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The Road to Bostock

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THE ROAD TO *BOSTOCK*

John Towers Rice*

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I. INTRODUCTION

On June 15, 2020, the Supreme Court of the United States announced its opinion in the landmark case *Bostock v. Clayton County, Ga.*,¹ in which the Court ruled 6–3—crossing conceived ideological lines—that the statutory prohibition against discrimination “because of sex” set forth in the Civil

* Visiting Professor of Law, Duquesne University School of Law. I express my sincerest thanks to my colleagues with whom I discussed this issue on the panel from which the original outline for this project grew during the Southeastern Association of Law Schools Annual Meeting in 2020: Dean Terri Beiner, Professor Richard Carlson, Professor Michael Green, Professor Jeff Hirsch, and Professor Keri Stone. I also express my thanks to Bryan Ramirez at the University of Tennessee College of Law for his outstanding research and editing assistance. Finally, I extend my heartfelt appreciation to the editorial staff at the *FIU Law Review* for their professionalism and dedication to this project, especially during the time of a pandemic.

¹ *Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020).

Rights Act of 1964 (the “Act”) extends to prohibit discrimination because of sexual orientation or gender identity or expression. *Bostock*—a consolidated case²—involved the plight of three employees who had been terminated because of their sexual orientation or gender identity and expression. Writing for the majority, Justice Neil M. Gorsuch succinctly explained: “An employer who fires an individual merely for being gay or transgender defies the law.”³

The Court’s decision here has significant societal implications for millions of American workers. By some counts, eight million people (or approximately four percent of the American workforce) identify as gay, lesbian, bisexual, or transgender.⁴ “Sexual orientation-based and gender identity discrimination is a common occurrence in many workplaces across the country.”⁵ “Research conducted over the past four decades yields compelling evidence that employment discrimination against LGBT people exists and that it has a range of negative effects on LGBT employees.”⁶ Studies conducted in the 1980s and 1990s revealed that 16% to 68% of self-identifying lesbian, gay, and transgender respondents “reported experiencing employment discrimination at some point in their lives.”⁷ Since the mid-1990s, at least fifteen studies found that 15 percent to 43 percent of lesbian, gay, and transgender respondents experienced discrimination in the workplace.⁸ Forms of discrimination varied, ranging from being fired or denied employment, being overlooked for promotions, receiving unequal pay or benefits, receiving negative performance evaluations, and being victimized by vandalism or verbal or physical abuse.⁹

Those who identify as transgender are particularly susceptible to workplace discrimination and disparate treatment. Studies conducted between 1996 and 2006 revealed that 20% to 57% of transgender individuals had been subject to mistreatment, including termination, being refused employment, harassment, and denial of promotion.

² The cases before the Court were: *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018); *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018) (en banc); and *Bostock v. Clayton Cty Bd. of Comm’rs.*, 723 F. App’x. 964 (11th Cir. 2018).

³ *Bostock*, 140 S. Ct. at 1754.

⁴ See Jennifer C. Pizer, Brad Spears, Christy Mallory & Nan D. Hunter, *Evidence of Persistent and Pervasive Workplace Discrimination Against LGBT People: The Need for Federal Legislation Prohibiting Discrimination and Providing for Equal Employment Benefits*, 45 LOY. L.A. L. REV. 715, 719 (2012).

⁵ M.V. Lee Badgett, Brad Sears, Holning Lau & Deborah Ho, *Bias in the Workplace: Consistent Evidence of Sexual Orientation and Gender Identity Discrimination 1998–2008*, 84 CHI.-KENT L. REV. 559, 561 (2009).

⁶ Pizer et al., *supra* note 4, at 720–21.

⁷ Badgett et al., *supra* note 5, 559.

⁸ *Id.*

⁹ *Id.*

As recently as 2011, 90 percent of respondents to the largest survey of transgender people to date reported having experienced harassment or mistreatment at work, or had taken actions to avoid it, and 47 percent reported having been discriminated against in hiring, promotion, or job retention because of their gender identity.¹⁰

Evidence demonstrates that such workplace discrimination and harassment can have a negative impact on the wages and mental and physical health of those who identify as LGBT people.¹¹ A significant body of empirical data suggests that the fear of discrimination, in and of itself, is associated with poor workplace performance and negative health outcomes.¹² A 1999 study indicated that LGBT employees who had experienced discrimination suffered from higher rates of psychological distress and other health-related problems.¹³ Likewise, they reported lower job satisfaction and were more likely to be absent from work, or quit altogether.¹⁴

Now, these workers may avail themselves through remedies under Title VII, not because of who they are not, but because of who they are. This moment in our legal history is the result of a remarkable and fascinating journey and should be characterized by celebration and foresightfulness. This article will attempt to concisely capture where we have been, assess where we are, and anticipate where we might be going. Part I will briefly review the history of civil rights law in the United States, with a particular focus on the “federalization” of civil rights protections and the suspect history of the inclusion of the term “sex” in Title VII of the Act. Part II will then survey the development of law relating to discrimination because of sexual orientation or gender identity or expression and will evaluate the roots of the legal arguments for such anti-discrimination prohibitions on the alternative grounds of textualism and *stare decisis*. Part III will consider how the Court resolved the question in favor of textualism. Finally, Part IV will anticipate the legacy of *Bostock*, including its impact on matters of statutory interpretation, social change, and the now-heightened tension between the statutory prohibition against employment discrimination and the First Amendment right to freedom of religion.

¹⁰ Pizer et al., *supra* note 4, at 721.

¹¹ Vickie M. Mays & Susan D. Cochran, *Mental Health Correlates of Perceived Discrimination Among Lesbian, Gay, and Bisexual Adults in the United States*, 91 AM. J. PUB. HEALTH 1869 (2001); Ilan H. Meyer, *Prejudice, Social Stress, and Mental Health in Lesbian, Gay, and Bisexual Populations: Conceptual Issues and Research Evidence*, 129 PSYCHOL. BULL. 674 (2003).

¹² See Pizer et al., *supra* note 4, at 735.

¹³ Craig G. Waldo, *Working in a Majority Context: A Structural Model of Heterosexism as Minority Stress in the Workplace*, 46 COUNSELING PSYCHOL. 218, 229 (1999).

¹⁴ *Id.*

II. A BRIEF HISTORY OF THE CIVIL RIGHTS ACT OF 1964.

Discrimination and social stratification are both deeply entrenched in our nation's history. Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer to "discriminate against any individual with respect to his [or her] compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, *sex*, or national origin"¹⁵ A full appreciation of the Court's opinion in *Bostock*—and any prediction of the trajectory of this law—would benefit from a brief¹⁶ review of the history of the federalization of civil rights legislation.

A. The "Federalization" of Antidiscrimination Law.

The Civil War ended, and Reconstruction began, in 1865. In the years after, Congress enacted the Civil Rights Act of 1875, affording public accommodation to all men despite race,¹⁷ and enacted the Civil Rights Amendments—the 13th, 14th, and 15th Amendments that abolish slavery, establish the bounds of citizens, and establish that voting shall not be denied on account of race.¹⁸

Yet, this social progress was not met with universal acceptance. Southern states adopted so-called "Jim Crow" laws which permitted disparate rights, treatment, and classification of African Americans.¹⁹ Although "Jim Crow" laws were not as rampant in Northern states, the desire to enforce civil rights laws was low, and racial discrimination pervaded.²⁰ The segregationist ideology underlying these laws was upheld by the Supreme Court's holding that it was unconstitutional for Congress to "adjust . . . the social rights of men and races in the community"²¹ and its infamous mantra "separate but equal," announced in its 1896 decision in *Plessy v. Ferguson*.²²

The decades after were full of racial strife and unrest—characterized by protest, civil action, disenfranchisement, and violence. In the 1920s,

¹⁵ 42 U.S.C. § 2000 (2012) (emphasis added).

¹⁶ I only attempt here to offer an abbreviated and cursory overview of the most critical context of the events leading up to the enactment of the Civil Rights Act of 1964. My overview is inadequate to give a full understanding of the ongoing struggle for civil rights and equality.

¹⁷ Civil Rights Act of 1875, Ch. 114, 18 Stat. 335; U.S. COMM'N OF CIVIL RIGHTS, FREEDOM TO THE FREE 52 (1963).

¹⁸ See U.S. CONST. amends. XIII, XIV, and XV.

¹⁹ See U.S. COMM'N OF CIVIL RIGHTS, *supra* note 17, at 58–61.

²⁰ *Id.* at 53.

²¹ *United States v. Stanley (Civil Rights Cases)*, 109 U.S. 3, 22 (1883).

²² *Plessy v. Ferguson*, 163 U.S. 537 (1896).

Presidents Warren G. Harding and Calvin Coolidge noted the increased need for federal action in the realm of civil rights, particularly pertaining to the issue of lynching.²³ The stock market plunge of 1929 hurt many low-income workers in generally low-paying jobs, a disproportionate amount of whom were African American.²⁴

As American involvement in World War II escalated, most black Americans worked low-wage farm, factory, or personal service jobs. This population was not permitted to fill higher-paying war-related jobs and was discouraged from serving in the war. On June 25, 1941,²⁵ President Franklin D. Roosevelt issued Executive Order 8802 prohibiting discrimination of the basis of race in filling national defense and government jobs.²⁶

However, after serving honorably in the war, numerous black soldiers were met with prejudice, discrimination, scorn, and even violence upon return to civilian life.²⁷ Following President Roosevelt's death in 1945, President Harry Truman adopted a civil rights agenda and charged a joint session of Congress with the need for civil rights legislation to prohibit lynching, secure voting rights, and provide employment discrimination prohibitions.²⁸ After winning reelection in 1948, but encountering deep opposition from southern democrats in Congress, Truman exercised his executive power to prohibit racial discrimination in federal employment and segregation in the military.²⁹

Dwight Eisenhower began his term as president in 1953. Although he espoused belief and support for civil rights efforts, he also maintained: "I do not believe we can cure all evils in men's hearts by law."³⁰ This was a signal that, while Eisenhower would continue Truman's efforts to desegregate the military and would generally uphold the law, Eisenhower would not take on the mantle of racial justice and would not interfere with local or state law or customs.³¹

The era can be rightly characterized as one of racial turmoil. In the wake of the Supreme Court announcing its ruling in *Brown v. Board of Education of Topeka*,³² the state of Arkansas mounted a public and bold opposition to

²³ U.S. COMM'N OF CIVIL RIGHTS, *supra* note 17, at 101–20.

