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INTRODUCTION

In June of 2020, the Supreme Court issued the watershed opinion *Bostock v. Clayton County* which holds that, under Title VII of the Civil Rights Act of 1964, discrimination because of sexual orientation and gender identity is necessarily and undisguisably discrimination because of sex.[1] This Note argues that, while *Bostock*

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

is historic and a critical step for LGBTQ+ rights, the majority was incorrect in failing to incorporate the precedent of *Price Waterhouse* that held discrimination because of sex includes sex stereotyping.[2] This omission, along with the failure to consider sexualities besides gay and lesbian, or gender identities besides male and female, leaves the decision susceptible to being read narrowly by lower courts. If read narrowly, some courts may find that bisexual and nonbinary employees are not protected by Title VII's prohibition on sex discrimination. Furthermore, the Court leaves many questions unanswered, including the impact the case will have on other federal statutes that prohibit sex discrimination and how to properly balance the First Amendment rights to freedom of religion with the prohibition on sex discrimination.

After the Supreme Court legalized gay marriage in 2015 through the landmark case *Obergefell v. Hodges*, a paradox became apparent: "a gay person could be legally married in any of the fifty states on Saturday and fired from her job because of that marriage on Monday."[3] While *Bostock* resolved this paradox by prohibiting discrimination against gay, lesbian, and transgender ("trans") employees, the failure of the Court to properly incorporate a *Price Waterhouse* analysis leaves the holding susceptible to narrow interpretations that would harm LGBTQ+ employees.

The proper redress to entrench sex discrimination as including discrimination because of sexual orientation and gender identity is for Congress to pass the Equality Act. The Equality Act, as most recently presented to the Senate in February of 2021,[4] will amend the Civil Rights Act to include protections for LGBTQ+ individuals and will prohibit discrimination on the basis of sex in more areas of the law outside of employment. Passing the Equality Act will eliminate the possibility of circuit splits that would limit protections for bisexual and nonbinary individuals. It will also dictate the balancing test between sex discrimination and Religious Freedom Restoration Act (RFRA) claims.

2. Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, *as recognized in* Landgraf v. USI Film Prods., 511 U.S. 244 (1994).

3. Ann C. McGinley, Nicole Buonocore Porter, Danielle Weatherby, Ryan H. Nelson, Pamela Wilkins & Catherine Jean Archibald, *Feminist Perspectives on* Bostock v. Clayton County, 53 CONN. L. REV. 1, 6 (2020).

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

Outside of employment discrimination claims, the present patchwork across states—of nondiscrimination laws in some states and explicitly anti-trans and anti-gay legislation in others—leaves "millions of people subject to uncertainty and potential discrimination that impacts their safety, their families, and their day-to-day lives."[5] The Equality Act will provide for a unified system of protection for LGBTQ+ individuals that is not limited to employment or geographic location.

I. THE COURT'S REASONING IN *BOSTOCK*

Bostock, decided in June of 2020, is a watershed Supreme Court case that extends the prohibition of discrimination because of sex in Title VII of the Civil Rights Act to include discrimination because of sexual orientation and gender identity.[6] The majority opinion, authored by Justice Neil Gorsuch, held 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."[7] When an individual is fired because of their sexuality or gender identity, "[s]ex plays a necessary and undisguisable role in the [firing] decision, exactly what Title VII forbids."[8] The opinion, while relying on a plain language reading of Title VII, examines the statutory history of Title VII and considers the Court's past willingness to broadly interpret "sex discrimination."

A. The History of the Civil Rights Act

Understanding the history of the inclusion of discrimination because of sex as a prohibited ground under Title VII of the Civil Rights Act is critical to understanding the bedrock foundation motivating the Court's holding.

The prohibition of discrimination based on sex was famously introduced by an amendment offered by Representative Howard Smith who opposed the Civil Rights Act.[9] The language was added to the text of the Act "only two days before the bill's passage in the

5. *The Equality Act*, HUM. RTS. CAMPAIGN (Oct. 8, 2021), https://www.hrc.org/resources/equality.

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

7. *Id.*

8. *Id.*

9. 110 CONG. REC. H2577 (daily ed. Feb. 8, 1964).

