repeated and ongoing efforts to perpetuate discrimination on the basis of sex with respect to sexual orientation and gender identity."³²⁴ However, rather than withdrawing the HHS Rule in order to re-consider it in light of the *Bostock* decision, the Trump administration did nothing. On August 23, 2020, a federal district court criticized the move and issued a stay and preliminary injunction to prevent the HHS Rule from going into effect.³²⁵

Katelyn Burns, *The Trump Administration Will Now Allow Doctors to Discriminate Against LGBT People*, VOX (June 12, 2020), <https://www.vox.com/identities/2020/4/24/21234532/trump-administration-health-care-discriminate-lgbtq> (explaining that Trump's rule would allow health care providers to deny care to anyone they perceived as trans or gay).

323. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1741 (2020) (holding that "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."). See also Sanger-Katz & Green, *supra* note 309 ("[T]he [Trump] administration's definition is now firmly at odds with how the court views "sex" discrimination.").

324. Letter from the U.S. Commission on Civil Rights to the Trump Administration (June 19, 2020), <https://www.usccr.gov/files/2020/2020-06-19-USCCR-Calls-for-Changes-Post-Bostock.pdf> (asserting that the Trump administration's actions violated its responsibility to enforce civil rights by neglecting to follow the Supreme Court's interpretation).

325. *Walker v. Azar*, 480 F. Supp. 3d 417 (E.D.N.Y. 2020). In a subsequent Memorandum and Order clarifying the extent of the stay and preliminary injunction, the court held that both would remain to all portions of the rule that are impacted by the *Bostock* decision and that the plaintiffs have standing to challenge. *Walker v. Azar*, 20CV2834FBSMG, 2020 WL 6363970, at *2-*4 (E.D.N.Y. Oct. 29, 2020), *appeal withdrawn sub nom.* *Walker v. Becerra*, 20-3580, 2021 WL 5548357, at *1 (2d Cir. Nov. 22, 2021). On November 22, 2021, after President Biden took office, the parties filed a stipulation withdrawing their appeal. See Susannah Luthi, *Judge Halts Trump's Rollback of Transgender Health Protections*, POLITICO (Aug. 17, 2020), <https://www.politico.com/news/2020/08/17judge-trump-rollback-transgender-health-397332>. See also Jane Wester, *Federal Judge Blocks Trump Administration's Rollback of LGBTQ Health Care Protections*, ALM BENEFITS PRO (Aug. 18, 2020), <http://www.benefitspro.com/2020/08/18/brooklyn-federal-judge-blocks-trump-administration-from-ending-health-care-bias-protections-for-lgbtq-patients-412-102588/?slreturn=benefitspro.com/2020/08/18/brooklyn-federal-judge-blocks-trump->

Finding that the Trump administration acted “arbitrarily and capriciously” in enacting the contradictory rule in light of the recent Supreme Court *Bostock* decision, the court admonished: “When the Supreme Court announces a major decision, it seems a sensible thing to pause and reflect on the decision’s impact Since HHS has been unwilling to take that path voluntarily, the Court now imposes it.”³²⁶

Following the Supreme Court’s *Bostock* decision and despite the district judge’s admonishment, Trump and his administration continued efforts to minimize the case, interpret it narrowly, and limit its reach by further implementing rules permitting discrimination based on sexual orientation and gender identity.³²⁷ On September 22, 2020, with four months left in the White House, Trump issued Executive Order 13950, *Combating Race and Sex Stereotyping*.³²⁸ The Order banned diversity training by federal contractors and federal fund recipients.³²⁹ The Order also implemented a policy prohibiting the discussion of “divisive” issues related to diversity and inclusion, including the promotion of “race or sex stereotyping or scapegoating,” in employee training.³³⁰ Trump’s order caused significant controversy and confusion to federal contractors, particularly those who wanted to pursue initiatives advancing diversity and inclusion.³³¹ Santa

administration-from-ending-health-care-bias-protections-for-lgbtq-patients-412-102588/?slreturn=20230006233231 (“When the Supreme Court announces a major decision, it seems a sensible thing to pause and reflect on the decision’s impact. . . . Since HHS has been unwilling to take that path voluntarily, the Court now imposes it.”).

326. 480 F. Supp. 3d at 430.

327. See Chris Johnson, *How the Trump administration is getting around Bostock to allow anti-trans discrimination*, WASH. BLADE (Sept. 16, 2020), <https://www.washingtonblade.com/2020/09/16/how-the-trump-administration-is-getting-around-bostock-to-allow-anti-trans-discrimination/> (“Faced with having to enforce the law to prohibit anti-transgender discrimination in the aftermath of the U.S. Supreme Court’s landmark decision for LGBTQ rights this summer, the Trump administration has sought to minimize the breadth of the ruling in ways that could still lead to transgender people being denied access to public spaces and activities.”). See also Sanger-Katz & Green, *supra* note 309 (“The Trump administration’s socially conservative agenda has included a broad-based effort to eliminate transgender rights across the government, in education, housing, the military and, as recently as Friday, health care.”).

328. Exec. Order No. 13,950, 85 Fed. Reg. 60,683 (Sept. 28, 2020).

329. *Id.*

330. *Id.*

331. See David Goldstein, *Trump’s Diversity Directive is Disruptive, but Not for Long*, BLOOMBERG L. (Nov. 20, 2020), <https://news.bloomberglaw.com/daily-labor-report/trumps-diversity-executive-order-is-disruptive-but-not-for-long> (“The immediate reaction of federal contractors to the order was overwhelmingly one of shock and dismay.

Clara County filed a lawsuit challenging the constitutionality of the Order on November 2, 2020, seeking declaratory and injunctive relief.³³² On December 22, 2020, yet another federal district court judge issued a nationwide preliminary injunction banning the Order's enforcement three months after it was issued, finding it restricted speech.³³³

Despite losing his re-election bid in a solid defeat by President Biden, Trump continued efforts to block future LGBT advances into the very last days of his presidency.³³⁴ On December 9, 2020, the Trump administration issued a final rule that purported to "clarify" the religious exemption President George W. Bush added in 2002 to President Johnson's Executive Order 11246, *Equal Opportunity Employment*.³³⁵ In practice, however, rather than provide clarification, Trump's final rule expanded the religious exemption and permitted discrimination against LGBT employees. In contrast, President Bush's 2002 amendment to Executive Order 11246 expressly added Title VII's religious exemption, permitting religiously affiliated contractors to make decisions "with respect to the employment of individuals of a particular religion" outside of the Order's equal opportunity

Most federal contractors feel strongly that a diverse workforce is a key to success in the modern global economy.").

332. *Santa Clara Lesbian and Gay Comm. Ctr. v. Trump*, 508 F. Supp. 3d 521, 534 (N.D. Cal. Dec. 22, 2020). See *infra* notes 312-315 and accompanying text.

333. *Santa Clara Lesbian and Gay Comm. Ctr.*, 508 F. Supp. at 550. See Guy Brenner & Abigail Rosenblum *Court Enjoins Enforcement of Combatting Race and Sex Stereotyping Executive Order for Federal Contractors and Grantees*, NAT'L L. REV. (Dec. 24, 2020), <https://www.Natlawreview.com/article/court-enjoins-enforcement-combatting-race-and-sex-stereotyping-executive-order>. On his first day in office, President Biden formally rescinded Trump's Order.

334. See Caroline Medina, et. al, *Improving the Lives and Rights of LGBTQ People in America*, CTR. FOR AM. PROGRESS, (Jan. 12, 2021), <https://www.americanprogress.org/article/improving-lives-rights-lgbtq-people-america/> ("The Trump administration spent the majority of its four years in office launching a barrage of attacks infringing on the rights of LGBTQ people, promoting discriminatory policies, and creating barriers to access critical government services. These actions reflect the Trump administration's blatant disregard for the rights, dignity, and well-being of LGBTQ people, their families, and communities.").

335. *Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption*, Final Rule, 85 Fed. Reg. 79,324 (Dec. 9, 2020) (amending President Johnson's EO 11246, *Equal Employment Opportunity*, 30 Fed. Reg. 12,319 (Sept. 24, 1965)). Trump's proposed rule was published in August 2019, after the Court had granted certiorari in the *Bostock* case to determine whether Title VII's nondiscrimination protections based on sex included sexual orientation and gender identity. *Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption, Notice of Proposed Rulemaking*, 84 Fed. Reg. 41,677 (Aug. 25, 2019). See also *supra* notes 208-212; *infra* notes 309-312.

clause, but did not permit discrimination in other protected areas.³³⁶

In fact, Bush's religious exemption explicitly stated, "[s]uch contractors and subcontractors are *not exempted or excused* from complying with the other requirements contained in this Order."³³⁷ Thus, while Title VII's religious exemption was incorporated into Executive Order 11246 to permit contractors with a primary religious purpose and character to make hiring decisions exempt from its equal opportunity clause, that exemption *does not* extend into or excuse compliance with other requirements of the Order.³³⁸ As such, qualifying religious employers continued to be prohibited from discriminatory employment actions on the basis of the protected characteristics *other than* religion, including sexual orientation and gender identity, even if the decisions are made for sincerely-held religious reasons.³³⁹ Further, Title VII case law has consistently held that while the statute's religious exemption permits the hiring of employees of a specific religion, it requires compliance with Title VII's other discrimination prohibitions.³⁴⁰ Prior to *Bostock*, President Obama's 2014 amendment to

336. See Exec. Order No. 13279, 67 Fed. Reg. 77,141 (Dec. 16, 2002) ("Section 202 of this Order shall not apply to a Government contractor or subcontractor that is a religious corporation, association, educational institution, or society, with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities."). The following year, a final rule was published amending EO 11246, incorporating President Bush's EO 13279 religious exemption. *Affirmative Action and Nondiscrimination Obligations of Government Contractors, Executive Order 11246, as amended; Exemption for Religious Entities*, 68 Fed. Reg. 56,392 (Sept. 30, 2003). The preamble notes that the exemption was modeled on the exemption for religious institutions and organizations under Title VII. *Id.*

337. 67 Fed. Reg. at 77,143 ("Section 202 of this Order shall not apply to a Government contractor or subcontractor that is a religious corporation, association, educational institution, or society, with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities. Such contractors and subcontractors are not exempted or excused from complying with the other requirements contained in this Order.") (emphasis added).

338. *Id.*

339. *Id.*

340. See, e.g., *Kennedy v. St. Joseph's Ministries, Inc.*, 657 F.3d 189, 192 (4th Cir. 2011) ("Section 2000e-1(a) does not exempt religious organizations from Title VII's provisions barring discrimination on the basis of race, gender, or national origin. Importantly, as originally enacted, the exemption applied only to personnel decisions related to carrying out an organization's religious activities."); *Cline v. Cath. Diocese of Toledo*, 206 F.3d 651, 658 (6th Cir. 2000) ("The Congressional drafters of the 1964 Civil Rights Act recognized the sensitivity surrounding the status of religious groups and institutions. Thus, while Title VII exempts religious organizations for "discrimination

Executive Order 11246 included sexual orientation and gender identity in the protective classifications of the equal opportunity clause.³⁴¹ Following the *Bostock* decision, it is clear that both classifications are protected under Title VII's sex-based employment prohibitions.³⁴²

Nonetheless, Trump's "clarification," which took effect on January 8, 2021, just days before he left office, made major modifications to the Order.³⁴³ The amendment added defined terms, a rule of construction, and misstated key aspects of the law.³⁴⁴ It also deviated from Title VII's case law and principles, resulting in a drastic departure that disregarded the text and purpose of Executive Order 11246.³⁴⁵ Due to these modifications,

based on religion," it does not exempt them "with respect to all discrimination. . . [] Title VII still applies . . . to a religious institution charged with sex discrimination."); *DeMarco v. Holy Cross High Sch.*, 4 F.3d 166, 173 (2d Cir. 1993) ("As several courts have noted, the legislative history of Title VII makes clear that Congress formulated the limited exemptions for religious institutions to discrimination based on religion with the understanding that provisions relating to non-religious discrimination would apply to such institutions.").

341. See *supra* note 243 and accompanying text.

342. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1754 (2020).

343. See *Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption*, 85 Fed. Reg. 79,324, 79,330 (Dec. 9, 2020) <https://www.govinfo.gov/content/pkg/FR-2020-12-09/pdf/2020-26418.pdf>. The summary claimed that the "clarifications to the religious exemption [would] help organizations with federal government contracts and subcontracts and federally assisted construction contracts and subcontracts better understand their obligations." *Id.* at 79,371-72.

344. *Id.* at 79,330 ("The NPRM proposed five new definitions to clarify key terms used in OFCCP's religious exemption: Exercise of religion; Particular religion; Religion; Religious corporation, association, educational institution, or society; and Sincere."). See also *id.* at 79,371-72.