²⁴ *Id.* at 104.

²⁵ *See id.* at 116.

²⁶ *See* Exec. Order No. 8802, 6 Fed. Reg. 3109 (June 25, 1941).

²⁷ *See* U.S. COMM'N OF CIVIL RIGHTS, *supra* note 17, at 117–18.

²⁸ *Id.* at 118–20.

²⁹ *See* Exec. Order No. 9981, 13 Fed. Reg. 4313 (July 26, 1948).

³⁰ *See The Struggle for Civil Rights*, MILLER CENTER, <https://millercenter.org/the-presidency/educational-resources/age-of-eisenhower/struggle-civil-rights> (last visited June 14, 2021).

³¹ *Id.*

³² *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

school integration.³³ After the governor withdrew the national guard, Eisenhower ordered federal troops to escort black children into the school and enforce integration.³⁴

In the years leading up to his run for president, John F. Kennedy had to deal publicly with the demand for civil rights during his presidential campaign.³⁵ Prior to the campaign, Kennedy had walked a fine line between supporting, but not advocating, the civil rights movement to both secure his own reelection as senator and contemplate his political future.³⁶

After his election, he faced bipartisan pressure to enact federal protections of civil rights.³⁷ Yet, Kennedy avoided publicly advocating civil rights out of concern of splitting the party.³⁸ Behind the scenes, he encouraged his cabinet members to the employment practices of their departments.³⁹ Finally, because of an increased national sense of consciousness around race issues arising out of the coverage of the Freedom Riders and the forced integration of the University of Mississippi, Kennedy decided the time to take public action had come and began urging Congress to pass civil rights legislation. Public focus was bolstered when, in April 1963, police in Birmingham, Alabama, under the direction of Public Safety Commission Eugene “Bull” Connor, brutally employed police dogs and fire hoses in an effort to disburse a series of non-violent protests lead by Dr. Martin Luther King, Jr.⁴⁰

That June, Kennedy addressed the nation and spoke of civil rights as both a moral and legal issue and promised to present Congress with a comprehensive civil rights legislation package.⁴¹ The package attempted to combat racial discrimination on multiple fronts, ranging from providing equal access to public accommodation, cutting off federal funding for discriminatory programs, and establishing an Equal Employment Opportunity Commission.⁴²

³³ U.S. COMM’N OF CIVIL RIGHTS, *supra* note 17, at 154–55.

³⁴ *Id.*

³⁵ Mark Stern, *Kennedy and Civil Rights: From Congress to Presidency*, 19 PRESIDENTIAL STUD. Q. 797, 801 (1989).

³⁶ *Id.* at 803.

³⁷ U.S. COMM’N OF CIVIL RIGHTS, *supra* note 17, at 129.

³⁸ Robert E. Gilbert, *John F. Kennedy and Civil Rights for Black Americans*, 12 PRESIDENTIAL STUD. Q. 386, 393 (1982).

³⁹ *Id.* at 387.

⁴⁰ *Id.* at 395; *see also* Ted Gittinger & Alan Fisher, *LBJ Champions the Civil Rights Act of 1964*, 36 PROLOGUE 1, 3 (2004), <https://www.archives.gov/publications/prologue/2004/summer/civil-rights-act-1.html>.

⁴¹ *See* Gilbert, *supra* note 38, at 397.

⁴² *Id.*

Supporters of the proposed civil rights legislation organized a march on Washington, D.C.⁴³ The march drew a quarter of a million people and culminated in Dr. King's famous "I Have a Dream" speech on the steps of the Lincoln Memorial on August 28, 1963.⁴⁴

In the midst of tortured debate of the legislation in Congress, Kennedy was assassinated on November 22, 1963.⁴⁵ During a joint session of Congress five days later, now-President Lyndon B. Johnson called for swift passage of the civil rights act:

I urge you again, as I did in 1957 and again in 1960, to enact a civil rights law so that we can move forward to eliminate from this Nation every trace of discrimination and oppression that is based upon race or color. There could be no greater source of strength to this Nation both at home and abroad.⁴⁶

Despite a tortured debate and strategic use of parliamentary procedure, the legislation passed both the House and the Senate. President Johnson signed the Civil Rights Act into law on July 2, 1964.⁴⁷

B. "*Because of . . . Sex*"—Political Fluke or Savvy Maneuvering?

Courts, pundits, and scholars have debated the circumstances surrounding the origins of the inclusion of "sex" in the Act. When tasked with construing Title VII's use of the word "sex," courts and scholars often lament a lack of clear evidence underlying the congressional intent.⁴⁸ Without a doubt, the actual floor debate of the amendment to include sex lasted approximately two hours and offers little insight into the complex political maneuvering behind the curtain. Many have debated the purpose of the "sex amendment."⁴⁹ The story—fascinating as it is beguiling—warrants a deliberate, albeit abbreviated, review of pertinent history—beginning at the founding of the country, then moving to women's suffrage, and then to the political efforts to achieve an equal rights amendment—leading up to the act itself.

⁴³ *Id.*

⁴⁴ See Gittinger & Fisher, *supra* note 40.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ See, e.g., Jack B. Harrison, *Because of Sex*, 51 LOY. L.A. L. REV. 91, 103 (2018).

⁴⁹ See Jo Freeman, *How "Sex" Got into Title VII: Persistent Opportunism as a Maker of Public Policy*, 9 MINN. J.L. & INEQ. 163, 178 (1991).

As an initial matter, it goes without saying that the drafters of the Constitution were all men.⁵⁰ They drafted the Constitution with specific contemplation of providing for men's dominance in the political sphere; the drafters had little contemplation that women would occupy such public office.⁵¹ For much of this nation's history, civic life was divided into spheres: men occupied the "public" sphere of political and commercial activity while women occupied the "private" sphere of domestic life.⁵² Through the legal concept of coverture, a married woman was part of the same legal entity as her husband, and women had few economic options apart from marriage.⁵³ A notable exception, women would engage in the political sphere on moral reform projects.⁵⁴ The abolitionist movement featured prominent women leaders.⁵⁵ Interestingly, at a World Anti-Slavery Convention in London, the women delegates were barred from being seated as delegates and relegated to the position of spectators looking on from the gallery.⁵⁶ It was here that women, Lucretia Mott and Elizabeth Cady Stanton, recognized a need for change—and with that, the women's movement was underway.⁵⁷

Mott, Stanton, and others called for a "women's rights convention."⁵⁸ Drawing over 300 people, the 1848 Seneca Falls Convention represented the moment these leaders identified the imperative of the voting franchise.⁵⁹ In the following years, the movement picked up steam, although there was considerable disagreement as to priorities.⁶⁰ By the end of the century, women had obtained more access to education, had begun to enter the workforce, and had begun to own property in most states.⁶¹ Yet, Stanton remained outspoken as to the importance of the right to vote.⁶²

The women's suffrage movement took a hiatus from 1861 to 1865 during the Civil War, but as Reconstruction began, leaders like Elizabeth

⁵⁰ Sandra Day O'Connor, *The History of the Women's Suffrage Movement*, 49 VAND. L. REV. 657, 658 (1996); W. William Hodes, *Women and the Constitution: Some Legal History and a New Approach to the Nineteenth Amendment*, 25 RUTGERS L. REV. 26, 27–28 (1970).

⁵¹ Akhil Reed Amar, *Women and the Constitution*, 18 HARV. J. L. & POL'Y 465, 465 (1994–95).

⁵² See O'Connor, *supra* note 50, at 658.

⁵³ See Joan Williams, *Is Coverture Dead? Beyond a New Theory of Alimony*, 82 GEO. L. REV. 2227, 2230 n.5 (1994).

⁵⁴ See O'Connor, *supra* note 50, at 658; Amar, *supra* note 51, at 465–66; Hodes, *supra* note 50, at 34.

⁵⁵ See O'Connor, *supra* note 50, at 658.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 660.

⁶¹ Hodes, *supra* note 50, at 34.

⁶² See O'Connor, *supra* note 50, at 660.

Stanton and Susan B. Anthony unsuccessfully campaigned to include suffrage for women in what would become the Civil War Amendments.⁶³ They maintained that if black men were about to obtain legal equality, then women should be entitled to the same.⁶⁴

Ratified July 9, 1868, the Fourteenth Amendment to the Constitution of the United States of America, in part pertinent to this discussion, provides:

No State shall make or enforce any law which shall abridge the **privileges or immunities** of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the **equal protection of the laws**.⁶⁵

Notably, the amendment did not include any provision for “sex.” Indeed, few people, if anyone, contemplated the “equal protection” clause of the Fourteenth Amendment being applied in the context of sex equality.⁶⁶ This came as a betrayal to many of the women who had advocated so staunchly for abolition and resulted in a split of ideology within the movement.⁶⁷

Many of the legal structures that, on their face, targeted women were regarded as protective rather than oppressive.⁶⁸ Not surprisingly, then, early litigation concerning women’s legal standing sounds in claims of the “privileges or immunities” of citizenship—not of “equal protection of the laws.” In the infamous *Slaughter-House Cases*, decided merely five years after the amendment’s ratification, the Court held that the “privileges or immunities” clause only enshrined the fundamental rights afforded by the Constitution; state and federal law were otherwise free to distinguish and discriminate without running afoul of this provision.⁶⁹ Thus, discriminatory classification because of sex was a valid exercise of the state’s police power.⁷⁰

⁶³ Hodes, *supra* note 50, at 35–36.

⁶⁴ *Id.*

⁶⁵ U.S. CONST. amend. XIV (emphasis added).

⁶⁶ Hodes, *supra* note 50, at 38.

⁶⁷ *See id.* at 36.

⁶⁸ *See* Ruth Bader Ginsburg, *Sex Equality Under the Fourteenth Amendment and Equal Rights Amendments*, 1979 WASH. U.L. REV. Q. 161, 163 (1979); *see also* Muller v. Oregon, 208 U.S. 412, 421–22 (1908) (recognizing that the “fact that woman has always been dependent upon man . . . [t]his difference justifies a difference in legislation, and upholds that which is designed to compensate for some of the burdens which rest upon her.”).