House, without prior hearing or debate . . . ."[10] However, the "little legislative history that exist[s]" indicates Congress intended for the provision to protect only women.[11]

Representative Smith, who introduced the amendment to include sex, "professed to be serious about the matter, claiming that women have just as much right to be free from discrimination as any other minority group."[12] The floor debates over the amendment were not particularly robust or earnest. Most representatives found it "difficult" to speak against the amendment "without appearing to favor discrimination against women, a position politically dangerous and hard to defend logically."[13] The main thrust of the opposition to the amendment, led by Representative Emanuel Celler, relied on the idea that discrimination based on sex "involves problems sufficiently different from discrimination based on the other factors listed to make separate treatment preferable" and it would ultimately "not be to the best advantage of women" at the time.[14] Representatives who spoke in favor of the amendment spoke "largely on emotional reactions" with comments that "at times bordered on irrelevancy."[15] Representative Martha Griffiths from Michigan defended the amendment by stating "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."[16] Representative Katharine St. George of New York argued "the addition of that terrifying little

10. Eric S. Dreiband & Brett Swearingen, *The Evolution of Title VII – Sexual Orientation, Gender Identity, and the Civil Rights Act of 1964*, JONES DAY 1, 2 (2015). Many historians, and the general public, believe Representative Smith introduced the sex amendment as a poison pill, believing that its inclusion would create enough opposition, particularly from labor unions, for the Civil Rights Act to not pass. While Representative Smith claimed interest in the amendment was genuine, he was already known as a staunch opposer of the Act. This likely, at least in part, influenced the lack of robust debate on the amendment in the House of Representatives. *See* NPR Staff, *How a Poison Pill Worded as 'Sex' Gave Birth to Transgender Rights*, NPR: KIOS (May 15, 2016, 7:36 AM), https://www.npr.org/2016/05/15/478075804/how-a-poison-pill-worded-as-sex-gave-birth-to-transgender-rights.

11. Dreiband & Swearingen, *supra* note 10, at 3.

12. Robert Stevens Miller Jr., *Sex Discrimination and Title VII of the Civil Rights Act of 1964*, 51 MINN. L. REV. 877, 880–81 (1966).

13. *Id.* at 881.

14. *Id.*

15. *Id.*

16. *Id.* at 881 n.27.

word 's-e-x' will not hurt this legislation in any way. In fact, it will improve it. It will make it comprehensive."[17]

Amidst these arguments on the inclusion of the amendment in the House, there was virtually no discussion on the congressional intent "as to interpretation of the amendment."[18] After the House voted to include the amendment, "the word 'sex' was inserted in each place where the words 'race, color, religion, or national origin' appeared."[19] Two days later, the Civil Rights Act passed from the House to the Senate. While the Civil Rights Act was heavily debated in the Senate, sex discrimination was "never seriously considered."[20] There was no challenge to the inclusion of sex discrimination, meaning there is no productive interpretive guidance to be drawn from the Senate debates.[21]

When reflecting on the inclusion of sex discrimination shortly after the Act passed, it was "viewed more as an accidental result of political maneuvering than as a clear expression of congressional intent to bring equal job opportunities to women."[22] Much of the public sentiment toward the inclusion of sex discrimination was indifferent. One newspaper wrote, "[w]hy should a mischievous joke perpetrated on the floor of the House of Representatives be treated by a responsible administrative body with this kind of seriousness?"[23] People considered the inclusion of sex in the Civil

17. *Id.*

18. *Id.* at 882.

19. *Id.*

20. *Id.*

21. *Id.* at 883. One of the primary thrusts of Justice Alito's dissent in *Bostock* is that "the concept of discrimination because of 'sex' is different from discrimination because of 'sexual orientation' or 'gender identity.'" Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1755 (2020) (Alito, J., dissenting). He posits that "if every single living American had been surveyed in 1964, it would have been hard to find any who thought that discrimination because of sex meant discrimination because of sexual orientation." *Id.* However, the history of the inclusion of sex discrimination demonstrates that the majority of Americans in 1964 likely did not believe Title VII was intended to protect men or have the broader, more nuanced definition it does today. The interpretation of sex discrimination has been beyond the scope intended by the legislature when enacting the Civil Rights Act for a long time now. While Justice Alito posits that, because Title VII has yet to be amended by any proposed legislation such as the Equality Act, "discrimination because of 'sex' still means what it has always meant." *Bostock*, 140 S. Ct. at 1755. However, the lack of legislative history, along with Supreme Court Jurisprudence and EEOC guidelines clearly indicate that there is no definition of "sex" that has remained constant for the last 50 years.