345. *Id.* at 79,326. The Executive Summary initially acknowledged that as the exemption originated from Title VII's religious exemption it "should be given a parallel interpretation, consistent with the Supreme Court's repeated counsel that the decision to borrow statutory text in a new statute is a 'strong indication that the two statutes should be interpreted *pari passu*,'" but then stated it "*generally* interprets the nondiscrimination provisions of E.O. 11246 consistent with the principles of Title VII." *Id.* at 79,324 (citing *Northcross v. Bd. of Educ. of Memphis City Sch.*, 412 U.S. 427, 428 (1973) (*per curiam*) (emphasis added) (Explaining that "[b]ecause [EO 11246] regulates federal contractors rather than private employers generally," OFCCP acknowledged it was deviating from Supreme Court counsel, stating that it "must apply Title VII principles in a manner that best fit its unique field of regulation, including when applying the religious exemption.")). *Id.* at 79,324-25. In this way the Trump administration justified its departure from Title VII jurisprudence and the EEOC's interpretation by relying on recent decisions made during Trump's presidency and its "interpretation" of recent cases. *Id.* ("OFCCP believes that this rule, which incorporates many recent Supreme Court decisions and other case law and is in accord with recent Executive Orders and guidance

previously unqualified federal contractors could claim a religious exemption that allowed them to fire and otherwise discriminate against employees based on their sexual orientation and gender identity.³⁴⁶ In effect, Trump's amendment broadly permitted employment discrimination well beyond those permitted by the Order and Title VII's religious exemption.³⁴⁷ In doing so, the amendment undermined the express purpose of Title VII's exemption, the purpose of incorporating the statute into Executive Order 11246, and the government's long-standing policy of requiring federal contractors to provide equal employment opportunity.³⁴⁸

In a final attempt to limit *Bostock*'s reach with only twelve days left in office, Trump's DOE released a document titled "*Memorandum for Kimberly M. Richey Acting Assistant Secretary of the Office for Civil Rights Re: Bostock v. Clayton Cty.*"³⁴⁹ In the memorandum, the DOE's Office for Civil Rights ("OCR") declared that Title IX's prohibition on discrimination based on sex did not provide protection from discrimination based on sexual orientation or gender identity, and that the *Bostock* decision did not construe Title IX.³⁵⁰ This memorandum misconstrued the *Bostock* opinion and declared that the DOJ had determined that "*Bostock* does not require any changes to . . . sex-specific facilities or policies."³⁵¹

Following his January 20, 2021, inauguration, President Biden and his administration set about reversing damage inflicted by Trump and his administration on the LGBT community, including implementing *Bostock*'s

from the Department of Justice, offers clarity as compared to less recent guidance from EEOC that does not incorporate these more recent developments.") (citing *Northcross*, 412 U.S. at 428).

346. *Id.* at 79,371 ("OFCCP also is not concerned about this rule purportedly decreasing clarity by creating two standards for additional reasons.").

347. *Id.* at 79,324. Trump's amendment defined the terms "particular religion"; "religion"; "religious corporation, association, educational institution, or society"; and "sincere." *Id.* at 79,371-72. Trump's amendment also included a rule of construction for subpart A, requiring it to be "construed in favor of the broadest protection of religious exercise permitted by the U.S. constitution and law." *Id.* at 79,372.

348. *See supra*, notes 204-212 and accompanying text.

349. U.S. Dep't of Educ., Off. of Gen. Couns., *Memorandum for Kimberly M. Richey Acting Assistant Secretary of the Office for Civil Rights Re: Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020), (Jan. 8, 2021) (misstating that "[t]he Court decided the case narrowly, specifically refusing to extend its holding to Title IX and other differently drafted statutes."); Trump's DOJ CRD issued a similar memo on Trump's last day in office as a final attempt to limit *Bostock*'s reach. *See infra*, note 371 and accompanying text.

350. *Id.*

351. *Id.*

broad holding.³⁵² Biden's administration rescinded Trump's final rule "clarifying" the religious exemption and reinstated Executive Order 11246's intended protections in accordance with Title VII just two weeks after it went into effect.³⁵³ Under Biden, Executive Order 11246's religious exemptions were again available to qualifying contractors for employment-related matters, but required nondiscrimination compliance as to all other protected classifications in its equal opportunity clause, including sex discrimination based on sexual orientation and gender identity.³⁵⁴

352. See Allison Hope, *Biden's Restoring What Trump Stole from LGBTQ Americans*, CNN (Jan. 22, 2021), <https://www.cnn.com/2021/01/22/opinions/joe-biden-lgbtq-rights-rachel-levine-hope/index.html> ("In the first hours and days of the Biden administration, something precious has been returned to us. That invaluable thing that has been restored to LGBTQ Americans—and many others—is hope."); Susan Milligan, *Two Steps Back, One Step Forward*, U.S. NEWS (Jan. 29, 2021), <https://www.usnews.com/news/the-report/articles/2021-01-29/biden-spends-first-week-issuing-orders-reversing-trumps-orders> ("The president has already issued more than three dozen executive orders and memorandums on a wide range of issues, from LGBTQ rights to climate change and immigration. And virtually all of them have been done to reverse or stop actions taken by the administration of President Donald Trump.").

353. See, e.g., Proposal to Rescind Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption, 86 Fed. Reg. 214 (proposed Nov. 9, 2021) (to be codified at 41 C.F.R. pt. 60-1) (publishing the Biden administration's proposed rule to rescind Trump's last minute final rule, *Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption*, 85 Fed. Reg. 79,324 (Dec. 9, 2020), which permitted open discrimination to LGBT employees based on sexual orientation and gender identity).

354. See Celine Castronuovo, *Biden Official Withdraws Last-Minute Trump LGBT Memo*, THE HILL (Jan. 23, 2021), <https://thehill.com/homenews/administration/535536-biden-official-withdraws-last-minute-trump-lgbt-memo/> ("President Biden's administration on Friday revoked a last-minute memo issued by former President Trump's Justice Department that sought to limit the scope of a landmark Supreme Court decision on workplace discrimination against the LGBTQ community."); Josh Gerstein, *Biden DOJ Nixes Last-Minute Trump Administration Memo on LGBTQ Rights*, POLITICO (Jan. 23, 2021), <https://www.politico.com/news/2021/01/23/biden-doj-lgbtq-rights-461571> ("The Justice Department has taken its first major step under President Joe Biden to reverse the Trump administration's resistance to expansion of rights accorded to LGBTQ Americans" by revoking a memorandum released by the Trump administration that took "a cramped view of a major Supreme Court decision last year that longstanding federal law protects LGBTQ individuals from discrimination at work.").

D. *Full Steam Ahead: Restoring Protections, Inclusive Policy & Biden's Broad Application of Bostock*

Upon taking office,³⁵⁵ President Biden immediately began to undo the damage inflicted upon the LGBT community under the Trump administration, including Trump's attempt to limit *Bostock's* holding.³⁵⁶ As Trump set about systematically taking away rights and progress put in place by Obama to benefit the LGBT community, Biden set about systematically giving those rights back and adding more. In one of several inauguration-day executive orders, President Biden announced his plan to move forward toward full equality and justice for all LGBT Americans, directing his administrative agencies to broadly apply *Bostock*.³⁵⁷ In Executive Order 13988, *Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation*, Biden issued "the most substantive, wide-ranging LGBT executive order in U.S. history,"³⁵⁸ and announced his new administration's policy "to prevent and combat discrimination on the basis of gender identity or sexual orientation, and to fully enforce Title VII and other laws that prohibit discrimination on the basis of gender identity or sexual orientation."³⁵⁹ In direct contrast to the Trump administration's consistent attacks on the LGBT community, Biden's Order provided the hope that was absent during the previous administration:

Every person should be treated with respect and dignity and should be able

355. Maanvi Singh, 'This is Democracy's Day': Biden Sworn in as 46th President of the U.S., THE GUARDIAN (Jan. 20, 2021), <https://www.theguardian.com/us-news/2021/jan/20/joe-biden-sworn-in-46th-president-inauguration>.

356. See, e.g., Gerstein, *supra* note 354 (noting the "first major step" taken under President Biden to reverse Trump-era resistance to expanding LGBT rights).

357. Exec. Order No. 13,988, 86 Fed. Reg. 7,023 (Jan. 20, 2021). The Order references the *Bostock* holding and states that *Bostock's* reasoning applies with equal force to other laws that prohibit sex discrimination "so long as the laws do not contain sufficient indications to the contrary." *Id.*

358. *Id.*; See President Biden Issues Most Substantive, Wide-Ranging LGBTQ Executive Order in U.S. History, HUM. RTS. CAMPAIGN (Jan. 20, 2021), <https://www.hrc.org/press-releases/president-biden-issues-most-substantive-wide-ranging-lgbtq-executive-order-in-u-s-history> ("Today, millions of Americans can breathe a sigh of relief knowing that their President and their government believe discrimination based on sexual orientation and gender identity is not only intolerable but illegal.").

359. 86 Fed. Reg. at 7,023. While President Biden's Executive Order 13988 impacted multiple federal administrative agencies and resulted in numerous actions taken in response to the Order, this Article focuses solely on its impact on Title VII. The author's work-in-progress, *Beyond Title VII: LGBT Protections and the Ongoing Battle Over Bostock's Impact on Other Federal Nondiscrimination Statutes*, addresses both *Bostock's* and Biden's impact on federal nondiscrimination statutes beyond Title VII.

to live without fear, no matter who they are or whom they love. Children should be able to learn without worrying about whether they will be denied access to the restroom, the locker room, or school sports. Adults should be able to earn a living and pursue a vocation knowing that they will not be fired, demoted, or mistreated because of whom they go home to or because how they dress does not conform to sex-based stereotypes. People should be able to access healthcare and secure a roof over their heads without being subjected to sex discrimination. All persons should receive equal treatment under the law, no matter their gender identity or sexual orientation.³⁶⁰

The Order, implementing the Supreme Court's *Bostock* ruling, directed Biden's administrative agencies to review "all existing orders, regulations, guidance documents, policies, programs, or other agency actions," including applicable federal civil rights statutes, and broadly apply *Bostock*'s reasoning that sex discrimination includes discrimination based on sexual orientation and gender identity.³⁶¹ Executive Order 13988 further instructed administrative agencies to "consider whether to revise, suspend, or rescind such agency actions, or promulgate new agency actions, as necessary to fully implement" Biden's policy initiatives.³⁶² Biden's historic Executive Order began the process of reversing the damage inflicted by the Trump administration and provided anti-discrimination protections to the LGBT community in areas including healthcare, housing, employment, credit, and education.³⁶³

In a separate inauguration-day action, the Biden administration took aim at all Trump-era guidance inconsistent with Executive Order 13988, rescinding or revising numerous executive orders and policies issued by Trump, including those addressing equity in the workplace.³⁶⁴ Executive Order 13985, *Advancing Racial Equity and Support for Underserved Communities Through the Federal Government*, revoked Executive Order

360. *Id.*

361. *Id.* at 7,024.

362. *Id.*

363. For a detailed analysis of President Biden's steps to support the LGBT community in the first one hundred days of his presidency, see Caroline Medina & Thee Santos, *A Timeline of the Biden Administration's Efforts to Support LGBT Equality in the First 100 Days*, CTR. FOR AM. PROGRESS (Apr. 28, 2021), <https://www.americanprogress.org/article/timeline-biden-administrations-efforts-support-lgbtq-equality-first-100-days/>.

364. Letter from Gregory B. Friel, Deputy Assistant Attorney General, to the Civil Rights Division (Jan. 22, 2021), <https://www.justice.gov/crt/page/file/1373621/download>.

13950, *Combating Race and Sex Stereotyping*,³⁶⁵ once again permitting diversity training regarding race and sex, including sexual orientation and gender identity.³⁶⁶ While a federal district court had temporarily enjoined the Order nationwide on December 22, 2020, finding several provisions impermissibly vague and an unconstitutional restriction on speech, Biden's action formally rescinded the rule in its entirety.³⁶⁷

Biden's Executive Order 13985 affirmed that "[e]qual opportunity is the bedrock of American democracy, and our diversity is one of our country's greatest strengths."³⁶⁸ The Order announced the Biden administration's policy "that the Federal Government should pursue a comprehensive approach to advancing equity for all, including people of color and others who have been historically underserved, marginalized, and adversely affected by persistent poverty and inequality."³⁶⁹ The Order directed agencies to identify best practices for assessing equity issues in the federal government and created a federal interagency working group designed to gather data on equity in federal data collection programs and policies.³⁷⁰

On January 22, 2021, in response to President Biden's Executive Order 13988, the DOJ reversed the Trump administration's last-minute memorandum, *DOJ CRD Mem Addressing Application of Bostock v. Clayton County*, issued on Trump's last day in office, January 19, 2021.³⁷¹ The DOJ found that the Trump administration's memorandum, designed to

365. Exec. Order No. 13,985, 86 Fed. Reg. 7,009 (Jan. 20, 2021) ("It is therefore the policy of my Administration that the Federal Government should pursue a comprehensive approach to advancing equity for all, including people of color and others who have been historically underserved, marginalized, and adversely affected by persistent poverty and inequality."). See also *infra*, notes 293-296 and accompanying text.