⁶⁹ *Slaughter-House Cases*, 83 U.S. 36, 75 (1872) (“If, then, there is a difference between the privileges and immunities belonging to a citizen of the United States as such, and those belonging to the citizen of the State as such, the latter must rest for their security and protection where they have heretofore rested; for they are not embraced by this paragraph of the amendment.”).

⁷⁰ *Id.* at 62.

This set off a domino-effect with regard to women's "constitutional" rights. The very next day, the Court relied on *Slaughter-House* to hold that an Illinois state law prohibiting women from being admitted to the practice of law, despite her being otherwise qualified, was constitutionally permissible.⁷¹ Concurring in the judgment, Justice Bradley maintained that "civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman,"⁷² and "[t]he paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother."⁷³ Two years later, in 1874, the Supreme Court upheld the Missouri constitutional limitation of the right of suffrage to male citizens, reasoning that the Fourteenth Amendment did not add to the "privileges and immunities of citizens" but instead "simply furnished an additional guaranty for the protection of such as he already had."⁷⁴

After herculean effort, the Nineteenth Amendment was ratified August 18, 1920: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex." Many viewed the ratification of the Nineteenth Amendment as a sort of "emancipation proclamation" to extend the guarantees of all three Civil War amendments to women.⁷⁵

After the ratification of the Nineteenth Amendment, a more progressive branch of the movement reorganized itself as the National Women's Party ("NWP") and shifted its primary focus to the ratification of an equal rights amendment ("ERA").⁷⁶ The ERA provided that "equality of rights under the law shall not be denied or abridged by the United States or any state on account of sex," or other substantially similar phrasing.⁷⁷ The ERA was first introduced in Congress in 1923 and was then reintroduced every year until 1972, when it actually passed and then went to the states to be considered for ratification.⁷⁸

⁷¹ See *Bradwell v. Illinois*, 82 U.S. 130 (1872).

⁷² *Id.* at 140.

⁷³ *Id.* at 141.

⁷⁴ *Minor v. Happersett*, 88 U.S. 162, 171 (1874).

⁷⁵ Hodes, *supra* note 50, at 26.

⁷⁶ DEBORAH L. RHODE, JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW 29 (1989); Robert C. Bird, *More than a Congressional Joke: A Fresh Look at the Legislative History of Sex Discrimination of the 1964 Civil Rights Acts*, 3 WM. & MARY J. WOMEN & L. 137, 146 (1997).

⁷⁷ Pauli Murray & Mary O. Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII*, 34 GEO. WASH. L. REV. 232, 236 (1965).

⁷⁸ See Barbara A. Brown, Thomas I. Emerson, Gail Falk & Ann E. Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 886 (1971); RHODE, *supra* note 76, at 72.

John F. Kennedy's campaign renewed hope for the ratification of the ERA.⁷⁹ After his election, in December 1961, Kennedy formed the President's Commission on the Status of Women to evaluate the proposed ERA.⁸⁰ While the NWP had hoped the Commission would endorse the ERA, the Commission instead determined the ERA unnecessary to accomplish equality:

Equality of rights under the law for all persons, male or female, is so basic to democracy and its commitment to the ultimate value of the individual that it must be reflected in the fundamental law of the land. The Commission believes that this principle of equality is embodied in the Fifth and Fourteenth Amendments to the Constitution of the United States.

. . . .

Since the Commission is convinced that the U.S. Constitution now embodies equality of rights for men and women, we conclude that a constitutional amendment need not now be sought in order to establish this principle. But judicial clarification is imperative in order that remaining ambiguities with respect to the constitutional protection of women's rights be eliminated.⁸¹

This public and high-leveled rebuke of the ERA created a problem for the NPW's continued viability and political influence.⁸² After President Kennedy asked Congress to enact sweeping civil rights legislation in June 1963, some leaders of the NWP began considering how they might connect the women's movement to the legislation.⁸³ The NWP leaders wanted a constitutional amendment, but they were also pragmatic: They would take whatever they could get.⁸⁴

Some attribute the "sex amendment" as an overt effort to defeat the passage of the civil rights legislation, while others point to the legal history of the struggle to obtain protections for women and suggest that the sex

⁷⁹ See Carl M. Brauer, *Women Activists, Southern Conservatives, and the Prohibition of Sex Discrimination in Title VII of the 1964 Civil Rights Act*, 49 J. SO. HIST. 37, 40 (1983).

⁸⁰ See Murray & Eastwood, *supra* note 77, at 232.

⁸¹ PRESIDENT'S COMMISSION ON THE STATUS OF WOMEN, AMERICAN WOMEN 44–45 (1963).

⁸² See Brauer, *supra* note 79, at 39.

⁸³ *Id.*

⁸⁴ *Id.*

amendment was a welcome inclusion representing political victory.⁸⁵ In my view, the truth is probably “all of the above, and then more.” In fact, motives varied between different groups and camps of legislators. The NWP was solely focused on their own objectives of achieving an amendment and gave little priority to racial equality. Thus, when the proposed civil rights legislation did not include provisions for women, they reached out to their friend and ally Rep. Howard Smith (D-Va), a well-known opponent of the civil rights legislation.⁸⁶ Ultimately, the day before the Act was passed by the House of Representatives, Rep. Smith proposed the amendment to “include sex within the discrimination bases banned by Title VII.”⁸⁷

Many have described Smith’s proffered amendment as a sort of joke or “poison pill,” intended to defeat the entire Civil Rights Act.⁸⁸ Considered against the backdrop of the women’s suffrage movement and the push for the equal rights amendment, Representative Smith’s so-called “last minute addition” can hardly be considered a fluke in my view. Indeed, Smith had been persuaded by the NWP to bring the amendment; had he not, a pro-ERA legislator like Rep. Martha Griffins would have.⁸⁹ Indeed, the discourse on the House floor may be most illuminating in demonstrating that there was not a single motivating attempt among the members of Congress in adopting the sex amendment, and indeed, many came to debate.⁹⁰

Indeed, there were camps. On the one hand, there was a class of legislators who were opposed to the civil rights legislation as a whole and viewed the sex amendment as an opportunity to jeopardize its passage.⁹¹ Others more openly opposed the amendment, shrugging off any need for it at all.⁹² Still, other representatives viewed the sex amendment as offering an opportunity to achieve part of a larger political goal.⁹³ For example, Representative Martha Griffins took to the floor to assert that women were second-class citizens and express concern that adoption of the Act without the sex amendment would be devastating for *white* women and place them

⁸⁵ See Michael Evan Gold, *A Tale of Two Amendments: The Reason Congress Added Sex to Title VII and Their Implication for Comparable Worth*, 19 DUQ. L. REV. 453, 457–67 (1981) (describing the debate of the sex amendment on the House floor).

⁸⁶ See Brauer, *supra* note 79, at 42; Bird, *supra* note 76, at 151.

⁸⁷ See Bird, *supra* note 76, at 150–51; Robert Stevens Miller, Jr., *Sex Discrimination and Title VII of the Civil Rights Act of 1964*, 51 MINN. L. REV. 877, 880 (1967).

⁸⁸ See, e.g., Anthony E. Varon & Jeffrey M. Monks, *En/Gendering Equality: Seeking Relief Under Title VII Against Employment Discrimination Based on Sexual Orientation*, 7 WM. & MARY J. WOMEN & L. 67 (2000).

⁸⁹ See Brauer, *supra* note 79, at 47.

⁹⁰ See 110 Cong. Rec. 2577–84 (1964).

⁹¹ See *id.* at 2581–82 (Statement of Rep. Green).

⁹² See *id.* at 2577–78 (Statement of Rep. Celler).

⁹³ See *id.* at 2578–80 (Statement of Rep. Griffins).

“at the bottom of the list” with “no rights at all.”⁹⁴ She closed her argument with an impassioned plea: “A vote against this amendment today by a white man is a vote against his wife, or his widow, or his daughter, or his sister. If we are trying to establish equality in jobs, I am for it, but I am for making white women equal, also.”⁹⁵

When the time of the vote on the sex amendment arrived, Representative Griffins requested tellers to document the vote. Although the record does not reflect specific votes, the sex amendment was adopted by a margin of 168 ayes to 133 noes.⁹⁶ The House version of the Act did not pass through the Senate unscathed, but the sex amendment survived and was subject to little debate.⁹⁷ As history tells us, the amendment was ultimately included in the legislation signed into law.

C. “Sex” as a Hydra.

No matter the tactic motivation, the last-minute addition of “sex” to Title VII has proved electric. The sheer volume of litigation arising from the inclusion of the word “sex” in Title VII supports a simple hypothesis: perhaps the meaning of “sex,” as understood in 1964 or as understood now, is not so obvious.

Almost across the board, the Supreme Court has applied a broad construction of the term “sex” and the remedial nature of the act. For instance, in *Phillips v. Martin Marietta Corp.*, the Court ruled that an employer’s policy against hiring women with pre-school aged children but permitting hiring men with pre-school aged children violated Title VII.⁹⁸

In *City of Los Angeles, Department of Water and Power v. Manhart*, the Court held that a policy requiring female employees to make larger contributions to the employer pension plan than was required by male employees violated Title VII.⁹⁹ In so holding, the Court emphasized that Title VII unambiguously “precludes treatment of individuals as simply components of a racial, religious, sexual, or national class.”¹⁰⁰

In 1983, the Court for the first time recognized that Title VII’s prohibition extended beyond protection of women to also prohibit discrimination against men. In *Newport News Shipbuilding and Dry Dock*

⁹⁴ *Id.*

⁹⁵ *Id.* at 2580.

⁹⁶ *Id.*

⁹⁷ See Brauer, *supra* note 79, at 53.

⁹⁸ *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971).

⁹⁹ 35 U.S. 702, 722–23 (1978).

¹⁰⁰ *Id.* at 708.