22. Miller, *supra* note 12, at 884.

23. *Id.*

Rights Act a "joke" or "fluke, born of segregationist antipathy to African American civil rights" for decades following the passage of the Act.[24] However, as time went on, the involvement of the National Woman's Party and female members of Congress in "pushing for an amendment banning sex discrimination" began to be revealed.[25]Although current records note the work of Representative Griffiths, National Woman's Party Leaders, and other activists in working for the inclusion of sex discrimination, the congressional record still remains largely silent as to the intent of the legislature.[26]

Shortly after the Civil Rights Act passed, a legal scholar argued "[a] desirable interpretation of Title VII should be consistent with . . . national policy" in light of the lack of legislative history to provide illumination on interpretation.[27] The scholar noted how "[t]he differences in the scope of permissible legal discrimination on the basis of sex and the other factors of Title VII reflect the attitudes of the public. Women are biologically different from men and have traditionally assumed a different role in our society."[28] The history of the Civil Rights Act and the inclusion of "sex" in Title VII, as well as the public and scholarly opinions on its inclusion would go on to influence the way sex discrimination was interpreted.

B. Use of Sex Discrimination Jurisprudence

In the decades following the passage of the Civil Rights Act, the Supreme Court and United States Equal Employment Opportunity Commission ("EEOC") worked to reconcile the lack of productive legislative history and stigma surrounding sex discrimination as a joke as they went on to clarify and interpret the meaning of sex discrimination. The majority's interpretation of sex discrimination in *Bostock* descends from the logic used in previous Supreme Court cases that first defined sex discrimination.

The *Bostock* Court primarily relies on the precedents of three previous Supreme Court cases to support its definition of sex

24. Serena Mayeri, *Intersectionality and Title VII: A Brief (Pre-)History*, 95 B.U. L. REV. 713, 716 (2015).

25. *Id.*

26. *Id.* at 717.

27. Miller, *supra* note 12, at 885.

28. *Id.* at 889.

discrimination: *Phillips v. Martin Marietta Corp.*,[29] *City of Los Angeles Department of Water & Power v. Manhart*,[30] and *Oncale v. Sundowner Offshore Services, Inc.*[31] Using these cases, the Court reconciles its holding in *Bostock* with its jurisprudence to show why sex discrimination includes discrimination because of sexual orientation and gender identity. In previous cases interpreting sex discrimination, the Court established "a classification-based, not a class-based, approach, which focuses on fairness to individuals rather than disparate treatment of classes."[32] These cases are used by the Court to demonstrate that discrimination because of sex includes the "entire spectrum" of sex-based discrimination, encompassing all forms of sex discrimination regardless of whether Congress contemplated that exact form when passing the Civil Rights Act in 1964.[33]

Phillips was among the first cases to reach the Supreme Court dealing with sex discrimination under Title VII. Phillips, a mother with preschool-age children, was informed by a corporation where she was attempting to apply for a job that the corporation was not accepting job applications from women with preschool-age children, even though it employed men with preschool-age children.[34] The Court interpreted Title VII to require that "persons of like qualifications be given employment opportunities irrespective of their sex."[35] Because Title VII prohibits companies from having one hiring policy for women and another for men, the corporation was not permitted to have different hiring policies for men and women where both had preschool-age children.[36]

Justice Thurgood Marshall's concurrence asserts that Congress, in passing the Civil Rights Act, was prohibiting businesses from relying on "ancient canards about the proper role of women to be a basis for discrimination."[37] This indication that sex stereotypes acted as part of the rationale in the corporation's improper hiring

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

30. City of L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978).

31. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998).

32. Katherine Carter, *Questioning the Definition of "Sex" in Title VII:* Bostock v. Clayton County, GA, 15 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 59, 67 (2020).