366. *Id.* President Biden explained that "[b]ecause advancing equity requires a systematic approach to embedding fairness in decision-making processes, executive departments and agencies must recognize and work to redress inequities in their policies and programs that serve as barriers to equal opportunity" and directed his agencies to "assess whether, and to what extent, its programs and policies perpetuate systemic barriers to opportunities and benefits for people of color and other underserved groups" in order to "develop policies and programs that deliver resources and benefits equitably to all." *Id.*

367. *Santa Clara Lesbian and Gay Comm. Ctr. v. Trump*, 508 F. Supp. 3d 521, 534 (N.D. Cal. Dec. 22, 2020). See *infra* notes 312-315 and accompanying text.

368. 86 Fed. Reg. 7,009.

369. *Id.*

370. *Id.*

371. Exec. Order No. 13,988, 86 Fed. Reg. at 7,023 (Jan. 19, 2021). Although Trump's last-minute memorandum was dated on January 17, 2021, the memorandum was not issued until Trump's last day in office. *Id.* See *supra* notes 349-351.

substantially limit the reach of *Bostock* in relation to Title VII's workplace discrimination protections and to refute *Bostock*'s applicability to other federal nondiscrimination statutes, was "inconsistent in many respects" with Biden's Executive Order.³⁷²

Three days later, the newly sworn president continued efforts to undo the Trump administration's harm to the LGBT community. On January 25, 2021, in a highly celebrated move, Biden issued Executive Order 14004, *Enabling All Qualified Americans To Serve Their Country in Uniform*, ending the ban on transgender military service put in place under Trump two years earlier.³⁷³ Executive Order 14004 addressed a 2016 "meticulous, comprehensive study" which found that open transgender service did not significantly impact either operational effectiveness or unit cohesion, supporting opening the military to transgender servicemembers under the Obama administration.³⁷⁴ Noting that the Trump administration did not utilize the comprehensive study before altering U.S. policy "bar[ring] transgender persons, in almost all circumstances, from joining the Armed Forces," Biden rescinded Trump's ban.³⁷⁵

On February 4, 2021, President Biden issued his *Memorandum on Advancing the Human Rights of Lesbian, Gay, Bisexual, Transgender, Queer, and Intersex Persons Around the World* to the heads of all executive

372. Letter from Gregory B. Friel, Deputy Assistant Attorney General, to Civil Rights Division of U.S. Dept. of Just. (Jan. 22, 2021) (on file at <https://www.justice.gov/crt/page/file/1373621/download>).

373. Exec. Order No. 14,004, 86 Fed. Reg. 7,471 (Jan. 25, 2021) ("[I]t shall be the policy of the United States to ensure that all transgender individuals who wish to serve in the United States military and can meet all appropriate standards shall be able to do so openly and freely of discrimination."). Noting that "gender identity should not be a bar to military service," the Order recognized that an "inclusive military is a stronger military." *Id.* See also Geoff Bennett & Adam Edelman, *Biden Reverses Trump's Transgender Military Ban*, NBC NEWS (Jan. 25, 2021, 11:27 AM), <https://www.nbcnews.com/politics/white-house/biden-reverse-trump-s-transgender-military-ban-n1255522> ("Today, those who believe in fact-based public policy and a strong, smart national defense have reason to be proud. The Biden administration has made good on its pledge to put military readiness above political expediency by restoring inclusive policy for transgender troops.").

374. 86 Fed. Reg. 7,471. See also Agnes Gereben Schaefer et al., *Assessing the Implications of Allowing Transgender Personnel to Serve Openly*, RAND CORP. (2016), https://www.rand.org/pubs/research_reports/RR1530.html (recommending that the DoD should ensure strong leadership and identify and communicate the benefits of an inclusive and diverse workforce to successfully implement a policy change and integrate openly serving transgender service members into the force).

375. 86 Fed. Reg. 7,471.

departments and agencies.³⁷⁶ The memorandum reaffirmed, updated, and built upon the historic principles stated in Obama’s December 6, 2011, *Presidential Memorandum – International Initiatives to Advance the Human Rights of Lesbian, Gay, Bisexual, and Transgender Persons*.³⁷⁷ Biden’s memorandum announced U.S. policy to “pursue an end to violence and discrimination on the basis of sexual orientation, gender identity or expression, or sex characteristics, and to lead by the power of our example in the cause of advancing the human rights of LGBTQI+ persons around the world” and declared that the United States belonged at the “forefront of this struggle.”³⁷⁸ The document provided specific steps for agencies abroad to take in order to “promote and protect the human rights of LGBTQI+ persons” and restated the administration’s position that “[a]ll human beings should be treated with respect and dignity and should be able to live without fear no matter who they are or whom they love.”³⁷⁹

After the Equality Act was introduced to Congress on February 25, 2021, President Biden shared his support for the bill, which would create sweeping protections for the LGBT community in areas including housing, healthcare, credit, and education,³⁸⁰ and encouraged Congress to act. On March 8, 2021,

376. Memorandum from the White House, for the Heads of Exec. Dep’ts and Agencies, on Advancing the Human Rights of Lesbian, Gay, Bisexual, Transgender, Queer, and Intersex Persons Around the World (Feb. 4, 2021) (on file at <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/02/04/memorandum-advancing-the-human-rights-of-lesbian-gay-bisexual-transgender-queer-and-intersex-persons-around-the-world/>).

377. See *infra* notes 198-201 and accompanying text.

378. 86 Fed. Reg. 7,471 (“All human beings should be treated with respect and dignity and should be able to live without fear no matter who they are or whom they love. Around the globe, including here at home, brave lesbian, gay, bisexual, transgender, queer, and intersex (LGBTQI+) activists are fighting for equal protection under the law, freedom from violence, and recognition of their fundamental human rights. The United States belongs at the forefront of this struggle — speaking out and standing strong for our most dearly held values.”).

379. *Id.*

380. See Press Release, The White House, Statement by Joseph R. Biden, Jr. on the Introduction of the Equality Act in Congress (Feb. 19, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/02/19/statement-by-president-joseph-r-biden-jr-on-the-introduction-of-the-equality-act-in-congress/> (“I urge Congress to swiftly pass this historic legislation. Every person should be treated with dignity and respect, and this bill represents a critical step toward ensuring that America lives up to our foundational values of equality and freedom for all.”). President Biden also included his support for the Equality Act in his first State of the Union address on March 1, 2022. See Brook Migdon, *Biden Calls for Passage of the Equality Act, Denounces State Legislative Attacks on Trans Youth in State of the Union*, THE HILL (Mar. 2, 2022), <https://thehill.com/changing-america/respect/equality/596531-biden->

in order to “advance gender equity and equality in both domestic and foreign policy development,” President Biden issued Executive Order 14020, *Establishment of the White House Gender Policy Council*.³⁸¹ The order launched a council to consist of numerous department and agency leaders responsible for overseeing the development of a coordinated government-wide strategy.³⁸² Responsibilities delegated by the order included providing legislative and policy recommendations, conducting outreach, and coordinating with outside groups and organizations to ensure the advancement of “equal rights and opportunities, regardless of gender or gender identity, in advancing domestic and foreign policy—including by promoting workplace diversity, fairness, and inclusion across the Federal workforce and military.”³⁸³

That same day, Biden signed Executive Order 14021, *Guaranteeing an Educational Environment Free From Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity*.³⁸⁴ The order directed the DOE to review and revamp all relevant agency regulations, policies, and actions to comply with both the *Bostock* decision and the Biden administration’s policy to “guarantee[] an educational environment free from discrimination on the basis of sex” for all students, including discrimination based on sexual orientation and gender identity.³⁸⁵ As a result of Biden’s directive, the DOE has engaged in policymaking to return to its pre-Trump position that Title IX’s sex discrimination prohibitions apply equally to both discrimination based on sexual orientation and gender identity, now with the support of *Bostock*’s persuasive authority.³⁸⁶

calls-for-passage-of-the-equality-act-denounces-state/ (“President Biden during his State of the Union address Tuesday evening demanded more protections for LGBTQ+ people in the U.S., urging Congress to pass the Equality Act and calling states’ proposed anti-LGBTQ+ legislation—most of which target LGBTQ+ youth—“wrong.”). See also *supra* note 245 and accompanying text.

381. Exec. Order No. 14,020, 86 Fed. Reg. 13,797 (Mar. 8, 2021).

382. *Id.*

383. *Id.*

384. Exec. Order No. 14,021, 86 Fed. Reg. 13,083 (Mar. 11, 2021).

385. See *id.* (the Order also explicitly directs the Secretary of Education to assess a Trump administration rule). See also Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 34 C.F.R. § 106 (2020) (implemented the prior year to assure consistency with current law, Title VII, and Biden’s policy).

386. See *Biden’s Title IX Reforms Would Roll Back Trump-era Rules, Expand Victim Protections*, NPR (June 23, 2022, 2:40 P.M.), <https://t.ly/LCC3q> (“The Department of Education said Thursday that it plans to reinstate Title IX regulations tossed out by the Trump administration. Proposed changes would combat sexual discrimination in schools

Continuing to implement his policy of inclusiveness, Biden issued Executive Order 14035, *Diversity, Equity, Inclusion, and Accessibility in the Federal Workforce*, on June 25, 2021.³⁸⁷ The Order reestablished “a coordinated Government-wide initiative to promote diversity and inclusion in the Federal workforce, expand its scope to expressly include equity and accessibility, and coordinate its implementation.”³⁸⁸ The sweeping order also set out Biden’s plans for a government-wide strategic plan, including reporting requirements and a directive for agency heads to “make advancing diversity, equity, inclusion, and accessibility a priority component of the agency’s management agenda and agency strategic planning.”³⁸⁹ Section 11 of the Order, *Advancing Equity for LGBTQ+ Employees*, specifically addressed Biden’s policy “to prevent and combat discrimination on the basis of gender identity or sexual orientation,”³⁹⁰ noting that “[e]ach Federal employee should be able to openly express their sexual orientation, gender identity, and gender expression, and have these identities affirmed and respected, without fear of discrimination, retribution, or disadvantage.”³⁹¹

In 2022, the Biden administration continued to take steps toward full inclusion for LGBT citizens. On March 31, 2022, in recognition of Transgender Day of Visibility, the Biden administration announced new actions to support the transgender community.³⁹² Some of the featured programs include reinforcing federal protections for trans youth, implementing an “x” gender marker on U.S. passport applications beginning

by boosting victim protections and modifying language to include sexual orientation and gender identity for LGBTQI+ students.”).

387. Exec. Order No. 14,035, 86 Fed. Reg. 34,593 (June 30, 2021) (“As the nation’s largest employer, the federal government must be a model for diversity, equity, inclusion, and accessibility, where all employees are treated with dignity and respect.”).

388. *Id.*

389. *Id.* at § 4, *Responsibilities of Executive Departments and Agencies*.

390. As announced in Executive Order 13988, *Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation*, Biden and his administration’s policy is “to prevent and combat discrimination on the basis of gender identity or sexual orientation, and to fully enforce Title VII and other laws that prohibit discrimination on the basis of gender identity or sexual orientation.” See *supra* 345-347 and accompanying text.

391. *Id.* at 34,600-34,601.

392. See *A Proclamation on Transgender Day of Visibility, 2022*, WHITE HOUSE PRESS Release (March 30, 2022) [hereinafter *Biden 2022 Transgender Proclamation*], <https://www.whitehouse.gov/briefing-room/presidential-actions/2022/03/30/a-proclamation-on-transgender-day-of-visibility-2022/> (addressing multiple anti-trans attacks, the value of visibility, and a promise of unwavering support from the White House).

April 11, 2022, as well as other travel-related measures to improve travel experiences.³⁹³ The administration also announced multiple services available to provide resources and care.³⁹⁴ Two months later President Biden signed “A Proclamation on Lesbian, Gay, Bisexual, Transgender, Queer, And Intersex Pride Month, 2022.”³⁹⁵ Biden’s words and support were in stark contrast to his predecessor:

This month, we remind the LGBTQI+ community that they are loved and cherished. My Administration sees you for who you are—deserving of dignity, respect, and support. As I said in my State of the Union Address – especially to our younger transgender Americans—I will always have your back as your President so that you can be yourself and reach your God-given potential. Today and every day, my Administration stands with every LGBTQI+ American in the ongoing struggle against intolerance, discrimination, and injustice. We condemn the dangerous State laws and bills that target LGBTQI+ youth. And we remain steadfast in our commitment to helping LGBTQI+ people in America and around the world live free from violence.³⁹⁶

The Proclamation also addressed the need for further LGBT protections, including another call on Congress to pass the Equality Act, which would provide stable federal discrimination protections, safe from reversal by a successor president.³⁹⁷ Biden’s comments highlight the hope and commitment his presidency has shown to the LGBT community, and underscores the vulnerability and challenges the community will continue to face after Biden’s presidency.

At the end of President Biden’s second year in office, he signed the Respect for Marriage Act into law.³⁹⁸ The Act, which overturned the federal Defense of Marriage Act (“DOMA”), requires states to recognize same-sex marriages across state lines and entitles same-sex couples to the identical federal benefits of any other married couple.³⁹⁹ Importantly, the bill gained bipartisan support, with a dozen Republican senators and thirty-nine House

393. See *Obama Admin. Fact Sheet*, *supra* note 218.

394. See *id.*

395. Proclamation No. 10,409, 87 Fed. Reg. 33,605 (May 31, 2022).

396. *Id.*

397. *Id.*

398. See Domenico Montanaro, *Biden Signs Respect for Marriage Act, Reflecting His and the Country’s Evolution*, NPR (Dec. 13, 2022, 4:36 p.m.), <https://www.npr.org/2022/12/13/1142331501/biden-to-sign-respect-for-marriage-act-reflecting-his-and-the-countrys-evolution> (“On almost no other issue has American public opinion shifted so dramatically so quickly.”).