Co. v. EEOC, the Court considered an employer's plan to "provide its female employees with hospitalization benefits for pregnancy-related conditions to the same extent as for other medical conditions . . . [but] provide[d] less favorable pregnancy benefits for spouses of male employees."¹⁰¹ The Court held that the policy violated Title VII's prohibition against discrimination because of sex "because the protection[s] it afford[ed] to married male employees is less comprehensive than the protection it afford[ed] to married female employees."¹⁰²

In *Meritor Savings Bank, FSB v. Vinson*,¹⁰³ the Court recognized that unwelcome sexual advances in noneconomic injury—so-called "hostile work environment" harassment—violates Title VII's prohibition of employment discrimination because of sex so long as the harassment is "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"¹⁰⁴

Then in 1989, the Supreme Court of the United States decided the watershed case of *Price Waterhouse v. Hopkins*.¹⁰⁵ Ann Hopkins was a senior manager who had worked for Price Waterhouse—a nationwide professional accounting partnership—for five years when she was proposed for partnership in 1982.¹⁰⁶ Of the 88 persons proposed for partnership that year, Ms. Hopkins was the only woman.¹⁰⁷ The trial court noted "Hopkins had played a key role in Price Waterhouse's successful effort to win a multi-million dollar contract with the Department of State" and that "none of the other partnership candidates at Price Waterhouse that year had a comparable record in terms of successfully securing major contracts for the partnership."¹⁰⁸ Yet, the nomination was put on "hold" for reconsideration the following year.¹⁰⁹

The evidence presented at trial showed that "some of the partners reacted negatively to Hopkin's personality because she was a woman."¹¹⁰ Ms. Hopkins was described as "macho," and it was suggested that she was overcompensating for being a woman. Some partners advised Ms. Hopkins to take a course at charm school, and others objected to Ms. Hopkins' use of profanity—a regular occurrence by men in their offices—"because it's a lady

¹⁰¹ 462 U.S. 669, 670 (1983).

¹⁰² *Id.*

¹⁰³ *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986).

¹⁰⁴ *Id.* at 67 (alteration in original).

¹⁰⁵ *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

¹⁰⁶ *Hopkins*, 490 U.S. at 232–33.

¹⁰⁷ *Id.* at 233.

¹⁰⁸ *Id.* at 233–34.

¹⁰⁹ *Id.* at 233.

¹¹⁰ *Id.* at 235.

using foul language.” Ms. Hopkins was advised that, to have a better chance of becoming partner, she should “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.” Her nomination was continued to the next year, but the partners refused to re-nominate her.

Ms. Hopkins quit her job and filed suit, alleging that Price Waterhouse had engaged in impermissible gender discrimination. The lower courts held in her favor, and the case found itself before the Supreme Court of the United States. In delivering its opinion, the Supreme Court showed a broad understanding of sex-based discrimination. The Court construed Title VII “to mean that gender must be irrelevant to employment decisions.”¹¹¹ Notably, the Court announced a prohibition against gender stereotyping:

As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for “[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.” An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they do not. Title VII lifts women out of this bind.¹¹²

Alternatively stated, sex discrimination does not depend merely on an employer discriminating based on whether an employee is male or female. Discrimination also occurs where an employer discriminates on whether a male or female comports with gender stereotypes associated with being male or female.

Finally, in *Oncale v. Sundowner Offshore Services, Inc.*, the Court recognized a complaint of same-sex sexual harassment as cognizable under Title VII.¹¹³ Justice Scalia, delivering the opinion of the Court, acknowledged that while same-sex sexual harassment was not the principal evil motivating Title VII, “statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.”¹¹⁴

¹¹¹ *Id.* at 240.

¹¹² *Id.* at 251 (citing *Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978) (quoting *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971))).

¹¹³ *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75 (1998).

¹¹⁴ *Id.* at 79.

D. Litigating Sexual Orientation and Gender Identity Cases.

1. The Legal Landscape

In the wake of *Hopkins*, courts and litigants alike were left to divine the contours of sex-based stereotype discrimination. For those who identify as LGBT, the question was both contrived and high stakes—what’s the difference between sex-based stereotype discrimination and discrimination because of sexual orientation or gender identity or expression? The answer could be the difference between protection of the law and vulnerability.

The conventional wisdom was that potential plaintiffs should avoid any claim of discrimination on the basis of sexual orientation and instead focus on claims of *Hopkins*-like gender stereotyping discrimination.¹¹⁵ This litigation strategy resulted in mixed results across the federal courts. Interestingly, plaintiffs who raised claims of *Hopkins* sex-stereotype discrimination arising from transgender status tended to be more successful than plaintiffs raising sexual orientation discrimination claims.¹¹⁶ However, in time, the wind and legal analysis began to shift in a number of significant ways.

Most visibly, the Supreme Court issued three opinions that reflected an increasing attitude of acceptance and dignity toward and a recognition of constitutional protections for the LGBT community. In *Lawrence v. Texas*,¹¹⁷ the Court relied on the Due Process Clause of the Fourteenth Amendment to invalidate a Texas statute prohibiting consenting adults from engaging in same-sex sexual activity.¹¹⁸ Then, ten years later in *United States v. Windsor*,¹¹⁹ the Court found that the exclusion of benefits under the Defense of Marriage Act to those in same-sex marriages violated the Due Process clause of the Fifth Amendment and the Equal Protection clause of the Fourteenth Amendment.¹²⁰ Finally, in 2015, the Court ruled in *Obergefell v. Hodges*,¹²¹ that the right to marry is fundamental and, because of the Due

¹¹⁵ See, e.g., Kristin M. Bovalino, Note, *How the Effeminate Male Can Maximize His Odds of Winning Title VII Litigation*, 53 SYRACUSE L. REV. 1117, 1133–34 (2003).

¹¹⁶ Professor Brian Soucek commented that “[c]ompared to sexual orientation cases, gender identity cases have had far more success under stereotyping theories.” See Brian Soucek, *Perceived Homosexuals: Looking Gay Enough for Title VII*, 63 AM. U.L. REV. 715, 726 n.54 (2014).

¹¹⁷ *Lawrence v. Texas*, 539 U.S. 558 (2003).

¹¹⁸ *Id.* at 578.

¹¹⁹ *United States v. Windsor*, 570 U.S. 744 (2013).

¹²⁰ *Id.* at 774.

¹²¹ *Obergefell v. Hodges*, 576 U.S. 644 (2015).

Process and Equal Protection Clauses of the Fourteenth Amendment, cannot be denied to same-sex couples.¹²²

Next, federal agency treatment of claims of discrimination because of sexual orientation or gender identity or expression also changed. In 2012, the EEOC determined for the first time that “intentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination ‘based on . . . sex,’ and such discrimination therefore violates Title VII.”¹²³ Since *Macy*, the EEOC has routinely accepted claims against employees on the basis of gender identity.¹²⁴ More recently, the EEOC concluded that “[d]iscrimination on the basis of sexual orientation is premised on sex-based preferences, assumptions, expectations, stereotypes, or norms.”¹²⁵

Another turning point in the development of this area of law came from the Seventh Circuit, sitting en banc, in 2017.¹²⁶ A three-judge panel had, in 2016, reviewed a district court’s dismissal of a plaintiff’s claim that she had not been hired for a full-time position and then her part-time employment was not renewed because she was a lesbian.¹²⁷ The panel first recognized that Seventh Circuit precedent clearly established “that the Title VII prohibition on discrimination based on ‘sex’ extends only to discrimination based on a person’s gender, and not that aimed at a person’s sexual orientation.”¹²⁸ In the same breath, the panel recognized that recent developments in law invited questions as to whether the *Hamner* and *Spearman* precedents remained good law.¹²⁹ Acknowledging that it was bound by circuit precedent, it almost

¹²² *Id.* at 680–81.

¹²³ *Macy v. Holder*, No. 0120120821, 2012 WL 1435995 (E.E.O.C. Apr. 20, 2012).

¹²⁴ See, e.g., *Lusardi v. Dep’t of the Army*, No. 0120133395, 2015 WL 1607756 (E.E.O.C. Apr. 1, 2015) (holding that restrictions on transgender female’s ability to use a common female restroom facility constituted disparate treatment on the basis of sex and that the restroom restrictions combined with hostile remarks, including intentional pronoun misuse, created a hostile work environment on the basis of sex); *Complainant v. Dep’t of Veterans Affairs*, No. 0120133123, 2014 WL 1653484 (E.E.O.C. Apr. 16, 2014) (holding that a sex discrimination allegation involving the failure to revise agency records pursuant to changes in gender identity state a valid Title VII claim); *Jameson v. U.S. Postal Service*, No. 0120130992, 2013 WL 2368729 (E.E.O.C. May 21, 2013) (holding that intentional misuse of the employee’s new name and pronoun may cause harm to the employee and may constitute sex based discrimination and/or harassment).

¹²⁵ *Baldwin v. Foxx*, No. 0120133080, 2015 WL 4397641, at *5 (E.E.O.C. Jul. 16, 2015); see also Anthony Michael Kreis, *Dead Hand Vogue*, 54 U. RICH. L. REV. 705 (2020) (recognizing the role of the EEOC’s determinations in prompting the analytical shift of Title VII’s prohibitions against sexual orientation and gender identity discrimination).

¹²⁶ *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339 (7th Cir. 2017) (en banc).

¹²⁷ See *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 830 F.3d 698 (7th Cir. 2016).

¹²⁸ *Id.* at 700; see also *Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc.*, 224 F.3d 701 (7th Cir. 2000); *Spearman v. Ford Motor Co.*, 231 F.3d 1080 (7th Cir. 2000).

¹²⁹ See *Hively*, 830 F.3d at 702–04.

seemed to all but invite the employee to seek full court review.¹³⁰ Needless to say, the full court granted the employee's petition for rehearing en banc.¹³¹

Sitting en banc, the Seventh Circuit determined that "discrimination on the basis of sexual orientation is a form of sex discrimination."¹³² The court very clearly established that it was not considering whether Title VII should be amended, but rather, whether sexual orientation discrimination is a subset of discrimination because of sex, and thus prohibited by Title VII.¹³³ The court remarked: "It would require considerable calisthenics to remove the 'sex' from 'sexual orientation.'"¹³⁴ Notably, the court's analysis did not require that a plaintiff make a showing under *Hopkins* of sex-stereotype discrimination; rather, under *Hively*, sexual orientation discrimination *is* discrimination because of sex and falls within the conduct that Title VII, on its face, prohibits.¹³⁵

Courts, lawyers, and scholars alike took note of the Seventh Circuit's groundbreaking analysis.¹³⁶ For purposes of understanding the journey from *Hively* to *Bostock*, we should examine the specific law of the jurisdictions from which the trio of cases arose: the Second Circuit, the Sixth Circuit, and the Eleventh (and former Fifth) Circuit.