33. *Id.* at 73–74 (internal quotation omitted).

34. *Phillips*, 400 U.S. at 543.

35. *Id.* at 544.

36. *Id.*

37. *Id.* at 545 (Marshall, J., concurring).

policy would later be explored and deemed discriminatory in later cases.[38] Justice Marshall also considered the bona fide occupational qualifications exception and warned the exception was not "intended to swallow the rule."[39]

The Court held in *Manhart* that employment decisions "cannot be predicated on mere 'stereotyped' impressions about the characteristics of males or females."[40] Title VII "makes it unlawful 'to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin.'"[41] The inquiry is about individuals, not groups.[42] "It precludes treatment of individuals as simply components" of a sex classification.[43] Even "true generalization[s] about the class" are insufficient reasons for "disqualifying an individual."[44] When Congress enacted Title VII, it "intended to strike at the entire spectrum of disparate treatment" resulting from sex stereotypes.[45]

Oncale further clarified what claims are actionable under Title VII. A male oil rig worker filed a Title VII claim on the grounds that sexual harassment directed at him by male co-workers constituted discrimination because of sex.[46] The Court, in an opinion authored by Justice Antonin Scalia, held that Title VII claims are not barred because the plaintiff and defendant are of the same sex.[47] However, the Court emphasized that Title VII is a narrow statute that only prohibits discrimination because of sex; it is limited to situations when "members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."[48]

38. *See* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, *as recognized in* Landgraf v. USI Film Prods., 511 U.S. 244 (1994).

39. *Phillips*, 400 U.S. at 545 (Marshall, J., concurring).

40. City of L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 (1978) (citing Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1198 (7th Cir. 1971)).

41. *Id.* at 708 (quoting 42 U.S.C. § 2000e–2(a)(1)) (emphasis omitted).

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at 707 n.13 (citing *Sprogis*, 444 F.2d at 1198).

46. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 77 (1998).

47. *Id.* at 79.

48. *Id.* at 80 (citing Harris v. Forklift Sys., Inc., 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)).

A closer inspection of the key facts in *Oncale* indicates some of the rationale possibly motivating the Court's decision. The employee was "forcibly subjected to sex-related, humiliating actions" by other members of the crew, was "physically assaulted," and was threatened with rape.[49] Justice Scalia, delivering the unanimous opinion of the Court, observed while "male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII," the statute goes "beyond the principal evil" and it is "the provisions of our laws rather than the principal concerns of our legislators by which we are governed."[50] Here, the Court explicitly recognizes that the interpretation of sex discrimination has changed over time, not in the text of the statute but in the evolving nature of values that are protected within the scope of sex discrimination.[51] The text of Title VII has never read "because of being a woman," even if that is what was generally understood in 1964; the text of Title VII has always stated "because of sex." Discrimination on the basis of sex includes discrimination by a man against another man.

In *Bostock*, the focus of Title VII on individuals was critical to the decision, as it was in *Manhart*.[52] The Court highlighted that Title VII explicitly states employers may not discriminate against individuals because of the individual's sex.[53] Relying on this authority, it held "an employer who intentionally fires an individual homosexual or transgender employee in part because of that individual's sex violates the law even if the employer is willing

49. *Id.* at 77.

50. *Id.* at 79.

51. In his dissent in *Bostock*, Justice Alito argues that "discrimination because of sex means discrimination because the person in question is biologically male or female," not because of sexual orientation or because an individual "identifies as a member of a particular gender." Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1757 (2020) (Alito, J., dissenting). However, as can be seen here, the Court has found on numerous occasions that Title VII is not limited to such narrow grounds. Justice Alito appears to impermissibly read in the word "biological" in front of "sex." He relies on previous Court of Appeals jurisprudence to assert that "until 2017, every single Court of Appeals" interpreted Title VII sex discrimination "to mean discrimination on the basis of biological sex." *Id.* This ignores the guidance and rulings of the EEOC as he appears to argue that the word "biological" should be read into the Act when there is no history to indicate that was the intent of the legislature. *Id.*

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

53. *Id.*

to subject all male and all female homosexual or transgender employees to the same rule."[54]