399. *Id.*

Republicans joining all Congressional Democrats.⁴⁰⁰

IV. ROADBLOCKS TO STABLE LGBT PROTECTIONS

Prior to the Supreme Court's landmark *Bostock* decision, employees in more than half of the states were without legal recourse when faced with discrimination on the basis of sexual orientation or gender identity.⁴⁰¹ As a result of the Court's holding that discrimination "because of sex" includes discrimination because of sexual orientation or gender identity, millions of workers in all fifty states have workplace protections for the first time in our nation's history.⁴⁰² The importance of the Court's decision, its impact on the LGBT community, and its contribution to LGBT rights cannot be overstated. However, while the Court's holding has led to clear court victories and has required employers to make needed changes in the workplace to remain compliant with *Bostock*, there are employers and employees that are not within *Bostock*'s ambit.⁴⁰³

Further, while the decision pointedly addressed firing LGBT employees, holding that Title VII's sex-based protection is violated when that decision is based, even in part, on sexual orientation or gender identity, the Court did not address the full reach of Title VII's sex-based prohibitions in the *Bostock* decision.⁴⁰⁴ The *Bostock* Court expressly declined to address other LGBT-related Title VII issues, including bathrooms, locker rooms, and pronouns, saving the determination for "future cases" when those topics are at issue.⁴⁰⁵

400. See Mychael Schnell, *Here are the 39 House Republicans Who Backed the Same-Sex Marriage Bill*, THE HILL (Dec. 8, 2022), <https://thehill.com/homenews/house/3767461-here-are-the-39-house-republicans-who-backed-the-same-sex-marriage-bill/>; Annie Karni, *The 12 Republican Senators Who Voted for the Same-Sex Marriage*, THE N.Y. TIMES (Dec. 13, 2022), <https://www.nytimes.com/2022/12/13/us/politics/republican-senators-vote-same-sex-marriage.html>.

401. See Conron, *supra* note 4.

402. *Id.*

403. See 42 U.S.C. §§ 2000e(b)-(n). Title VII applies to employers with fifteen employees or more and prohibits employment discrimination based on race, color, religion, sex, and national origin. Title VII does not cover employers with fewer than 15 employees.

404. See *infra* notes 438-440 and accompanying text.

405. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1753 (2020) ("What are these consequences anyway? The employers worry that our decision will sweep beyond Title VII to other federal or state laws that prohibit sex discrimination. And, under Title VII itself, they say sex-segregated bathrooms, locker rooms, and dress codes will prove unsustainable after our decision today. But none of these other laws are before us; we have not had the benefit of adversarial testing about the meaning of their terms, and we do not prejudice any such question today... Whether other policies and practices might or

The Court's decision not to address these matters has resulted in dueling presidential administrative interpretations and a wave of litigation.⁴⁰⁶ The Biden administration is involved in ongoing legal challenges as administrative agencies issue rule interpretations and engage in the rulemaking process to apply *Bostock's* broad holding to their nondiscrimination statutes.⁴⁰⁷ Further, activist judges have attempted to prevent a broad application of *Bostock's* holding, by issuing injunctions not just in their applicable jurisdictions, but nationwide.⁴⁰⁸ These actions have led to an overall lack of consistency and protection for LGBT Americans and a lack of reliable guidance for employers.⁴⁰⁹

A. *Dueling Executive Orders: Their Power, Vulnerability & the Resulting Lack of Consistency*

Every president since George Washington, with the single exception of President Harrison, has utilized his executive order power to advance policy and issue administrative directives.⁴¹⁰ While presidential executive orders were first utilized to harm the LGBT community, that use shifted in the mid-1990s when presidents began to provide LGBT protections and rights via executive power.⁴¹¹ Since the first use of the presidential executive order to extend rights to LGBT Americans during the Clinton administration, executive orders have provided welcome and needed protections to the

might not qualify as unlawful discrimination or find justifications under other provisions of Title VII are questions for future cases, not these.”) (internal citation omitted).

406. See *supra* Section III text and accompanying footnotes.

407. See *infra* Section IV.C. See also *supra* note 8 addressing the circuit split regarding whether the *Bostock* reasoning equally applies to Title IX.

408. See *infra* Section IV.C. See *infra* notes 474-477 and accompanying text.

409. For example, within six weeks following the *Bostock* decision, the Eleventh and Fourth Circuits agreed that the Court's reasoning applied equally to Title IX's sex nondiscrimination prohibition. However, following a complicated procedural history and an *en banc* review by the Eleventh Circuit that held Title IX's sex protection did not include sexual orientation or gender identity, the Eleventh Circuit's *en banc* holding created a split in the circuits. See *supra* note 8 and accompanying text regarding the circuit split. In the meantime, the DOE engaged in the notice and comment period of the APA and will be releasing revised rules regarding Title IX regulations that will almost certainly include sexual orientation and gender identity as protected under Title IX's sex discrimination prohibition. Initially projected for a May 2023 release, the DOE has announced that that it would not release its new Title IX Guidelines until October 2023. In the meantime, the circuit courts are split regarding whether *Bostock's* reasoning is equally applicable to Title IX. See *supra* note 8 and accompanying text.

410. Gerhard Peters & John T. Woolley, *Executive Orders*, THE AM. PRESIDENCY PROJECT (Sept. 29, 2023), <https://www.presidency.ucsb.edu/node/323876>.

411. See *infra* notes 184-189 and accompanying text.

vulnerable LGBT community. President Obama used his executive power to build on Clinton's efforts, including advancing equal employment opportunity protections in the federal government, on behalf of government contractors, and to provide first-time transgender protections.⁴¹² Importantly, decades of discriminatory employment treatment based on the false narrative that LGBT employees presented a national safety risk effectively ended by executive order, which permitted security clearances for LGBT federal employees.⁴¹³

Presidential executive orders have also been utilized to further expand nondiscrimination employment protections and to welcome the LGBT community into the federal workforce.⁴¹⁴ Executive orders have led to the expansion of discrimination protections in the federal civilian workforce⁴¹⁵ and by government contractors,⁴¹⁶ provided federal benefits to same-sex partners prior to *Obergefell*,⁴¹⁷ allowed for needed child and partner care,⁴¹⁸ and allowed LGBT Americans to openly serve in the military.⁴¹⁹ Further, because congressional approval is not required, and because executive orders are immediately effective, presidents have been able to quickly implement administrative policies to advance LGBT equality while avoiding the ever-increasing party gridlock in Congress.⁴²⁰

During Trump's presidency, rather than expanding or protecting hard-won LGBT rights, he used the executive order power to harm the LGBT community, halting advancements and undoing protections and benefits

412. See, e.g., *President Obama Signs a New Executive Order to Protect LGBT Workers*, WHITE HOUSE (Jul. 21, 2014), <https://obamawhitehouse.archives.gov/blog/2014/07/21/president-obama-signs-new-executive-order-protect-lgbt-workers> (detailing Obama's EO prohibiting federal contractors from discriminating on the basis of gender identity).

413. See *infra* notes 184-189 and accompanying text.

414. See *supra* note 211 and accompanying text.

415. See *supra* note 206 and accompanying text.

416. See *supra* note 208 and accompanying text.

417. See *infra* notes 213-215 and accompanying text.

418. *Id.*

419. See *infra* notes 338-340 and accompanying text.

420. See, e.g., Drew Desilver, *The Polarization in Today's Congress Has Roots That Go Back Decades*, PEW RSCH. CTR. (Mar. 10, 2022), <https://www.pewresearch.org/fact-tank/2022/03/10/the-polarization-in-todays-congress-has-roots-that-go-back-decades/> ("It's become commonplace among observers of U.S. politics to decry partisan polarization in Congress. Indeed, a Pew Research Center analysis finds that, on average, Democrats and Republicans are further apart ideologically today than at any time in the past 50 years.").

provided by presidential predecessors.⁴²¹ Although President Trump spent his single term working to dismantle his predecessor's efforts and inflict damage on the LGBT community, the *Bostock* decision and his subsequent loss to President Biden served to reign in the extent of his harmful actions. Upon taking office, President Biden immediately began the work to undo the damage Trump inflicted and to further extend LGBT rights and protections with a goal of full equality for LGBT Americans.⁴²²

While executive orders have the effect of law and provide a president with the ability to direct his or her executive administration and advance policy without congressional involvement, these presidential efforts to support and protect the LGBT community are not permanent and cannot be relied upon long term.⁴²³ Because executive orders can be easily revoked, rescinded, or amended, executive orders that protect and advance LGBT rights may remain in effect only as long as the president who issued the order remains in the White House.⁴²⁴ A subsequent president's power to unilaterally revoke or amend a predecessor's order and direct opposing action illustrates the critical need for a more permanent and reliable solution.

B. Presidential Elections & Administrative Policy Changes in the White House

In his first two years in the White House, President Biden and his administration made substantial progress in removing barriers put in place under Trump and achieved major strides in instituting and extending discrimination protections to the LGBT community.⁴²⁵ Biden utilized his

421. See *infra* Section III.C.

422. See Press Release, The White House, *supra* note 380 (declaring that LGBT rights "shouldn't be about conservative or liberal, red or blue. No, this is about realizing the promise of the Declaration of Independence — a promise rooted in the sacred and secular beliefs; a promise that we're all created equal, we're all entitled to what Abraham Lincoln called "an open field and a fair chance.").

423. See Abigail A. Graber, *Executive Orders: An Introduction*, CONG. RSCH. SERV. (Mar. 29, 2021), <https://crsreports.congress.gov/product/pdf/R/R46738> ("A President may amend, rescind, or revoke a prior executive order issued by his or an earlier Administration. Although executive orders can be flexible and powerful, they can also be impermanent because a later President can, generally, revoke or modify any previously issued executive order with which he disagrees. Similarly, Congress may nullify the legal effect of an executive order issued pursuant to power that it delegated to the President.").

424. *Id.*

425. See generally Caroline Medina, Sharita Gruberg, & Lindsay Mahowald, *Improving the Lives and Rights of LGBTQ People in America*, CTR. FOR AM. PROGRESS (Jan. 12, 2021), <https://www.americanprogress.org/article/improving-lives-rights-lgbtq-people-america/> (outlining the Biden administration's commitment to advancing LGBT

executive power to issue orders, memorandums, and proclamations advancing LGBT rights.⁴²⁶ He also made historical appointments of members of the LGBT community to U.S. cabinet positions and the federal bench.⁴²⁷ Biden’s administration has filed statements of interest in litigation challenging state laws that violate the legal rights of transgender youth, and he has spoken out against hateful and harmful state gender-affirming bans.⁴²⁸ Despite the historical and monumental steps the Biden administration has taken to further the march toward full equality, LGBT Americans are still vulnerable and many protections can be immediately rescinded. The potential for change every four years clearly indicates and strongly supports the need to provide these protections and benefits in a more stable and permanent manner.

A presidential administration’s positions and policies make a significant impact on whether LGBT protections and rights are advanced or put on hold. For example, in 2016, during President Obama’s second term in office, the DOE and DOJ jointly issued a “Dear Colleague” letter interpreting Title IX to prohibit discrimination based on gender identity.⁴²⁹ In order to remain compliant with Title IX, the letter directed schools receiving federal assistance to allow transgender students to use the bathroom that matched the student’s identified gender.⁴³⁰ On October 28, 2016, the Supreme Court granted certiorari to an interlocutory appeal in the Fourth Circuit Title IX case, *G.G. v. Gloucester County School Board* (“*Grimm*”).⁴³¹ The *Grimm* lawsuit involved allegations of Title IX and Equal Protection violations when a transgender male high school student was denied access to the male

equality).

426. See *infra* note 421 and accompanying text. See also *Biden 2022 Transgender Proclamation*, *supra* note 392 (addressing multiple anti-trans attacks, the value of visibility, and a promise of unwavering support from the White House).

427. See *Biden 4/26/21 100 Days In Fact Sheet*, *supra* note 398.

428. See, e.g., *President Biden’s Pro-LGBT Timeline*, HUM. RTS CAMPAIGN, <https://www.hrc.org/resources/president-bidens-pro-lgbtq-timeline> (last visited Apr. 24, 2023) (“President Biden committed to being a champion for LGBTQ+ people every day in the White House, and he’s off to a historic start. From protecting people from discrimination to addressing the epidemic of violence against trans people to ensuring a safe future for LGBTQ+ youth, there’s so much good we can do together. We’re tracking every action taken by this White House to defend our communities and expand our rights.”).