2. The Second Circuit.

The Second Circuit first explored the applicability of Title VII to discrimination because of sexual orientation in 2000.¹³⁷ The facts of *Simonton*—the abuse the plaintiff endured—were so appalling that the court refused to fully detail it.¹³⁸ The plaintiff was employed as a postal worker from 1984 until 1995.¹³⁹ In 1987, the plaintiff became the victim of ridicule, harassment, and disparate treatment because of his sexual orientation.¹⁴⁰ The

¹³⁰ See *id.* at 718.

¹³¹ See *Hively v. Ivy Tech Cmty. Coll.*, South Bend, No. 15-1720, 2016 WL 6768628, at *1 (7th Cir. Oct. 11, 2016).

¹³² *Hively*, 853 F.3d at 341.

¹³³ *Id.* at 343.

¹³⁴ *Id.* at 350.

¹³⁵ *Id.* at 350–51.

¹³⁶ See, e.g., *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018) (en banc); *Tumminello v. Father Ryan High School, Inc.*, 678 F. App'x 281 (6th Cir. 2017); Regina Lambert Hillman, *Title VII Discrimination Protections & LGBT Employees: The Need for Consistent, Certainty & Equality Post-Obergefell*, 6 BELMONT L. REV. 1, 32 (2019).

¹³⁷ *Simonton v. Ruyon*, 232 F.3d 33 (2d Cir. 2000).

¹³⁸ *Id.* at 35.

¹³⁹ See *Simonton v. Ruyon*, 50 F. Supp. 2d 159, 160 (E.D.N.Y. 1999).

¹⁴⁰ *Id.*

plaintiff was also physically assaulted in 1994 and 1995.¹⁴¹ This physical abuse and harassment caused the plaintiff to suffer a heart attack and experience mental distress.¹⁴² The plaintiff maintained that he was blamed for the abusive environment and was forced to resign from his job.¹⁴³ The district court found that while the abuse the plaintiff suffered was intolerable, Title VII provided no remedy for it.¹⁴⁴

On appeal, the Second Circuit ruled that claims for discrimination because of sexual orientation were not cognizable under Title VII.¹⁴⁵ The court noted, but did not decide, that the plaintiff may have been able to avail himself of a sex-stereotyping claim under *Hopkins* and that the claim would not act to “bootstrap” protection for all sexual orientation claims into Title VII.¹⁴⁶ The court reasoned: “[N]ot all homosexual men are stereotypically feminine, and not all heterosexual men are stereotypically masculine.”¹⁴⁷ This was little more than dicta because the court concluded that plaintiff had failed to plead sufficient facts to consider the issue.¹⁴⁸

Five years later, the Second Circuit again encountered this issue.¹⁴⁹ There, an assistant at a hair salon alleged that she had been fired for being a lesbian and for not conforming with gender stereotypes.¹⁵⁰ The court quickly rejected that it was well established that Title VII did not prohibit discrimination because of sexual orientation¹⁵¹ and skeptically cautioned: “When utilized by an avowedly homosexual plaintiff, however, gender stereotyping claims can easily present problems for an adjudicator. This is for the simple reason that ‘[s]tereotypical notions about how men and women should behave will often necessarily blur into ideas about heterosexuality and homosexuality.’”¹⁵² The court acknowledged the viability of a claim for sex-stereotyping discrimination under these circumstances and analyzed the plaintiff’s sex-stereotyping claims under *Hopkins*, but determined that the plaintiff had “produced no substantial evidence from which we may plausibly

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 163.

¹⁴⁵ *Simonton*, 232 F.3d at 36.

¹⁴⁶ *Id.* at 38.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ See generally *Dawson v. Bumble & Bumble*, 398 F.3d 211 (2d Cir. 2005).

¹⁵⁰ *Id.* at 213.

¹⁵¹ *Id.* at 217–18.

¹⁵² *Id.* at 218.

infer that her alleged failure to conform her appearance to feminine stereotypes resulted in her suffering any adverse employment action.”¹⁵³

Simonton and *Dawson* remained binding precedent in the Second Circuit for nearly thirteen years.¹⁵⁴ During this time, the Second Circuit decided *Christiansen v. Omnicom Group, Inc.*¹⁵⁵ and reiterated that while sexual orientation discrimination, standing alone, does not fall within the conduct prohibited by Title VII, employees who are gay, lesbian, and bisexual do not have any less protection under *Hopkins* than other employees.¹⁵⁶ Despite the plea of amici to reconsider *Simonton* and *Dawson*, the court denied it had the authority to do so.¹⁵⁷ Rather, the court emphasized “that *Simonton* and *Dawson* merely hold that being gay, lesbian, or bisexual, standing alone, does not constitute nonconformity with a gender stereotype that can give rise to a cognizable gender stereotyping claim.”¹⁵⁸

In 2017, a three-judge panel of the Second Circuit considered the case *Zarda v. Altitude Express*.¹⁵⁹ There, the plaintiff was fired for being gay.¹⁶⁰ The district court granted summary judgment to the employer on the plaintiff’s Title VII claims, having found both that Second Circuit precedent holds that Title VII did not protect against sexual orientation discrimination and that the plaintiff had failed to establish under *Hopkins* that his termination had any proximity to gender nonconformity.¹⁶¹ On appeal, the plaintiff argued that *Simonton* should be overturned, but the court refused to do so because of the panel rule.¹⁶² Thus, the court affirmed the district court’s grant of summary judgment.¹⁶³

¹⁵³ *Id.* at 222–23.

¹⁵⁴ *See, e.g.,* *Miller v. City of New York*, 177 F. App’x 195 (2d Cir. 2006); *Kiley v. Am. Soc’y for the Prevention of Cruelty to Animals*, 296 F. App’x 107 (2d Cir. 2008); *Rodas v. Town of Farmington*, 567 F. App’x 24 (2d Cir. 2014); *Giudice v. Red Robin Int’l, Inc.*, 555 F. App’x 67 (2d Cir. 2014).

¹⁵⁵ *Christiansen v. Omnicom Group, Inc.*, 852 F.3d 195 (2d Cir. 2017).

¹⁵⁶ *Id.* at 200–01.

¹⁵⁷ *Id.* at 199 (quoting *United States v. Wilkerson*, 361 F.3d 717, 732 (2d Cir. 2004) & *Shipping Corp. of India Ltd. v. Jaldhi Overseas Pte Ltd.*, 585 F.3d 58, 67 (2d Cir. 2009)). In an opinion concurring in judgment, however, Chief Judge Katz noted that “it would make sense for the Court to revisit the central legal issue presented in *Simonton* and *Dawson*, especially in light of the changing legal landscape that has taken shape in the nearly two decades since *Simonton* issued.” *Christiansen*, 852 F.3d at 202 (Katz, C.J., concurring). Notably, Judge Katz referenced “worthy approaches” to arguments that sexual orientation discrimination is discrimination because of sex that had not been considered by the *Simonton* or *Dawson* courts. *Id.* at 207.

¹⁵⁸ *Christiansen*, 852 F.3d at 201.

¹⁵⁹ *Zarda v. Altitude Express*, 855 F.3d 76 (2d Cir. 2017).

¹⁶⁰ *Id.* at 79.

¹⁶¹ *Id.* at 79–80, 81.

¹⁶² *Id.* at 82.

¹⁶³ *Id.* at 84.

On rehearing en banc, however, the Second Circuit overruled its prior decisions in *Simonton* and *Dawson* and held that Title VII prohibits discrimination on the basis of sexual orientation as discrimination “because of . . . sex.”¹⁶⁴ The court explained that “sexual orientation discrimination is motivated, at least in part, by sex and is thus a subset of sex discrimination.”¹⁶⁵ The court also concluded that sexual orientation discrimination represented the ultimate case of failure to conform with sex stereotypes, and thus, such discrimination sufficiently stated a claim under *Hopkins*.¹⁶⁶ Accordingly, the court overruled *Simonton* and *Dawson* and concluded that the plaintiff had stated a claim for sexual orientation discrimination that fell within the protections of Title VII.¹⁶⁷

The employer filed a petition for certiorari, which the Supreme Court granted.¹⁶⁸

3. The Sixth Circuit.

The Sixth Circuit first¹⁶⁹ examined discrimination against an employee on the basis of gender identity in the 2004 case of *Smith v. City of Salem*.¹⁷⁰ The plaintiff—a lieutenant in the Salem Fire Department—was born a male.¹⁷¹ After being diagnosed with Gender Identity Disorder, the plaintiff began expressing a more feminine appearance.¹⁷² After co-workers began questioning and criticizing the plaintiff’s appearance and behavior, the plaintiff disclosed his diagnosis to his supervisor and informed his supervisor that the medical treatment would eventually include a complete physical transformation from male to female.¹⁷³ The plaintiff’s supervisor then began consulting with city officials in an attempt to terminate the plaintiff’s

¹⁶⁴ Zarda v. Altitude Express, 883 F.3d 100, 108 (2d Cir. 2018) (en banc).

¹⁶⁵ *Id.* at 112.

¹⁶⁶ *Id.* at 120–21.

¹⁶⁷ *Id.* at 132.

¹⁶⁸ See Altitude Express, Inc. v. Zarda, 139 S. Ct. 1599 (2019).

¹⁶⁹ In 1992, the Sixth Circuit considered the case *Dillon v. Frank*, No. 90-2290, 1992 WL 5436, at *1 (6th Cir. Jan. 15, 1992), which concerned the workplace harassment of a postal worker perceived by his co-workers to be gay. The Court noted that, even though the plaintiff had not alleged legal protections for discrimination because of perceived sexuality, “Title VII does not proscribe discrimination based on sexual activities or orientation.” *Id.* at *4. Rather, the plaintiff alleged that he had been the victim of pervasive workplace sexual harassment. *Id.* at *5. The Court ultimately held that sexual harassment based on perceived sexual orientation was not prohibited under Title VII. See *id.* at *7.