The Court reconciles *Bostock* with *Oncale* and *Phillips* while also using these cases to counter the nonexistent "canon of donut holes."[55] Even though sexual orientation and gender identity are not explicitly stated as protected grounds in Title VII, the failure of Congress to speak directly to these grounds does not exclude them from protection under Title VII sex discrimination.[56] Justice Gorsuch states there is no "such thing as a canon of donut holes, in which Congress's failure to speak directly to a specific case that falls within a more general statutory rule creates a tacit exception."[57] Even though "sexual harassment" is not included in the list of protected grounds in Title VII and is "conceptually distinct from sex discrimination," the Court found it to be included in sex discrimination in *Oncale*.[58] Likewise in *Phillips*, even though "motherhood discrimination" is not explicitly listed in Title VII and may not be the principle evil Title VII aimed to cure, it is nonetheless included in the reach of sex discrimination.[59] "Title VII prohibits all forms of discrimination because of sex, however they may manifest themselves or whatever other labels might attach to them."[60]

C. The Logic of Bostock

To illustrate how sex discrimination necessarily includes discrimination because of sexual orientation and gender identity[61] the Court presents a number of hypotheticals. If an employer has two employees, "both of whom are attracted to men," the two individuals are "materially identical in all respects, except that one is a man and the other is a woman."[62] "If the employer fires the male

54. *Id.* at 1744.

55. *Id.* at 1747.

56. *Id.*

57. *Id.*

58. *Id.*; *Oncale*, 523 U.S. at 79–80.

59. *Bostock,* 140 S. Ct. at 1747; *Phillips*, 400 U.S. at 544.

60. *Bostock,* 140 S. Ct. at 1747.

61. Discrimination because of sexual orientation and gender identity is necessarily included in sex discrimination because it is "impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex." *Id.* at 1741.

62. *Id.*

employee for no reason other than the fact he is attracted to men," the employer has discriminated against the male employee for "traits or actions it tolerates in his female colleague."[63] This necessarily means the employer has discriminated because of sex.[64]

To illustrate how sex discrimination necessarily includes discrimination because of gender identity, Justice Gorsuch presents another example.[65] If an employer fires a trans individual who "was identified as a male at birth but who now identifies as a female," and "the employer retains an otherwise identical employee who was identified as female at birth," the employer is intentionally discriminating against the individual identified as male at birth for "traits or actions that it tolerates in an employee identified as female at birth."[66] Again, the sex of the employee is playing an "unmistakable and impermissible role" in the firing decision.[67]

II. THE COURT REACHED THE RIGHT DECISION BUT FAILED TO INCORPORATE THE PROPER ANALYSIS IN *BOSTOCK*

Despite establishing a legal basis for *Bostock*'s holding rooted in previous Supreme Court cases, the Court failed to utilize the precedent set by *Price Waterhouse v. Hopkins*.[68] This omission, along with the failure to discuss any sexual orientations besides gay and lesbian, or gender identities besides cisgender and transgender, and the failure to consider the implications of the decision on other statutes and areas of law, leaves *Bostock* susceptible to being read narrowly, causing additional harm to LGBTQ+ individuals.

A. The Absence of Price Waterhouse

One of the most important cases to deal with sex discrimination is *Price Waterhouse*, where the Court held discrimination against employees "because of sex" on a theory of "sex stereotyping" is legally relevant under Title VII.[69] The Court found "Congress'

63. *Id.*

64. *See id.*

65. *Id.*

66. *Id.*

67. *Id.* at 1741–42.

68. *See* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, *as recognized in* Landgraf v. USI Film Prods., 511 U.S. 244 (1994).