429. See *supra* note 227.

430. *Id.*

431. *G.G. ex. rel. Grimm v. Gloucester Cnty. Sch. Bd.*, 822 F.3d 709, 715 (4th Cir. 2016), *vacated and remanded*, 580 U.S. —, 137 S. Ct. 1239 (2017).

bathroom.⁴³² The Fourth Circuit reversed and remanded the trial court's grant of the defendant school district's motion to dismiss and denial of the transgender student's request for a preliminary injunction.⁴³³ The court determined that the district court erred when it failed to give deference to the Obama administration's Title IX guidance requiring schools to treat transgender students consistent with their gender identity and that the district court applied the incorrect standard when denying the preliminary injunction.⁴³⁴

On remand, the district court granted the preliminary injunction and the school board appealed to the Fourth Circuit, requesting a stay of the decision pending appeal to the Supreme Court.⁴³⁵ The Fourth Circuit denied the stay as well as an *en banc* hearing, and the Supreme Court granted certiorari, vacating the decision.⁴³⁶ Oral arguments were scheduled for March 28, 2017, but the change in presidential administration drastically impacted the litigation.⁴³⁷ Shortly after Republican President Trump's inauguration, his administration issued a new "Dear Colleague" letter withdrawing and rescinding the Obama administration's guidance.⁴³⁸ As a result, the Supreme Court revoked the certiorari grant and rescinded the case because the lower court's decision relied on the Obama-era guidance.⁴³⁹

The Supreme Court's certiorari rescission in *Grimm*⁴⁴⁰ stresses that an administration's position and policies regarding LGBT rights and protections can drastically influence the pace and degree of advancement of national LGBT civil rights.⁴⁴¹ This single example illustrates the far-

432. *Id.* at 727.

433. *Id.*

434. *Id.* at 724-25.

435. *G.G. v. Gloucester Cnty. Sch. Bd.*, No. 4:15CV54, 2016 WL 3581852, at *1 (E.D. Va. June 23, 2016).

436. *G.G. v. Gloucester Cnty. Sch. Bd.*, 654 Fed. Appx. 606, 606 (4th Cir. 2016).

437. *Grimm v. Gloucester Cnty. Sch. Bd.*, 302 F. Supp. 3d 730, 740 (E.D. Va. 2018) ("The United States Supreme Court granted a stay of the Fourth Circuit's mandate and granted the Board's writ of certiorari. After the guidance letter was rescinded as the result of a change in administration, the Supreme Court vacated the Fourth Circuit's decision and remanded for reconsideration of the Title IX claim.").

438. *Id.*

439. Letter from Sandra Battle, Acting Ass't Sec. for Civil Rights, U.S. Dep't of Educ. and T.E. Wheeler, II, Acting Ass't Attorney General for Civil Rights, U.S. DEP'T OF JUSTICE (Feb. 22, 2017).

440. See *infra* notes 236-239 and accompanying text.

441. *Id.* After graduating, Grimm amended his original complaint and requested a declaration by the school board that his rights were violated under Title IX and the Equal Protection Clause. *G.G. v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 593 (4th Cir. 2020),

reaching changes that can occur due to a presidential party shift and the clear need for stable protections that will not be vulnerable when a new president is in the White House. The potential for an administrative policy changeover every four years, and the accompanying possibility that those opposing policies will undo advances and protections, creates instability, chaos, and confusion. As evidenced by the back-and-forth from Obama to Trump to Biden, conferring protections, rights, and benefits in a non-permanent manner has placed the LGBT community in an untenable tug-of-war, unable to rely on consistent protections and rights.

In addition, agency administrative actions taken in response to an executive order, or in line with a presidential administration's policy objectives, are vulnerable to legal challenges and activist judges that can impose personal agendas and stall or stop the implementation of efforts to provide protections.⁴⁴² Agency actions are also vulnerable to revocation and alteration upon a presidential change.⁴⁴³ Further, due to the controversial, strongly-felt, and deeply-held opinions of some regarding LGBT rights and protections, it is particularly important to have clear rules, laws, and guidance in place that are not subject to political whim. It is crucial that legal rights and protections achieved maintain a level of permanence so that the rights and protections afforded to LGBT citizens are not dependent on who

as amended (Aug. 28, 2020), *reh'g en banc denied*, 976 F.3d 399 (4th Cir. 2020), *cert. den.* June 28, 2021. In May 2018, the trial court denied the school board's subsequent motion to dismiss, finding that the plaintiff had stated a valid claim. *Id.* After a rehearing, the trial court found Grimm's favor on both claims. *Id.* ("At the heart of this appeal is whether equal protection and Title IX can protect transgender students from school bathroom policies that prohibit them from affirming their gender. We join a growing consensus of courts in holding that the answer is resoundingly yes."). The school board appealed to the Fourth Circuit, which upheld the trial court decision on August 26, 2020, noting that the recent *Bostock* decision informed the court's conclusion: "After the Supreme Court's recent decision in *Bostock* . . . , we have little difficulty holding that a bathroom policy precluding Grimm from using the boys restrooms discriminated against him 'on the basis of sex.'" *Id.* The Fourth Circuit addressed the school board's argument that Title IX allows for "separate toilet, locker room, and shower facilities on the basis of sex" by clarifying that Grimm's challenge related to the board's discriminatory exclusion of transgender male students using the male bathroom, not the separation of bathrooms by sex. *Id.* at 618. The Supreme Court denied the school board's certiorari petition, *Grimm*, 972 F.3d at 593, *cert. denied*, 141 S. Ct. 2878 (2021), leaving the Fourth Circuit's decision final, providing persuasive precedent for other similar court decisions. *Id.* Further, although the Supreme Court stated in *Bostock* that it "did not purport to address bathrooms, locker rooms, or anything else of the kind," by denying certiorari the Court knowingly allowed *Bostock*'s reach to extend to those very protections. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1753 (2020).

442. See *infra* notes 400-434 and accompanying text.

443. See *infra* notes 400-434 and accompanying text.

is seated in the Oval Office.

When President Biden took office seven months after *Bostock*'s release, his administration engaged in multiple efforts to advance its policy to further LGBT rights. However, some efforts, including his inauguration day executive order directing agencies to apply *Bostock* broadly, have resulted in challenges, lawsuits, stalling, and tabling, all potentially preventing the positive realization and impact of those actions. Further, as the Biden administration continues its efforts to implement agency rules and regulations through the rulemaking process, the possibility remains that, if those efforts are successful, they could be undone by a future anti-LGBT administration.

C. *Conflicting Interpretations & Litigation Over Bostock's Parameters*⁴⁴⁴

In *Bostock*, the Court explicitly addressed the employers' concerns regarding the reach of Title VII. The *Bostock* employers were concerned that the Court's decision would render "sex-segregated bathrooms, locker rooms, and dress codes" unsustainable.⁴⁴⁵ The Court clarified, "Under Title VII . . . we do not purport to address bathrooms, locker rooms, or anything else of the kind," as they were not issues raised in the *Bostock* case.⁴⁴⁶ The concerns raised by the employers, the Court explained, were "questions for future cases, not these."⁴⁴⁷ Foreseeably and almost immediately after the decision was announced, lawsuits followed, including challenges to the reach of *Bostock*'s reasoning and the extent of Title VII's sex discrimination protections.⁴⁴⁸

444. The two cases addressed in this section, *Tennessee v. United States Dep't of Educ.*, No. 3:21-CV-308, 2022 WL 2791450, at *3 (E.D. Tenn. July 15, 2022) and *Texas v. EEOC*, No. 21-194, 2022 WL 4835346 at *1 (N.D. Tex. Oct. 1, 2022) are examples of federal litigation initiated in response to President Biden and his administration's efforts to provide the broadest protections possible to the LGBT community and to apply the broadest possible reading of *Bostock*.

445. *Bostock*, 140 S. Ct. at 1753.

446. *Id.*

447. *Id.* at 1754 ("Whether other policies and practices might or might not qualify as unlawful discrimination or find justifications under other provisions of Title VII are questions for future cases, not these."). See *supra* Section I.B.4. and accompanying text.

448. See, e.g., *Adams*, *supra* note 8. Initial appellate court decisions unanimously held that *Bostock*'s reasoning applied equally to Title IX's sex nondiscrimination prohibition.

Two examples occurred in response to President Biden’s Executive Order 13988 directing federal agencies to apply *Bostock* broadly.⁴⁴⁹ As directed, the EEOC applied *Bostock*’s reasoning and announced that Title VII’s nondiscrimination protections extended to bathrooms, locker rooms, and pronouns, also citing a 2015 pre-*Bostock* EEOC decision holding that denying a transgender employee access to the restroom of their gender identity was a Title VII violation in support of its position.⁴⁵⁰ The EEOC issued guidelines to that effect on June 15, 2021, and included additional guidance on its website to assist both employees and employers.⁴⁵¹ In response, on August 30, 2021, twenty conservative Republican state Attorneys Generals (“AGs”) filed a complaint against the EEOC, among others, challenging its guidance and interpretation of *Bostock*.⁴⁵² The complaint alleged that the EEOC’s interpretation diverged from the protections available under Title VII in light of the *Bostock* decision, going

449. See Exec. Order No. 13,988, 86 Fed. Reg. 7,023-25 (Jan. 20, 2021) (enforcing prohibitions on sex discrimination on the basis of sexual orientation or gender identity).

450. See EEOC Discrimination Protection Fact Sheet, *supra* note 155 (noting that “the Supreme Court held that Title VII makes it unlawful for a covered employer to take an employee’s sexual orientation or transgender status into account in making employment-related decisions. The Court explicitly reserved some issues for future cases.”). See also *Lusardi v. McHugh*, EEOC DOC 0120133395, 2015 WL 1607756, at *8 (Apr. 1, 2015). In *Lusardi*, the Commission held that denying a transgender employee access to the bathroom corresponding to the employee’s gender identity is a violation of Title VII that is not resolved by providing access to a single-use bathroom. *Id.* The Commission also clarified that an agency could not condition facility access, or any other “terms, conditions, or privileges of employment,” on whether the employee had undergone medical steps to prove their gender identity. *Id.*

451. See *id.* The EEOC’s June 2021 guidance noted that certain types of workplace conduct may violate Title VII’s sex nondiscrimination protections on the basis of sexual orientation or gender identity, including requiring a transgender employee to dress in accordance with the employee’s sex assigned at birth; (ii) denying an employee equal access to bathrooms, locker rooms, or showers that correspond to the employee’s gender identity; and (iii) intentionally and repeatedly using the wrong name and pronouns to refer to a transgender employee. *Id.*

452. *Tennessee v. United States Dep’t of Educ.*, No. 3:21-CV-308, 2022 WL 2791450, at *3 (E.D. Tenn. July 15, 2022). The lawsuit also included the DOE, DOJ, and agency officials. *Id.* The states represented in the lawsuit are Alabama, Alaska, Arizona, Arkansas, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, and West Virginia. *Id.* The lawsuit also named the DOE and DOJ as defendants in the litigation and challenged guidance documents issued by the DOE and EEOC in response to President Biden’s January 20, 2020, Executive Order as in violation of both the APA and the Constitution. *Id.*

beyond the Court's alleged "narrow" holding.⁴⁵³

Of particular concern to the twenty state AGs was that the EEOC's interpretation directly conflicted with the states' conservative anti-LGBT positions, including laws expressly requiring or permitting discrimination based on sexual orientation and gender identity.⁴⁵⁴ The state AGs sought preliminary and permanent injunctive and declaratory relief regarding whether Title VII prohibits the use of biological sex in the handling of bathrooms, locker rooms, showers, and dress codes, among others, and whether the statute requires the use of preferred pronouns.⁴⁵⁵ The complaint also requested a judgment to set aside the EEOC's guidance documents.⁴⁵⁶ On September 2, 2021, the state AGs filed a Motion for Preliminary Injunction requesting that the court temporarily enjoin the EEOC from enforcing its guidance documents during the pendency of the litigation.⁴⁵⁷

Similar to the EEOC's June 15, 2021, guidance, on March 2, 2022, HHS's Office of Civil Rights ("OCR") issued its "Notice and Guidance" that addressed federal discrimination prohibitions applicable to gender affirming care.⁴⁵⁸ HHS's guidance instructed that Section 1557 of the ACA prohibits

453. *Id.* The court examined the difference between legislative rules requiring a notice and comment period and interpretive rules that do not: "[L]egislative rules have the force and effect of law and interpretive rules do not. Thus, a rule that intends to create new law, rights, or duties, is legislative, while a rule that simply states what the administrative agency thinks the statute means, and only reminds affected parties of existing duties is interpretive." *Id.* The court surmised, "[b]ecause interpretive rules cannot effect a substantive change in the regulations, a rule that adopts a new position inconsistent with any of the [agency's] existing regulations is necessarily legislative." *Id.* at *20.

454. *Id.* at *7 ("Plaintiffs argue that based on Defendants' guidance, conduct required under their state laws constitutes sex discrimination under Titles VII and IX. Therefore, Plaintiffs claim Defendants' interpretations of Titles VII and IX, as set forth in the challenged guidance, directly interfere with and threaten their ability to enforce their state laws as written; it is well-settled that Plaintiffs have a concrete interest in the continued enforceability of their state laws, and ten Plaintiff States have identified a plausible conflict between their state laws and Defendants' guidance documents. Plaintiffs have enacted, and are currently enforcing, statutes that arguably conflict with Defendants' guidance as to the legality of certain conduct related to sexual orientation and gender identity.").