¹⁷⁰ *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004).

¹⁷¹ *Id.* at 568.

¹⁷² *Id.*

¹⁷³ *Id.*

employment.¹⁷⁴ After the plaintiff received a “right to sue” letter from the EEOC, the fire department suspended him for one twenty-four-hour shift for an alleged violation of policy.¹⁷⁵ At a hearing before the civil service commission, the plaintiff was not permitted to call witnesses to testify, and the commission upheld the suspension.¹⁷⁶ The plaintiff filed suit in federal court.¹⁷⁷

The district court, relying only on pre-*Hopkins* opinions from other circuits,¹⁷⁸ ruled “Title VII does not prohibit discrimination based on an individual’s transsexualism”¹⁷⁹ and thus dismissed the plaintiff’s lawsuit.¹⁸⁰ On appeal, the Sixth Circuit held: “Having alleged that his failure to conform to sex stereotypes concerning how a man should look and behave was the driving force behind Defendants’ actions, Smith has sufficiently pleaded claims of sex stereotyping and gender discrimination.”¹⁸¹ Further, the Sixth Circuit noted that the district court erred by relying on pre-*Hopkins* cases¹⁸²—thus recognizing the *Hopkins* sex-stereotyping theory as the conclusive analysis to resolve claims of discrimination on the basis of gender identity.¹⁸³

Two years later, the Sixth Circuit rejected an argument that the *Hopkins* sex-stereotyping theory extended to protect a male employee who was being harassed for being perceived as gay.¹⁸⁴ In *Vickers*, the plaintiff worked as a private police officer at a medical center. After the plaintiff became friends with a doctor who was gay, the plaintiff’s co-workers began physically and verbally harassing the plaintiff. They barraged him with sexual slurs and derogatory remarks that suggested the plaintiff was gay and questioned his masculinity. After his supervisor instructed him to attend a disciplinary meeting, the plaintiff resigned from his position.

The *Vickers* court bluntly rejected the plaintiff’s allegations as an attempt to sue for sexual orientation discrimination rather than sex-

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 569.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ The district court had cited *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748 (8th Cir. 1982); and *Holloway v. Arthur Andersen*, 566 F.2d 659 (9th Cir. 1977). See *Smith v. City of Salem*, No. 4:02-CV-1405, 2003 WL 25720984, at *7 (N.D. Ohio Feb. 26, 2003).

¹⁷⁹ *Smith*, at *7.

¹⁸⁰ *Id.* at *16.

¹⁸¹ *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004).

¹⁸² *Id.*

¹⁸³ The Sixth Circuit reiterated the centrality of *Hopkins* in *Barnes v. City of Cincinnati*, 401 F.3d 729, 741 (6th Cir. 2005); *Myers v. Cuyahoga Cty.*, 182 F. App’x 510, 519 (6th Cir. 2006); and *Dodds v. U.S. Dept. of Educ.*, 845 F.3d 217, 221 (6th Cir. 2016).

¹⁸⁴ See *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 765 (6th Cir. 2006).

stereotyping discrimination: “[S]exual orientation is not a prohibited basis for discriminatory acts under Title VII.”¹⁸⁵ The Court lambasted the plaintiff’s claim, maintaining that to allow it would be a “de facto” amendment to Title VII to “encompass sexual orientation as a prohibited basis for discrimination.” Notably, while the dissenting judge maintained that the plaintiff had made out a claim for sex-stereotyping discrimination under *Hopkins*, he proffered: “It is beyond debate that Title VII does not prohibit workplace discrimination or harassment based on sexual preference, sexual orientation, or homosexuality.”¹⁸⁶

Despite the *Vickers* dissent’s labeling the issue as “beyond debate,” the Sixth Circuit soon thereafter noted that the question of whether Title VII prohibits discrimination based on sexual orientation was unresolved.¹⁸⁷ The court noted that neither the Supreme Court nor any federal circuit had ruled that such discrimination was prohibited but noted that the Seventh Circuit had recently granted a rehearing en banc to consider that exact issue. The court also noted that the EEOC had recently concluded that sexual orientation was a sex-based characteristic, and thus, fell within the protections of Title VII. Noting “practical problems with the current interpretation of Title VII and Title IX,” the court nevertheless concluded that the panel rule precluded a revisit to the issue in the Sixth Circuit.

Then, in 2018, the Circuit decided the case *EEOC v. R.G. & G.R. Harris Funeral Home, Inc.*¹⁸⁸ Aimee Stevens—assigned male at birth—began working at a funeral home presenting as a male and going by the name “Anthony” in 2007. In 2013, Stevens informed the funeral home that she intended to undergo sex reassignment surgery. As a prerequisite for the surgery, Stevens planned to fully live and present as a woman for one year—the timing of which would begin when she returned from vacation. Shortly before Stevens left for vacation, however, the funeral home informed her that “this is not going to work out” and offered her a severance package if she “agreed not to say anything or do anything.” The funeral home admitted that Stevens’ termination was because Stevens was no longer going to present as a man but instead desired to present as a woman.

The EEOC determined that there was reasonable cause to believe that the funeral home had discharged Stevens because of her sex and gender identity in violation of Title VII. After the EEOC and funeral home could not resolve the dispute through mediation, the EEOC commenced legal action. The district court ruled, on motion for summary judgment, that although an

¹⁸⁵ *Id.* at 764.

¹⁸⁶ *Id.* at 766 (Lawson, J., dissenting).

¹⁸⁷ *See* *Tumminello v. Father Ryan High Sch., Inc.*, 678 F. App’x 281, 285 n.1 (6th Cir. 2017).

¹⁸⁸ *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018).

individual's transgender status is not a protected class under Title VII, the EEOC had sufficiently pleaded a sex-stereotyping sex discrimination claim under Title VII as interpreted by *Hopkins* and *Smith*.¹⁸⁹

On appeal, the Sixth Circuit affirmed the district court's holding that the funeral home had unlawfully discriminated against Stevens for failure to conform with sex stereotypes. But the Court went further and also found that Title VII also prohibited discrimination because of an individual's transgender and transitioning status. The court—invoking the Seventh Circuit's rationale in *Hivley v. Ivy Tech Community College*—explained that “[f]irst, it is analytically impossible to fire an employee based on that employee's status as a transgender person without being motivated, at least in part, by the employee's sex.”¹⁹⁰ Next, the Court explained: “discrimination against transgender persons necessarily implicates Title VII's proscriptions against sex stereotyping”¹⁹¹—the *Hopkins* argument.

The Court admonished that, while subsequent courts had construed *Smith* for the proposition that that discrimination on the basis of transgender status is unlawful, *Smith* did not so expressly hold. Rather, the *R.G. & G.R. Harris Funeral Home* Court expressly held: “Title VII protects transgender persons because of their transgender or transitioning status, because transgender or transitioning status constitutes an inherently gender non-conforming trait.” The Court also noted that the question of whether Title VII protects against discrimination because of sexual orientation was a separate legal question and had been fully resolved by *Vickers*.

The funeral home filed a petition for certiorari, which the Supreme Court granted.¹⁹²

4. The Eleventh (and the Former Fifth) Circuit.

The Former¹⁹³ Fifth Circuit first¹⁹⁴ considered Title VII's applicability to sexual orientation discrimination in 1979—one of the very first cases to

¹⁸⁹ See *EEOC v. R.G. & G.R. Harris Funeral Home, Inc.*, 100 F. Supp. 3d 594, 603 (E.D. Mich. 2015).

¹⁹⁰ *R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d at 575.

¹⁹¹ *Id.* at 576.

¹⁹² See *R.G. & G.H. Harris Funeral Homes, Inc. v. EEOC*, 139 S. Ct. 1599 (2019).

¹⁹³ See *Bonner v. City of Pritchard, Ala.*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc) (“We hold that the decisions of the United States Court of Appeals for the Fifth Circuit (the ‘former Fifth’ or the ‘old Fifth’), as that court existed on September 30, 1981, handed down by the court prior to the close of business on that date, shall be binding as precedent in the Eleventh Circuit, for this court, the district courts, and the bankruptcy courts in the circuit.”).

¹⁹⁴ In 1978, the Fifth Circuit reviewed a district court's finding that a male plaintiff did not raise a claim under Title VII when he alleged—and the employer conceded—that he was not hired because he was perceived to be effeminate. See *Smith v. Liberty Mutual Ins. Co.*, 569 F.2d 325, 327 (5th Cir. 1978).

address the issue.¹⁹⁵ In *Blum*, the plaintiff alleged that he had been terminated for his religious and sexual “preferences.”¹⁹⁶ Engaging in little discussion, the Fifth Circuit applied its 1978 holding in *Smith* as holding that “discharge for homosexuality is not prohibited by Title VII”¹⁹⁷

The Eleventh Circuit then confronted the issue again in 2017.¹⁹⁸ A security officer at the hospital alleged that she had been discriminated against at work because of her sexual orientation and gender non-conformity.¹⁹⁹ After a magistrate court determined that “Title VII ‘was not intended to cover discrimination against homosexuals,’”²⁰⁰ the district court dismissed the plaintiff’s action.²⁰¹ On appeal, the Eleventh Circuit rejected both claims. The Court ruled that while a plaintiff may be able to prevail on a claim of sex-stereotyping discrimination under *Hopkins*, the plaintiff here had failed to plead facts sufficient to state a claim.²⁰² As it pertained to the plaintiff’s argument that she had been discriminated against because of her sexual orientation, the Court applied *Blum* as binding precedent and reiterated that “[d]ischarge for homosexuality is not prohibited by Title VII.”²⁰³

About a year later, the court considered the case *Bostock v. Clayton County Board of Commissioners*.²⁰⁴ A mere four-paragraph opinion, the court recounted that the plaintiff had alleged that the county had discriminated against him because of his sexual orientation and gender identity.²⁰⁵ The district court detailed that the plaintiff had been employed as a Child Welfare Services Coordinator for ten years and had earned numerous positive performance evaluations and accolades.²⁰⁶ Yet, when the plaintiff became involved in a gay recreational softball league and began promoting volunteer opportunities with the juvenile court to others who participated in the league,

This case did not expressly turn on the issue of sexual orientation discrimination and actually “forced” a label onto the plaintiff who had not claimed it. See Kreis, *supra* note 125, at 710.