455. *Id.* at *15. The lawsuit also sought preliminary and permanent injunctive and declaratory relief regarding whether Title IX prohibited the use of biological sex in the handling of school sports teams, bathrooms, locker rooms, showers, and dress codes, and whether the statutes required the use of preferred pronouns of transgender students.

456. *Id.* The lawsuit requests relief identical to the Department of Education.

457. *Id.*

458. *Texas v. EEOC*, No. 21-194, 2022 WL 4835346 at *1 (N.D. Tex. Oct. 1, 2022).

federal fund recipients from restricting a person's ability to "receive medically necessary care, including gender-affirming care, from their health care provider solely on the basis of their sex assigned at birth or gender identity."⁴⁵⁹ HHS's March 2 Guidance also addresses Section 504 of the Rehabilitation Act and Title II of the ACA, noting that restricting individuals who are otherwise qualified to receive medical care due to "gender dysphoria, gender dysphoria diagnosis, or perception of gender dysphoria may . . . also violate Section 504 and Title II of the ACA."⁴⁶⁰

On September 20, 2022, the State of Texas filed a similar lawsuit against the EEOC and HHS, challenging the EEOC's June 15 guidelines and the guidelines issued by HHS on March 2, 2022.⁴⁶¹ Texas sought declaratory and injunctive relief to invalidate the guidance and enjoin their enforcement and implementation.⁴⁶² Texas asserted that the guidelines violated the First Amendment, Title VII, the Freedom of Information Act, and the Administrative Procedure Act ("APA").⁴⁶³ The case was assigned, coincidentally, to the same Trump-appointed district court judge who had recently been assigned an analogous lawsuit challenging HHS's interpretation of *Bostock*'s impact on the sex discrimination prohibition in Section 1557 of the ACA.⁴⁶⁴ On May 22, 2021, the judge refused to dismiss the case and rejected the government's argument that the state lacked standing to challenge the guidance, absent enforcement activity.⁴⁶⁵

The following summer, on July 15, 2022, the Tennessee district court judge entered an order granting in part and denying in part the state AG's preliminary judgment motion.⁴⁶⁶ The court enjoined the government from

459. *Id.* (quoting HHS's Notice and Guidance).

460. *Id.*

461. *Id.* See *supra* notes 437-38 and accompanying text regarding the EEOC's June 15, 2021, guidance. Similarly, on March 2, 2022, HHS's OCR issued its "Notice and Guidance" that addressed federal discrimination protections applicable to gender affirming care. *Id.* The HHS guidance advised that, under Section 1557 of the ACA, a federal fund recipient was prohibited from "restricting an individual's ability to receive medically necessary care, including gender-affirming care, from their health care provider solely on the basis of their sex assigned at birth or gender identity." *Id.* (quoting HHS's Notice and Guidance).

462. *Id.* at *2. The lawsuit also included the Attorney General as a defendant. *Id.*

463. *Id.*

464. See *Neese v. Becerra*, No. 2:21-CV-163-Z, 2022 WL 1265925, at *1 (N.D. Tex. Apr. 26, 2022).

465. *Texas*, 2022 WL 4835346 at *2.

466. See *Tennessee v. United States Dep't of Educ.*, No. 3:21-CV-308, 2022 WL 2791450, at *3 (E.D. Tenn. July 15, 2022).

implementing the challenged guidance as to the twenty plaintiff states.⁴⁶⁷ The United States filed a notice of appeal on September 13, 2022, and filed its appellate brief on December 15, 2022.⁴⁶⁸ The brief raised four issues on appeal: (1) Whether the States have standing to support a pre-enforcement challenge to the agencies' documents; (2) whether the challenged documents constitute reviewable "final agency action" for purposes of review under the APA; (3) whether the district court abused its discretion in granting a preliminary injunction where the States failed to show a likelihood of success on the merits of their APA notice-and-comment claim and failed to show that the balance of equities weighs in favor of preliminary relief; and (4) whether the preliminary injunction granted is overbroad.⁴⁶⁹ Appellee briefs were filed on January 24, 2023, and the case is ongoing.⁴⁷⁰

On October 1, 2022, in response to cross motions for summary judgment, the Texas district court judge released a Memorandum Opinion and Order, ruling on behalf of Texas.⁴⁷¹ The conservative, Republican judge noted that "the crux of the parties' disagreement distill[ed] down to one question: is the nondiscrimination holding in *Bostock* cabined to 'homosexuality and transgender status' or does it extend to correlated *conduct*."⁴⁷² The Texas judge decided that "conduct" represented, among other things, the unaddressed matters the Court left open in *Bostock*: sex-specific dress, bathroom use, pronouns, and healthcare practices.⁴⁷³ When addressing the *Bostock* opinion, the judge applied a narrow reading, limiting the Court's holding solely to prohibiting an employer, under Title VII's sex-based protection, from firing an employee based on an employee's sexual orientation or gender identity *status*—for *being* gay or transgender.⁴⁷⁴

The Texas district court judge completely disregarded the Court's stated reason for not addressing issues such as bathrooms, pronouns, and health practices in the *Bostock* decision, instead stating that "[w]hen the *Bostock* plaintiffs pressed the Court to expand the Title VII analysis and definition of 'sex' beyond mere *status* to reach a "broader scope" of conduct, Justice

467. *Id.*

468. Brief for Appellants at 1, *Tennessee v. U.S. Dept. of Educ.*, No. 22-5807, 2022 WL 17901086 (6th Cir. 2022).

469. *Id.* at b *Texas v. EEOC*, No. 21-194, 2022 WL 4835346 at *1 (N.D. Tex. Oct. 1, 2022).

470. *Id.*

471. *Id.*

472. *Id.*

473. *Id.* at *2. (emphasis in original).

474. *Id.* at *13. (emphasis added).

Gorsuch expressly declined.⁴⁷⁵ However, the Court clearly noted that it did not address those issues because “[t]he only question before us is whether an employer who fires someone simply for being homosexual or transgender has discharged or otherwise discriminated against that individual “because of such individual’s sex.”⁴⁷⁶ Holding that “[f]iring employees because of a statutorily protected trait surely counts,” the Court explained that the other issues were “questions for future cases, not these.”⁴⁷⁷

Nonetheless, the Texas district court judge found that the EEOC had “misread” the *Bostock* opinion and violated Title VII and the APA, declaring the guidance unlawful and setting it aside.⁴⁷⁸ According to the Texas judge’s reasoning, *Bostock* held that an employee is protected from discrimination under Title VII based on *being* homosexual or transgender, but that Title VII may not extend to the person’s “correlated conduct”—which the court indicated may be fair game for discrimination.⁴⁷⁹ In fact, the *Bostock* Court did not make such a distinction. The Court clearly stated that “[a]n employer who fires an individual for *being* homosexual or transgender fires that person for *traits or actions* it would not have questioned in members of a different sex,” clarifying that because “[s]ex plays a necessary and undisguisable role in the decision,” the employment action is “*exactly what Title VII forbids.*”⁴⁸⁰ The Supreme Court used the term “being” to make the point that “it is impossible to discriminate against a person for *being homosexual or transgender without discriminating against that individual based on sex.*”⁴⁸¹ The term “being homosexual or transgender” was used to illustrate how both sexual orientation and gender identity are “inextricably bound up with sex,” a protected Title VII characteristic.⁴⁸² In *Bostock*’s reasoning, the Court

475. *Id.* at *3.

476. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1753 (2020).

477. *Id.*

478. *Texas*, 2002 WL 4835346, at *3.

479. *Id.* at *1, *3 (emphasis in original) (“The Guidances and Defendants misread *Bostock* by melding “status” and “conduct” into one catchall protected class covering all conduct correlating to “sexual orientation” and “gender identity.”).

480. *Bostock*, 140 S. Ct. at 1753 (emphasis added).

481. *Id.* at 1741 (emphasis added).

482. *Id.* at 1742 (“But unlike any of these other traits or actions [like tardiness or incompetence or simply supporting the wrong sports team], homosexuality and transgender status are inextricably bound up with sex. Not because homosexuality or transgender status are related to sex in some vague sense or because discrimination on these bases has some disparate impact on one sex or another, *but because to discriminate on these grounds requires an employer to intentionally treat individual employees differently because of their sex.*”) (emphasis added).

clearly noted that “[w]hen it comes to Title VII, the adoption of the traditional but-for causation standard means a defendant cannot avoid liability just by citing some *other* factor that contributed to its challenged employment decision. *So long as the plaintiff’s sex was one but-for cause of that decision, the law is triggered.*⁴⁸³

The Supreme Court has also explicitly stated that with Title VII, Congress intended to make sex irrelevant to employment decisions and it did not distinguish between discrimination based on sex and discrimination based on *conduct* related to sex as both require an employer to consider a prohibited characteristic: sex.⁴⁸⁴ The *Bostock* Court definitively stated that “[a]n individual’s homosexuality or transgender status is not relevant to employment decisions.”⁴⁸⁵ The simple test the Court employs to determine whether there is a Title VII violation based on sex is whether the evidence shows that “changing the employee’s sex would have yielded a different choice by the employer.”⁴⁸⁶ If so, “a statutory violation has occurred.”⁴⁸⁷ Considering an employee’s sex, whether their status based on sexual orientation or gender identity or any related conduct, is an impermissible violation of Title VII.⁴⁸⁸ Allowing female bathroom access to a woman who was assigned female at birth but denying the same access to a transgender woman who was not assigned female at birth does not pass the Court’s simple test because the employer has intentionally treated the transgender woman differently because of her sex in violation of Title VII.⁴⁸⁹

The Trump-appointed, conservative LGBT-opponent from Texas does not

483. *Id.* at 1739 (emphasis added). *See also supra* notes 20-22 and accompanying text.

484. *Id.* at 1741 (emphasis added). As further evidence that the Court did not make the distinction the *Texas* judge asserted, the *Price Waterhouse* plaintiff sued, in part, based on a coworker’s advice that she would have a better chance at a promotion if she walked, talked, dressed, and presented more feminine. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 235 (1989). The coworker’s comments focused on the plaintiff’s *conduct* as opposed to her “*being*” a woman. *Id.* The Court held that the plaintiff’s employer violated Title VII’s sex-based discrimination provision because it considered the plaintiff’s *conduct* as a woman, not for *being* a woman. *Id.* Similarly, in *Manhart*, the Court held that the plaintiff’s employer violated Title VII’s sex-based discrimination prohibition for considering life expectancy, which was a *trait associated with sex*. *City of Los Angeles, Dept. of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978) (emphasis added).

485. *Id.* (citing *Price Waterhouse*, 490 U.S. at 239).

486. *Bostock*, 140 S. Ct. at 1741.

487. *Id.*

488. *See supra* note 481 and accompanying text.

489. *Bostock*, 140 S. Ct. at 1740

apply sound reasoning in his opinion. His explanation that an employee cannot be discriminated against *because of* his sexual orientation or gender identity, but that he can be discriminated against *because of actions or conduct related to* his sexual orientation or gender identity, does not square up with the Court's opinion.⁴⁹⁰ For example, in the *Bostock* case, one of the plaintiffs was fired after notifying her employer that when she returned from an upcoming vacation, she would be presenting as a woman, including dressing in clothing required for female employees.⁴⁹¹ According to the Texas judge, her dress would be considered *conduct*.⁴⁹² Another plaintiff in the case was fired after his employer discovered that he was playing in a gay softball league, which the employer found was "*conduct* unbecoming a county employee."⁴⁹³ The Texas judge did not address either scenario, both of which evidence his flawed approach and inconsistency with the *Bostock* Court's legal analysis.⁴⁹⁴ Judge Kacsmaryk is likely well aware that Supreme Court precedent does not delineate between status and conduct. As he wrote and recognized in his article, *The Abolition of Man . . . and Woman*, Justice Ginsberg stated in *Christian Legal Soc'y Chapter of the Univ. of California Hastings v. Martinez*, "Our decisions have declined to distinguish between status and conduct in this context."⁴⁹⁵

490. See generally Ian Millhiser, *How an Obscure Christian Right Activist Became One of the Most Powerful Men in America*, Vox (Dec. 17, 2022, 7:00 AM), <https://www.vox.com/policy-and-politics/2022/12/17/23512766/supreme-court-matthew-kacsmaryk-judge-trump-abortion-immigration-birth-control>.

491. *Bostock*, 140 S. Ct. at 1738 ("Ms. Stephens wrote a letter to her employer explaining that she planned to 'live and work full-time as a woman' after she returned from an upcoming vacation. The funeral home fired her before she left, telling her 'this is not going to work out.'").

492. *Texas*, 2022 WL 4835346 at *1 (emphasis in original).

493. *Bostock*, 140 S. Ct. at 1738 (The *Bostock* plaintiff began participating in a gay recreational softball league and members of the community allegedly made "disparaging comments about Mr. Bostock's sexual orientation and participation in the league.").

494. *Id.* at 1745 ("[T]he defendants before us suggest that an employer who discriminates based on homosexuality or transgender status doesn't *intentionally* discriminate based on sex, as a disparate treatment claim requires. But, as we've seen, an employer who discriminates against homosexual or transgender employees necessarily and intentionally applies sex-based rules.") (internal citations omitted, emphasis added).

495. *Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of Law v. Martinez*, 561 U.S. 661, 689 (2010). See also *Lawrence v. Texas*, 539 U.S. 558, 575 (2003) ("When homosexual *conduct* is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual *persons* to discrimination.") (emphasis added); *Id.* at 583 (O'Connor, J., concurring) ("While it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, [the] law is

These two lawsuits, intended to challenge and block rights and protections extended to the LGBT community, further highlight the vulnerability of presidential executive orders and agency actions taken in response to those orders. Further, legal challenges to actions taken in response to an executive order can result in inconsistent opinions, causing further confusion and resulting in injunctions preventing or delaying needed protections. Absent a clear determination of Title VII's protective reach, these issues will remain unsettled and continue to be litigated in the courts. As a result, LGBT community protections and rights remain in a confusing holding pattern, despite President Biden's and his administration's efforts to provide consistent, stable protections.

V. THE NEED FOR CONSISTENT & RELIABLE LGBT PROTECTIONS: A CLEAR SOLUTION

As plainly illustrated by the dueling presidential orders over the past decade, LGBT rights and protections provided via executive order do not provide the crucial consistency and reliability essential to members of the LGBT community, those who are subject to statutory compliance, and those who must implement nondiscriminatory policy. Additionally, a change in presidential party and policy impacts and upsets established institutional practices implemented in reliance on earlier policy. Further, absent a clear and binding application of *Bostock*, partisan courts may freely halt rights and protections. These scenarios confirm that permanent measures are needed. In the interim, LGBT citizens continue to pay a high price in the give-and-take tug-of-war battle over protections and rights.

Regardless of the party affiliation of the leader in the White House, existing and future legal challenges to *Bostock*'s boundaries will likely take years to resolve during which time LGBT Americans will continue to suffer discrimination and harm. While a certiorari grant by the Supreme Court in an appropriate case to address and resolve the explicit issues left unaddressed in *Bostock* may provide needed certainty regarding Title VII's parameters, the best step forward is for Congress to act. President Biden acknowledged at the signing of the Respect for Marriage Act, "It's one thing for the Supreme Court to rule on a case, but it's another thing entirely for elected representatives of the people to take a vote on the floor of the United States Congress and say loudly and clearly: Love is love. Right is right. Justice is

targeted at more than conduct. It is instead directed toward gay persons as a class." Cf. *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993) ("A tax on wearing yarmulkes is a tax on Jews.").

justice.”⁴⁹⁶

Further supporting congressional action, in his *Zarda v. Altitude Express* dissenting opinion, Judge Lynch noted that it took an act of Congress to prohibit race and sex discrimination nationwide and predicted that it would take a similar act of Congress to prohibit nationwide discrimination based on sexual orientation and gender identity.⁴⁹⁷ Recognizing that several states do not provide protections to their LGBT citizens, he commented on those states that do: “Many states [have] recognized the injustice of discrimination on the basis of sexual orientation. In doing so, they have called discrimination by its right names, and taken a firm and explicit stand against it. I hope that one day soon Congress will join them, and adopt that principle on a national basis.”⁴⁹⁸

Whether by codifying the *Bostock* decision broadly to apply to all employment areas covered by Title VII’s sex discrimination protections or by passing the Equality Act or related legislation, it is crucial that Congress take action to prohibit sex-based discrimination on the basis of sexual orientation or gender identity. With American public support for LGBT equal rights at an all-time high of over eighty percent⁴⁹⁹ and over seventy percent of all Americans in support of same-sex relationships and marriages, now is the time for Congress to reflect the will of the people and clearly and decisively provide much-needed protections to the LGBT community.⁵⁰⁰

A. Federal Codification of *Bostock*—A Small Step in the Right Direction

In order to avoid ongoing conflict and provide solid and reliable guidance at the earliest time possible, a stand-alone bill should be introduced that includes a broad application of *Bostock*, including the resolution of issues left open by the *Bostock* Court. Those issues should be resolved by providing the greatest protections possible from a broad reading of the Court’s opinion,

496. See Press Release, The White House, *supra* note 380.

497. *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 166 (2d Cir. 2018) (Lynch, J., dissenting).

498. *Id.* at 166-67.

499. See GLAAD, *ACCELERATING ACCEPTANCE*, 2023, EXECUTIVE SUMMARY (“The most important finding of our 2023 study is that support for LGBTQ equal rights is at an all-time high: eighty-four percent of survey respondents support equal rights for the LGBTQ community.”), <https://assets.glaad.org/m/23036571f611c54/original/Accelerating-Acceptance-2023.pdf>

500. See Frank Newport, *American Public Opinion and the Equality Act*, GALLUP (Mar. 18, 2021), <https://news.gallup.com/opinion/polling-matters/340349/american-public-opinion-equality-act.aspx> (“One recent poll conducted by Hart Research for the LGBTQ advocacy group Human Rights Campaign included a detailed summary of the new bill and found that seventy percent of those interviewed favored it.”).

including extending discrimination protections to bathrooms, locker rooms, dress codes, and pronouns. The *Bostock* decision's most narrow reading clearly prohibits the firing of LGBT employees based on sexual orientation or gender identity.⁵⁰¹ The Court was unambiguous that Title VII's sex-based prohibitions do not permit an employer to consider, even in part, an employee's LGBT status when making such decisions.⁵⁰² Thus, an honest application of the Court's reasoning that "[a]n employer who discriminates against homosexual or transgender employees necessarily and intentionally applies sex-based rules," highlights much broader implications than solely protecting LGBT employees from discriminatory firing.

The *Bostock* Court held that an employer cannot discriminate against a person based, even in part, on their sexual orientation or gender identity without discriminating against that person based on sex.⁵⁰³ In the same way, refusing to permit transgender employees to use the bathroom or locker room that coordinates with their sexual identity also requires the employer to take sex into consideration, which is impermissible under Title VII.⁵⁰⁴ As such, *Bostock*'s holding is rightly applicable to all sex discrimination prohibitions providing protection under Title VII, and its codification should include the broadest possible application of Title VII, including those not addressed in *Bostock*.⁵⁰⁵

A bill that meets this description has been proposed in recent scholarship.⁵⁰⁶ Among its strengths, the proposed bill is geared toward removing roadblocks that have prevented successful passage of prior bills.⁵⁰⁷ Such a bill, identifying and eliminating points of contention that have

501. See, e.g., *supra* note 488 and accompanying text. Anit-LGBT and far-right conservative District Court Judge Kacsmaryk is even willing to concede that under *Bostock* an individual cannot be fired for *being* gay or transgender. (According to Kacsmaryk, an employee cannot be discriminated against *because of* his sexual orientation or gender identity, but he can be discriminated against *because of actions or conduct related to* his sexual orientation or gender identity). *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1754 (2020).

502. *Id.*

503. See generally *Bostock*, 140 S. Ct. at 1731.

504. 42 U.S.C. § 2000e et. seq.

505. *Id.* at 1737 ("An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids.").

506. Alex Reed, *The Title VII Amendments Act: A Proposal*, 59 AM. BUS. L.J. 339, 339 (2022). Professor Reed is an Associate Professor of Legal Studies at the Terry College of Business at the University of Georgia.

507. *Id.* at 341-42.

precluded successful passage by Congress, presents an avenue to workplace protections that are clear, permanent, and consistent. Further, a bill that aims to eliminate studied points of impasse would increase the likelihood that it could be introduced and passed during the 118th U.S. Congress after multiple unsuccessful attempts over several years. Such a bill would also reflect the will of the American public and provide proposed protections at the earliest opportunity possible and while President Biden remains in the White House. Like the recent passage of the Respect for Marriage Act, the House and Senate need to move forward in a nonpartisan manner to provide clarity to employers, needed protections to LGBT employees, and implement protections supported by the large majority of their constituents.⁵⁰⁸ This proposal could do the trick.

In his sixty-eight page detailed proposition, published in June 2022, eminent scholar Professor Alex Reed, proposed an alternate remedy to the Equality Act similar to the above suggested codification of *Bostock*.⁵⁰⁹ Due to two identified controversial provisions contained in the Equality Act, the author calculates that the current version of the Act is unlikely to receive both House and Senate approval in the near future: transgender sport participation⁵¹⁰ and a “perceived threat to religious liberty” based on limitations placed on the Religious Freedom Restoration Act (“RFRA”) as to certain civil rights violations.⁵¹¹ By recognizing that these presently unresolvable issues have resulted in the inability to receive the needed support to pass both houses of Congress, and acknowledging the desperate need for immediate and clear LGBT protections, the author published an alternate proposal offering a well-reasoned compromise to the Equality Act.⁵¹²

In order to provide prompt and decisive resolution to the issues expressly left open in *Bostock*, the article proposes “a new employment statute: the Title VII Amendments Act (“T7AA”)” that would include existing Equality

508. The 118th U.S. Congress convened in Washington, D.C., on January 3, 2023, and is scheduled to continue until January 3, 2025. See *Date of Sessions of the Congress*, SENATE.GOV, <https://www.senate.gov/legislative/DatesofSessionsofCongress.htm> (last visited Apr. 25, 2023).

509. See Reed, *supra* note 506, at 341-43.

510. See, e.g., Chris Johnson, *Trans Kids in Sports May be Sticking Point in Equality Act Talks*, WASH. BLADE (Apr. 21, 2021), <https://www.washingtonblade.com/2021/04/21/trans/>.

511. See, e.g., Anthony LoCoco, *The Equality Act is a Threat to Religious Liberty*, WI INST. FOR L. & LIBERTY (Apr. 15, 2021), <https://will-law.org/the-equality-act-is-a-threat-to-religious-liberty/>.

512. See Reed, *supra* note 506, at 341-43.

Act employment provisions extending *Bostock* broadly and exclude any reference to Title IX education law or its RFRA restriction.⁵¹³ By effectively removing the two challenged provisions that have prevented the Equality Act's successful passage, T7AA increases the likelihood that *Bostock*'s employment protections will receive the support of both the House and the Senate.⁵¹⁴ By removing the contested portions of the Act, the author provides a thoroughly analyzed successful path forward extending full Title VII protections to all areas of employment law, leaving non-employment-related discrimination issues to be resolved in separate legislation when a consensus is possible.⁵¹⁵

The author also contends that, as a separate bill, the proposal can extend its protections to classes other than sexual orientation and gender identity, creating a broader, more diverse bill able to gain greater support than the Equality Act has been able to attract thus far.⁵¹⁶ Further, by broadening the intended beneficiaries of the proposed legislation, it would be "less likely to be seen as special-interest legislation inuring to the exclusive benefit of LGBTQ persons and more likely to be viewed as omnibus civil rights legislation conferring broad employment protections on all Americans."⁵¹⁷ The proposed plan resolves *Bostock*'s open questions, favoring greater protections to workers in general and specifically to LGBT employees, but it allows RFRA to be raised as a defense in sex-based employment discrimination matters.⁵¹⁸

By removing the two main barriers impacting the Equality Act's support, Professor Reed's proposed Title VII amendment provides a less controversial path and increases the likelihood the bill will pass. Although T7AA leaves RFRA and Title IX issues unaddressed, those issues are not off the table and can be raised at a later time. By avoiding the issues causing the

513. Reed, *supra* note 506, at 341-42.

514. *Id.* at 341-42.

515. *See id.*

516. *Id.* at 505.

517. *Id.* at 505.

518. *Id.* at 505. The author points out that "omitting the Equality Act's RFRA preclusion provision would provide a symbolically important but legally insignificant concession to those concerned about LGBTQ civil rights legislation's implications for religious liberty without compromising [the proposal's] core substantive protections for LGBTQ persons." The author notes that RFRA claims have been found by most courts as unavailable in private party suits; when RFRA is available, the proposal would likely succeed in overcoming an intermediate scrutiny challenge, and the proposed amendment would "almost certainly" satisfy as the "least restrictive means" to eliminate sex-based discrimination and thus excuse "ancillary burden[s] on [an] employers' religious liberty."

current congressional Equality Act stalemate, T7AA forges a path to immediate LGBT employment discrimination protections and guidance. The proposal should be considered by those working toward the Equality Act's passage, and possibly introduced in lieu of another unsuccessful Equality Act bill so to quickly obtain crucial LGBT protections, as well as much-needed guidance for employers. Through the codification of *Bostock* and its broad reasoning that "you cannot discriminate based on sexual orientation or gender identity without discriminating based on sex," Congress can provide substantial certainty, stability, and protection to LGBT employees that *Bostock* provides in the employment arena.⁵¹⁹

While codifying *Bostock* would resolve many issues related to Title VII's broad LGBT protections, it would not resolve similar issues outside of the employment arena, including rulemaking challenges and courtroom interpretations related to healthcare and education, among others. *Bostock's* codification, however, would reach LGBT workers who are outside of Title VII's reach as independent contractors or small business workers living in one of the many states lacking LGBT employment protections.⁵²⁰ *Bostock's* codification would afford clear direction prohibiting employment discrimination based on sexual orientation or gender identity, establish binding national law, and provide clarification, consistency, and guidance to both the LGBT community and those who are required to adhere to the law.