¹⁹⁵ *Blum v. Gulf Oil Corp.*, 597 F.2d 936 (5th Cir. 1979).

¹⁹⁶ *Id.* at 937.

¹⁹⁷ *Id.* at 938 (citing *Smith*, 569 F.2d at 327).

¹⁹⁸ *Evans v. Ga. Reg’l Hosp.*, 850 F.3d 1248 (11th Cir. 2017).

¹⁹⁹ *Id.* at 1251.

²⁰⁰ *Id.* at 1252.

²⁰¹ *Id.* at 1253.

²⁰² *Id.* at 1254. The Eleventh Circuit had, in the context of an action under 42 U.S.C. § 1983, recognized that “all persons, whether transgender or not, are protected from discrimination on the basis of gender stereotype.” *Glenn v. Brumby*, 663 F.3d 1312, 1318 (11th Cir. 2011). The *Evans* court seems to have been implicitly acknowledging that *Glenn*, and thus by extension *Hopkins*, sets the analytical framework for sex-stereotyping claims under Title VII for the circuit. See *Evans*, 850 F.3d at 1254.

²⁰³ *Id.* at 1255 (quoting *Blum*, 597 F.2d at 938).

²⁰⁴ 723 F. App’x 964 (11th Cir. 2018).

²⁰⁵ *Id.* at 964.

²⁰⁶ *Bostock v. Clayton Cty.*, No. 1:16-CV-1460-ODE, 2017 WL 4456898, at *1 (N.D. Ga. July 21, 2017).

the plaintiff was subjected to criticism and disparaging comments about his sexual orientation. Shortly after, the plaintiff was terminated.²⁰⁷

The plaintiff ultimately filed suit in federal district court.²⁰⁸ The district court dismissed the plaintiff's complaint because the Eleventh Circuit had "foreclosed the possibility of a Title VII action alleging discrimination on the basis of sexual orientation as a form of sex discrimination protected by" Title VII and that the plaintiff had failed to plead any facts about sex-stereotype discrimination except that he had been discriminated against because of his sexual orientation.²⁰⁹

On appeal, the court affirmed based on the simple reasoning that binding precedent—*Blum* and *Evans*—had previously held that "[d]ischarge for homosexuality is not prohibited by Title VII."²¹⁰ The court then denied to rehear the case en banc, but Judge Rosenbaum penned a sharp dissent calling for an en banc hearing.²¹¹ The dissent maintained that this issue was socially significant and that the court had the obligation to consider the changes in law instead of continuing to "cling to a 39-year-old precedent" that had likely been abrogated by the Supreme Court's ruling in *Hopkins*.²¹² The dissenting judge also noted that both the Second and the Seventh Circuits²¹³ had recently overruled their pre-*Hopkins* cases that had reached the same outcome as *Blum*.

The employee filed a petition for certiorari, which the Supreme Court granted.²¹⁴

III. A TEXTUALIST SHIFT IN THE WIND ON THE ROAD TO BOSTOCK: A RETURN HOME?

The majority opinion in *Bostock* deserves close attention—both for its social significance and for its legal analysis.²¹⁵ In announcing the opinion of the Court, Justice Gorsuch noted that "[f]ew facts were needed to appreciate the legal question" presented.²¹⁶ Indeed, though the stories varied, the

²⁰⁷ *Id.*

²⁰⁸ *Id.* at *2.

²⁰⁹ *Id.* at *2–*3.

²¹⁰ *Bostock*, 723 F. App'x at 964.

²¹¹ See *Bostock v. Clayton Cty. Bd. of Comm'rs*, 894 F.3d 1335 (11th Cir. 2018).

²¹² *Id.* at 1337 (Rosenbaum, J., dissenting).

²¹³ See *Zarda v. Altitude Express*, 883 F.3d 100, 108 (2d Cir. 2018) (en banc); *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339 (7th Cir. 2017) (en banc).

²¹⁴ See *Bostock v. Clayton Cty.*, 139 S. Ct. 1599 (2019).

²¹⁵ The dissenting opinions are significant as well, but this article will only briefly summarize the substance of them. The dissents deserve close scrutiny, but that is beyond the scope of this article.

²¹⁶ *Bostock*, 140 S. Ct. at 1737 (alteration in original).

essential framework of each of the three cases giving rise to the question before the Court was fairly simple: “An employer fired a long-time employee shortly after the employee revealed that he or she [was] a homosexual or transgender—and allegedly for no reason other than the employee’s homosexuality or transgender status.”²¹⁷

Bostock thus purportedly presented a fairly straight forward question for the Court to resolve: does Title VII’s prohibition of discrimination “because of . . . sex” prohibit an employer from firing an employee “simply for being homosexual or transgender.” First, the Court announced a critical ruling:

[H]omosexuality 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.***²¹⁸

The Court also included language in the opinion limiting its analysis solely to the meaning of the term “sex” in Title VII and left for another day the meaning of the word “sex” in other statutory, or perhaps even constitutional, provisions.²¹⁹ Notably, Justice Alito, in dissent, offered a long list of other statutory provisions to which the majority’s interpretation of the meaning of “sex” could be imputed.²²⁰ Why would “sex” be unambiguous here but ambiguous in another context? Indeed, courts have already begun to apply *Bostock* outside the context of Title VII.²²¹

Next, the Court reiterated that congressional intent should be used as a tool of statutory interpretation when the language of the statute itself is ambiguous—not to create ambiguity.²²² It’s not the intent of the lawmakers or their forecast of outcomes that matter; their words do.²²³ “Only the written word is the law, and all persons are entitled to its benefit.”²²⁴

Finally, and perhaps most surprisingly, the Court did not resolve this case on the theory of sex-based stereotyping under *Hopkins*. Indeed, the majority’s only reference to *Hopkins* was in support of a fairly basic proposition of law. Many observers—myself included—envisioned an

²¹⁷ *Id.* (alteration in original).

²¹⁸ *Id.* at 1742 (emphasis added).

²¹⁹ *Id.* at 1753.

²²⁰ *See id.* at 1791 (Alito, J., dissenting).

²²¹ *See infra* Part VI, Section A.

²²² *See Bostock*, 140 S. Ct. at 1737.

²²³ *Id.*

²²⁴ *Id.*

outcome where the Court would extend *Hopkins* to interpret Title VII as offering a remedy for those employees discriminated against per se because of sexual orientation and gender identity.²²⁵ But such analysis was missing; indeed, the majority only relied on *Hopkins* once for a general principle of law.²²⁶ Instead, the Court suggested the answer was more obvious—more textual: “This elephant has never hidden in a mousehole; it has been standing before us all along.”²²⁷ In other words, gone is the need to show sex-stereotype discrimination. As such, the protection for employees is found in the language of the statute itself—in that “sex amendment” once added as a joke or afterthought. Rather, a plaintiff’s claim is no longer evaluated based on who the plaintiff isn’t, but rather, on who the plaintiff is.

IV. LOOKING AHEAD.

A. The Substantive Legacy of Bostock: More Protection for More People on More Fronts.

Bostock certainly represents a watershed moment in the movement for LGBT equality in American law. Indeed, several courts have already ruled that *Bostock* removes any doubt that claims of discrimination against individuals based on sexual orientation or gender identity are cognizable under Title VII.²²⁸ In addition, *Bostock* offers broader development of other legal doctrines.

First, and perhaps most significantly, courts have already begun to rely on *Bostock* to find greater protections—even constitutional protections under the Fourteenth Amendment—for the LGBT community. For example, the Eleventh Circuit decided in *Adams ex rel Kasper v. School Board of St. Johns County* that discrimination against individuals who identify as transgender violated the plaintiff’s Fourteenth Amendment equal protection rights. The court cited *Bostock* in reaching its decision that the school district’s policy prohibiting students who were transgender from using the restroom facility matching their gender identity discriminated against those students based on

²²⁵ See, e.g., Ilona M. Taylor, *Sex Stereotyping Per Se: Transgender Employees and Title VII*, 95 CAL. L. REV. 561, 566 (2007).

²²⁶ See *Bostock*, 140 S. Ct. at 1741 (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239 (1989)) (“Title VII’s message is ‘simple but momentous’: An individual employee’s sex is ‘not relevant to the selection, evaluation, or compensation of employees.’”).

²²⁷ *Bostock*, 140 S. Ct. at 1753.

²²⁸ See, e.g., *Hatcher v. Birmingham-Jefferson Cty. Transit Auth.*, 816 F. App’x 426 (11th Cir. 2020); *Gurkin v. CMH Physician Servs., L.L.C.*, No. 3:20CV59, 2020 WL 6829769, at *3 n.7 (E.D. Va. Nov. 20, 2020); *Doe v. DeJoy*, No. 5:19-CV-05885, 2020 WL 4382010, at *12 (E.D. Pa. July 31, 2020); *Lange v. Houston Cty.*, No. 5:19-CV-392, 2020 WL 6372702, at *9 (M.D. Ga. Oct. 30, 2020); *Sarco v. 5 Star Fin., LLC*, No. 5:19CV86, 2020 WL 5507534, at *4 (W.D. Va. Sept. 11, 2020).

sex; accordingly, the Fourteenth Amendment was implicated, and the school's policy was subject to heightened scrutiny.²²⁹

As another example, in *Grimm v. Gloucester County School Board*,²³⁰ the Fourth Circuit Court of Appeals concluded that a school district's policy requiring individuals to use the bathroom facility that aligned with their sex assigned at birth violated Title IX of the Civil Rights Act of 1964. The Fourth Circuit expressly noted that the *Bostock* ruling as it pertains to Title VII guided its evaluation of Title IX.²³¹ Relying on the simple notion that "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex," the Fourth Circuit concluded that the school district's policy both harmed the plaintiff and amounted to "a special kind of discrimination against a child that he will no doubt carry with him for life."²³² The Supreme Court denied certiorari.²³³

Despite the *Bostock* majority's attempt to use narrowing language to limit its holding,²³⁴ Justice Alito's prediction that the holding will have broader implications seems right. Only time—and more litigation—will tell.