519. For a detailed analysis of LGBT legislative approaches to achieve federal LGBT protection immediately after *Obergefell* and before *Bostock*, see generally Lisa Bornstein & Megan Bench, *Married on Sunday, Fired on Monday: Approaches to Federal LGBT Civil Rights Protections*, 22 WM. & MARY J. WOMEN & L. 31 (2015) (discussing four legislative approaches to achieving comprehensive civil rights protections for the LGBT community: (1) an incremental issue-by-issue standalone approach similar to the ADEA or ENDA; (2) a comprehensive standalone approach similar to the ADA; (3) an incremental issue-by-issue amendment to the Civil Rights Act, similar to the Pregnancy Discrimination Act; or (4) a comprehensive approach to amending the Civil Rights Act, similar to the newly introduced Equality Act, which amends several sections of the Civil Rights Act of 1964 in one bill).

520. As of January 1, 2023, the Movement Advancement Project reported that 22 states and Washington D.C. explicitly prohibit discrimination against LGBTQ people in employment, housing, and public accommodations. Movement Advancement Project, *Equality Maps: Local Nondiscrimination Ordinances*, https://www.lgbtmap.org/equality-maps/non_discrimination_ordinances (last visited July 1, 2023).

B. *The Better Option: Amending Title VII to Codify “Bostock Plus” — The Equality Act*

A better alternative to *Bostock*’s codification is to pass the Equality Act, which would provide the *Bostock* employment protections addressed above, as well as additional much-needed LGBT protections beyond Title VII.⁵²¹ Many academic scholars have written about the Equality Act, identifying it as critical legislation needed to provide protections to the LGBT community.⁵²² Since it was first introduced in 1974, the Equality Act has been introduced in some form for the last fifty years.⁵²³ The Act’s current version prohibits discrimination on the basis of sex, sexual orientation, and gender identity by incorporating LGBT protections into federal civil rights law both inside and outside of the employment realm, in areas ranging from education to employment to housing.⁵²⁴ The Equality Act also expands current civil rights protections to the LGBT community, women, people of color, and minority groups by amending the definition of “public

521. Press Release, The White House, *supra* note 380 (when introducing the Act, Biden stated, “Every person should be treated with dignity and respect, and this bill represents a critical step toward ensuring that America lives up to our foundational values of equality and freedom for all.”). For the history of and a thorough discussion of the Equality Act, the Employment Non-Discrimination Act (ENDA), and the urgent need for the Equality Act to pass, see Jennifer C. Pizer, *Anything Less Is Less Than Equal: The Structure and Goals of the Equality Act*, AM. BAR ASS’N (July 5, 2022), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/intersection-of-lgbtq-rights-and-religious-freedom/anything-less-is-less-than-equal/.

522. See, e.g., Rachel Eric Johnson, *Discrimination Because of Sex(ual Orientation and Gender Identity): The Necessity of the Equality Act in the Wake of Bostock v. Clayton County*, 47 B.Y.U.L. REV. 685, 702 (2022); Pizer, *supra* note 521 (“*The Equality Act is Urgently Needed*. It is difficult to overstate the need to establish broad, effective protections against the discrimination LGBTQ people still face throughout their daily lives in all corners of the United States.”); Ty Gamble-Eddington, *The Equality Act: How We Got Here and How to Get It Passed*, GLAAD (Sept. 30, 2020), <https://www.glaad.org/amp/equality-act-how-we-got-here-and-how-we-move-forward>; Julie Allen, *The Equality Act Is 46 Years In The Making. The US Senate Should Pass It Now*, WBUR (Apr. 2, 2021), <https://www.wbur.org/cognoscenti/2021/04/02/equality-act-stella-keating-julie-marie-allen>.

523. See Pizer, *supra* note 521 (noting that the initial 1974 bill proposed amending the Civil Rights Act in more limited ways than the recent version). Further, ENDA, which would enact LGBT employment protections, was unsuccessfully introduced from 1994 to 2013. *Id.* The most recent version of the Equality Act was first introduced in 2015 and passed by the House in 2019 and in 2021. *Id.* Although the Senate Judiciary Committee heard testimony on the bill in March 2021, it died in committee at the end of the 117th Congress. Equality Act, H.R. 5, 117th Cong. (2021), <https://www.congress.gov/bill/117th-congress/house-bill/5>.

524. See Pizer, *supra* note 521.

accommodations” to include “businesses that provide exhibitions, recreation, exercise, amusement, gatherings, or displays goods, services or programs, including transportation services.”⁵²⁵

The Act was last introduced in February 2021, at the beginning of Biden’s presidency.⁵²⁶ President Biden clearly supported the bill and urged Congress to quickly pass the legislation, commenting that “Every person should be treated with dignity and respect, and this bill represents a critical step toward ensuring that America lives up to our foundational values of equality and freedom for all.”⁵²⁷ While the bill passed the House with a vote of 224-206 on February 25, 2021, it died in Senate committee without enough support to overcome a Senate filibuster and was never brought to a floor vote before

525. Equality Act, H.R. 5, 117th Cong. (as passed by House, Feb. 25, 2021). *See also* FACT SHEET: *The Equality Act Will Provide Long Overdue Civil Rights Protections for Millions of Americans*, WHITE HOUSE (June 25, 2021) [hereinafter *Equality Act Fact Sheet*], <https://www.whitehouse.gov/briefing-room/statements-releases/2021/06/25/fact-sheet-the-equality-act-will-provide-long-overdue-civil-rights-protections-for-millions-of-americans/#:~:text=In%20states%20across%20the%20country,afforded%20equal%20protection%20under%20law> (“The updated scope includes shopping malls, online commerce, transportation and financial services, and other infrastructure of contemporary American life. The act aims to create nondiscrimination coverage using the familiar legal standards in employment, housing, education, health-care services, other public accommodations, jury service, and federally funded programs.”).

526. The Equality Act bill summary that was proposed to the 117th Congress states: This bill prohibits discrimination based on sex, sexual orientation, and gender identity in areas including public accommodations and facilities, education, federal funding, employment, housing, credit, and the jury system. Specifically, the bill defines and includes sex, sexual orientation, and gender identity among the prohibited categories of discrimination or segregation.

The bill expands the definition of public accommodations to include places or establishments that provide (1) exhibitions, recreation, exercise, amusement, gatherings, or displays; (2) goods, services, or programs; and (3) transportation services.

The bill allows the Department of Justice to intervene in equal protection actions in federal court on account of sexual orientation or gender identity.

The bill prohibits an individual from being denied access to a shared facility, including a restroom, a locker room, and a dressing room, which is in accordance with the individual’s gender identity.

Equality Act, H.R. 5, 117th Cong. (2021).

527. Press Release, The White House, *supra* note 380. For a thorough discussion of the Employment Non-Discrimination Act (“ENDA”) and the Equality Act of 2015, *see* Shalyn L. Caulley, *The Next Frontier to LGBT Equality: Securing Workplace-Discrimination Protections*, 2017 U. ILL. L. REV. 909, 945 (2017). *See also* Alex Reed, *RFRA v. ENDA: Religious Freedom and Employment Discrimination*, 23 VA. J. SOC. POL’Y & L. 1, 4 (2016).

the 117th Congress adjourned.⁵²⁸ While the same or a similar bill could easily be re-introduced to the 118th Congress, the roadblocks to passage of its predecessors must be considered to avoid a new bill suffering the same fate. With an all-time high percentage of Americans in support of same-sex marriage and the recent passage by Congress of the Respect for Marriage Act,⁵²⁹ now is the time for lawmakers to take additional steps to provide the LGBT community with stable, consistent, and reliable protections in areas beyond marriage.⁵³⁰ At the Respect for Marriage signing ceremony, President Biden poignantly stated, “When a person can be married in the morning and thrown out of a restaurant for being gay in the afternoon, this is still wrong. Wrong. And that’s why . . . people . . . continue to fight to pass the Equality Act.”⁵³¹

VI. CONCLUSION

Bostock was a major step forward in the march toward full LGBT equality and has resulted in first-ever protections from discrimination based on sexual orientation and gender identity for millions of LGBT Americans workers. In *Bostock*, the Court resolved the long-debated issue of whether an employer who bases an employment action, even in part, on an employee’s sexual

528. Equality Act, S. 393, 117th Cong. (2021).

529. See Press Release, The White House, Remarks by President Biden and Vice President Harris at Signing of H.R. 8404, the Respect for Marriage Act [hereinafter Respect for Marriage Act Signing], Dec. 15, 2022, [https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/12/13/remarks-by-president-biden-and-vice-president-harris-at-signing-of-h-r-8404-the-respect-for-marriage-act/#:~:text=you%2C%20thank%20you.,\(Applause.\),Justice%20is%20justice](https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/12/13/remarks-by-president-biden-and-vice-president-harris-at-signing-of-h-r-8404-the-respect-for-marriage-act/#:~:text=you%2C%20thank%20you.,(Applause.),Justice%20is%20justice). (“It’s one thing — it’s one thing for the Supreme Court to rule on a case, but it’s another thing entirely for elected representatives of the people to take a vote on the floor of the United States Congress and say loudly and clearly: Love is love. Right is right. Justice is justice.”).

530. *LGBT Rights*, GALLUP, <https://news.gallup.com/poll/1651/gay-lesbian-rights.aspx> (last visited May 25, 2023). The LGBT Rights Gallop poll shows a drastic increase in LGBT support nationally. For example, approval of marriage equality increased from twenty-seven percent in 1996 to seventy-one percent in 2022. In May 2001, forty percent of Americans found same-sex relationships morally acceptable compared with seventy-one percent twenty-one years later. In a May 2019 poll, ninety-three percent reported that LGBT employees should have equal rights at work, seventy-five percent supported adoption as compared to fourteen percent in 1977. For a detailed analysis of conflicting court and agency interpretations of Title VII protections based on sexual orientation and gender identity pre-*Bostock*, see Adam P. Romero, *Does the Equal Pay Act Prohibit Discrimination on the Basis of Sexual Orientation or Gender Identity?*, 10 ALA. C.R. & C.L.L. REV. 35, 54-58 (2019).

531. Press Release, The White House, *supra* note 380.

orientation or gender identity violates Title VII's sex nondiscrimination prohibition. By holding in the affirmative, the Court provided recourse to millions of American workers that have historically suffered from workplace discrimination. However, the Court expressly recognized that several issues remained unresolved regarding Title VII's protective reach, including bathrooms, pronouns, and religious exemptions, noting that those issues would be saved for a "later case."

As predicted by Justice Alito, the *Bostock* decision has resulted in multiple lawsuits and challenges over Title VII's protective reach.⁵³² Presidential administrations have approached the Court's holding in diametrically opposing manners, leading to battling executive orders and administrative rules. While presidents have utilized executive orders to advance LGBT protections and rights since the mid-80s, under Trump this executive power was weaponized against the LGBT community, clawing back advances and protections and attempting to limit the reach of *Bostock*'s Title VII protections. Although President Biden and his administration have made a strong and concerted effort to nullify Trump's damage during his first two years in the White House, a future president in the Oval Office could undo those efforts, many with the swipe of a pen. Federal courts have also disagreed over the parameters of *Bostock*'s reach, with some holding that LGBT employees are protected from discrimination in all employment-related areas while others limit *Bostock* to its most narrow application.

LGBT Americans have experienced major steps forward in the past few decades, from the recognition of privacy rights in consensual relationships to the constitutional right to marry, to federal statutory protections from workplace discrimination. During this evolution, the LGBT community has endured years of discrimination and abuse. Today, an unprecedented percentage of Americans support equal protections and rights for LGBT citizens. Thus, in order to prevent further dueling executive orders, resolve the battle over conflicting presidential agency actions, avoid ongoing litigation, provide a clear application of *Bostock*'s broad holding, and to provide the LGBT community with the stability, consistency, and the

532. See, e.g., Jon W. Davidson, *How the Impact of Bostock v. Clayton County on LGBT Rights Continues to Expand*, ACLU (July 15, 2022), <https://www.aclu.org/news/civil-liberties/how-the-impact-of-bostock-v-clayton-county-on-lgbtq-rights-continues-to-expand> ("[T]he [Bostock] ruling has had far-reaching effects . . . as evidenced by the more than 250 cases that have cited *Bostock* in the mere two years since the case was decided. Numerous courts have since followed the Supreme Court's compelling reasoning — which did not depend upon the particulars of the federal employment discrimination law — to hold that other federal laws barring sex discrimination in other settings also protect against sexual orientation and gender identity discrimination.").

confidence to rely long-term on these hard-earned legal advancements, action by Congress is crucial.

The present state of limbo is untenable for members of the LGBT community, who equally deserve the promise of Justice for All. As such, Congress should immediately begin working toward the passage of legislation, at a minimum codifying *Bostock* broadly, and, ideally, enacting the broader Equality Act, extending LGBT discrimination protections beyond the employment realm, and furthering the constitutional promise of full equality to all Americans. An individual's protection from discrimination based on sexual orientation or gender identity, whether in the workplace, the marketplace, at school, while seeking medical treatment, obtaining credit, or when buying or renting a house, should not be impacted by a change in presidential administrations or erased with the swipe of a pen.