B. The Right to Try.

The plight of employees in employment discrimination cases is well documented and does not need to be reiterated here.²³⁵ We should not skip a step in the analysis and presume that employment discrimination cases brought by plaintiffs alleging claims of discrimination because of sexual orientation or gender identity will be easy. Rather, the Court's ruling in *Bostock* removes a barrier that these parties previously faced—that is, whether the law even bothered to offer a potential remedy. Plaintiffs seeking relief under *Bostock* will still be subject to the high, and at times insurmountable, procedural, and evidentiary barriers all other employment discrimination plaintiffs face.

²²⁹ See also *Lange v. Hous. Cty.*, No. 5:19-CV-392, 2020 WL 6372702, at *10–11 (M.D. Ga. Oct. 30, 2020) (acknowledging that a plaintiff may assert a Fourteenth Amendment equal protection violation where a government employer policy excluded coverage of treatment for a medical condition unique to transgender persons).

²³⁰ 972 F.3d 586 (4th Cir. 2020), cert. denied, ___ S. Ct. ___, No. 20-1163, 2021 WL 2637992, at *1 (June 28, 2021).

²³¹ *Id.* at 616–17.

²³² *Id.* at 620.

²³³ *Gloucester Cty. School Bd. V. Grimm*, ___ S. Ct. ___, No. 20-1163, 2021 WL 2637992, at *1 (June 28, 2021).

²³⁴ See *supra* notes 218–221 and accompanying text.

²³⁵ See, e.g., Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HAR. J. L. & POL'Y REV. 104 (2009).

But that in itself is a win. No longer must plaintiffs be dismissed by judges who find harassment or abuse intolerable, but not illegal. No longer must plaintiffs pay for lawyers to argue over their basic right to dignity or to exist on their merits in the workplace. No longer is the dispute *whether* the law affords protections or remedies, but whether the merits of any given case entitle that plaintiff to relief.

C. The Power of Social Legitimacy.

“[L]aw matters for what it says in addition to what it does.”²³⁶ There is value in the label of a right, not just in the enjoyment of it.²³⁷ Discrimination against the LGBT community has become a part of the national discourse, and now, in a public and prominent forum, the highest Court of the land has announced that employment discrimination on these bases is prohibited. No matter whether this opinion results in more plaintiffs prevailing in lawsuits, it offers the LGBT community a clear victory in being seen and validated, and it sends a clear message: one’s sexual orientation or gender identity is irrelevant to employment decisions.

D. The Coming Storm: Tension with Religion.

The Court’s opinion in *Bostock* is certainly welcome and cause for celebration in the LGBT community. But it should be acknowledged that this opinion does not resolve all legal disparity for the community. Indeed, the Court cautioned, in strong language, the importance of the employer’s religious convictions.²³⁸ The Court recognized a potential First Amendment limit on Title VII’s protections.²³⁹

Recently, the Court issued its opinion in *Fulton v. City of Philadelphia*, in which the Court found that the City’s refusal to renew a contract with a religiously affiliated private foster care agency because the agency refused to certify unmarried couples of any sex and same-sex married couples as prospective foster families.²⁴⁰ The private foster care agency, Catholic Social Services, is a religious non-profit corporation that is incorporated under the law of the Commonwealth of Pennsylvania and that acts under the auspices

²³⁶ Marie-Amelie George, *Expressive Ends: Understanding Conversion Therapy Bans*, 68 ALA. L. REV. 793, 825 (2017) (alteration in original).

²³⁷ *Id.*

²³⁸ *Bostock*, 140 S. Ct. at 1753–54.

²³⁹ *Id.*

²⁴⁰ *Fulton v. City of Phila.*, __ S. Ct. __, No. 19-123, 2021 WL 2459253, at *1 (June 17, 2021).

of the Archdiocese of Philadelphia.²⁴¹ CSS's refusal to certify unmarried couples, the City claimed, ran afoul of a non-discrimination provision in the foster care contract.²⁴² Of significant note, the City's contract provided that a private foster care agency could seek an exception, which would be granted or denied "by the Commissioner of the Commissioner's designee, in *his/her sole discretion*."²⁴³

The majority recognized that the City had a "weighty" interest in preventing discrimination because "[o]ur society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth."²⁴⁴ But, the Court ultimately concluded that the policy's delegation of broad authority to the Commissioner, subject only to their own discretion, to grant an exception from the anti-discrimination policy rendered the policy "not generally applicable . . . because it 'invite[s] the government to decide which reasons for not complying with the policy are worthy of solicitude.'"²⁴⁵ Thus, according to the Court, the non-discrimination policy was not the rule of law that needed to be scrutinized; rather, the analysis centered on this "system of individual exceptions."²⁴⁶ Ultimately, the Court held that the City failed to show that granting an exception to the religiously affiliated agency would jeopardize its interest of "[m]aximizing the number of foster families and minimizing liability[.]"²⁴⁷

Without doubt, *Fulton* illustrated the strained relationship between the LGBT community and certain religious sects. Although certainly a frustrating moment for those who advocate for LGBT equality, *Fulton* may likely have little impact on anti-discrimination law. If anything, *Fulton* may prove more substantial in discussions about appropriate scrutiny to be applied in a free exercise analysis. In fact, *Fulton* may actually prove a useful roadmap for future litigants seeking equal protection for the LGBT community.

The Court's impact is likely limited to the factual particularities of the case and the arguments of counsel. Indeed, the plaintiffs' recitation of the facts were compelling and illustrate the importance of facts and narrative. *Fulton* involved claims of religious discrimination by foster parents who

²⁴¹ Complaint at 7, *Fulton v. City of Phila.*, 320 F. Supp. 3d 661 (E.D. Pa. 2018) (No. 2:18-cv-02075-PBT).

²⁴² *Fulton*, 2021 WL 2459253, at *4.

²⁴³ *Id.* at *5 (emphasis added).

²⁴⁴ *Id.* at *9 (alteration in original) (quoting *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1727 (2018)).

²⁴⁵ *Fulton*, 2021 WL 2459253, at *7.

²⁴⁶ *Id.* at *6.

²⁴⁷ *Id.* at *8 (alterations added).

risked losing support if the City's non-renewal of CSS's contract prevailed.²⁴⁸ Foster parent and plaintiff Sharonell Fulton, an African American who recounted her own experiences of racial discrimination, alleged that she cares for foster children with serious medical problems, that CSS provides better support for those children than would other agencies, and that the children would be immediately transferred away from her if CSS's contract was terminated.²⁴⁹ Similarly, former-foster parent and plaintiff Cecelia Paul—a career nurse who had cared for over 133 children over 46 years—was no longer caring for children after CSS's contract was terminated.²⁵⁰ Finally, foster parent and plaintiff Toni Lynn Simms-Busch—a trained social worker—alleged she worked with CSS because of its high-level of care, that she would not receive the same level of care and encouragement from other agencies, and that she would likely not be able to foster through other agencies.²⁵¹ CSS provided services for these and many other foster families through its contract with the City for over 50 years—the entire time consistent in its beliefs pertaining to unmarried couples and same-sex couples.²⁵²

On the other hand, the City received a complaint about CSS's refusal to certify same-sex couples in 2018.²⁵³ According to the Court, the City offered no proof that any same-sex couple had ever sought certification as a foster home through CSS.²⁵⁴ The city council called for an investigation and the Commissioner of the Department of Human Services met with the leaders of CSS.²⁵⁵ After that meeting, the City stated that it would no longer refer children to CSS and would not renew its contract with CSS.²⁵⁶

Thus, the Court encountered a case where it had to balance the rights of one side presented claims of religious discrimination and raised allegations of harm against the rights of the City that could present no instance of a married same-sex couple being denied the ability to become a foster family—or for that matter—even being denied certification through CSS.

This factual background ultimately lost the City the case. The Court summarized the City's argument for why it had a compelling purpose to terminate CSS's contract: "The City asserts that its non-discrimination

²⁴⁸ Complaint at 3–4, *Fulton v. City of Phila.*, 320 F. Supp. 3d 661 (E.D. Pa. 2018) (No. 2:18-cv-02075-PBT).

²⁴⁹ *Id.* at 5.

²⁵⁰ *Id.*

²⁵¹ *Id.* at 5–6.

²⁵² *Fulton*, 2021 WL 2459253, at *3.

²⁵³ *Id.* at *4.

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.*

policies serve three compelling interests: maximizing the number of foster parents, protecting the City from liability, and ensuring equal treatment of prospective foster parents and foster children.”²⁵⁷ But none of these claims survive scrutiny. Indeed, as established by the record, the City’s termination of CSS’s contract actually resulted in a *reduction* in the number of available foster homes.²⁵⁸ Next, the Court rejected the City’s argument that it may be sued as speculative.²⁵⁹ Finally, the City’s interest in equal protection was undermined by the lack of evidence that any same-sex couple had actually been rejected and the availability of discretionary exceptions.²⁶⁰ To the extent lawyers seek to traverse the tension between claims of discrimination against the LGBT community and religious freedom, they will be well advised to avoid speculation and provide concrete evidence of discrimination and the associated harms.

Next, *Fulton* addresses the exercise of governmental discretion rather than non-discrimination. Even this non-discrimination provision may have survived scrutiny if it did not leave the question of exemptions to the sole discretion of one government official.

Finally, it is worth noting that CSS was not a for-profit corporation or enterprise. Rather, CSS was incorporated under a legal scheme that expressly accounted for the incorporation of a business entity for religious purposes.²⁶¹ Thus, the precedential value of *Fulton* on for-profit enterprises remains subject to debate.

In sum, we will certainly see more litigation over the conflict between LGBT equality and religious freedom. *Fulton*’s value to that litigation remains untested, but may ultimately prove inconsequential.

V. CONCLUSION

Bostock will long be recognized as a watershed moment in the movement for LGBT equality under law. It both resolves and simplifies the law while drawing attention to what may be coming. For now, those members of the LGBT community can find some resolve in knowing they are on equal footing with other employees when it comes to discrimination because of sex. But the pursuit of progress and full equality and dignity under law must continue. Here, the Court has offered a tool in that mission.

²⁵⁷ *Id.* at *8.

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ See *supra* note 247 and accompanying text; 15 PA. CONS. STAT. § 5301(a) (2014).