69. *Id.*

intent to forbid employers to take gender into account in making employment decisions appears on the face of the statute," which means that "gender must be irrelevant to employment decisions."[70] Ultimately, the Court held "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."[71]

The facts in *Price Waterhouse* demonstrate the extent to which the stereotyping faced by Ann Hopkins, a female employee at an accounting firm whose candidacy for partnership was denied, amounted to sex discrimination. Partners at her firm described her as "macho," advised her to "take a course at charm school," and directly told her she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry" to increase her chances of partnership.[72] The Court found that such treatment violated Title VII's prohibition of sex discrimination and that employers cannot evaluate employees by "assuming or insisting" that they match the "stereotype associated with their group."[73]

Price Waterhouse clarified that the term "sex" in Title VII encompasses both biological sex and gender. When gender plays a role in an employer's decision to take an "adverse employment action," they have committed sex discrimination.[74]

In the years following *Price Waterhouse*, the EEOC utilized the holding of *Price Waterhouse* to expand sex discrimination to include discrimination because of sexual orientation and gender identity before *Bostock* ever reached the Supreme Court.

The EEOC was established by Title VII and is tasked with the enforcement of Title VII and other federal workplace anti-discrimination statutes, including the Equal Pay Act, the Age Discrimination in Employment Act, Title I of the Americans with Disabilities Act, and more.[75] From the beginning, the EEOC has had

70. *Id*. at 239–40.

71. *Id*. at 250.

72. *Id*. at 235.

73. *Id*. at 251.

74. *See id*. at 262 (O'Connor, J., concurring).

75. Tessa M. Register, *The Case for Deferring to the EEOC's Interpretations in* Macy *and* Foxx *to Classify LGBT Discrimination as Sex Discrimination Under Title VII*, 102 IOWA L. REV. 1397, 1402 (2017) (citing *Laws Enforced by EEOC,* U.S. EQUAL EMP. OPPORTUNITY COMM'N, http://www.eeoc.gov/laws/statutes/index.cfm (last visited Oct. 11, 2021)).

jurisdiction to define the meaning of sex discrimination.[76] Due to the lack of legislative history and public sentiment that the inclusion of sex discrimination was a "joke," early EEOC interpretations "explicitly prioritized race discrimination and denigrated the sex amendment's importance."[77] However, that is not to say early interpretations did not deal with sex discrimination to some degree.

The 1965 Guidelines on Discrimination Because of Sex published by the EEOC demonstrate the narrow interpretation that was first used for sex discrimination. When considering what constitutes a bona fide occupational qualification, the EEOC gave a singular, narrow affirmative admission of an exception, stating "[w]here it is necessary for the purpose of authenticity or genuineness, the Commission will consider sex to be a bona fide occupational qualification, e.g., an actor or actress."[78]

As time went on and sex discrimination claims started gaining more legitimacy, the EEOC interpreted Title VII to prevent employers from refusing to "hire an individual based on stereotyped characterizations of the sexes."[79] The bona fide occupational qualification exception was clarified to be applicable only to "job situations that require specific physical characteristics necessarily possessed by only one sex."[80]

As the interpretation of sex discrimination evolved with public sentiment and Supreme Court jurisprudence, the question of whether sexual orientation and gender identity are included in sex discrimination reached the EEOC.

Beginning in 2012, the EEOC ruled "discrimination based on gender identity, change of sex, and/or transgender status" is discrimination because of sex under Title VII.[81] Not only did the EEOC rely on the sex stereotyping theory of *Price Waterhouse* to reach the conclusion, but the Commission "utilized a new theory"

76. *What Laws Does EEOC Enforce?*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/youth/what-laws-does-eeoc-enforce (last visited Oct. 6, 2021).

77. Mayeri, *supra* note 24, at 716.

78. Miller, *supra* note 12, at 892.

79. Phillips v. Martin Marietta Corp., 400 U.S. 542, 545 (1971) (Marshall J., concurring) (quoting U.S. Equal Emp. Opportunity Comm'n, Guidelines on Discrimination Because of Sex, 29 C.F.R § 1604.1(a)(1)(ii)).

80. *Id.* at 545–46 (citing U.S. Equal Emp. Opportunity Comm'n, Guidelines on Discrimination Because of Sex, 29 CFR § 1604.2).

81. Macy v. Holder, No. 0120120821, 2012 WL 1435995, at *1 (E.E.O.C. Apr. 20, 2012).

developed from the Supreme Court's stereotyping analysis, asserting that "Title VII prohibits employers from taking gender into account in making employment decisions."[82]

Under *Macy v. Holder*, employers who made adverse employment decisions against trans individuals have discriminated because of sex "because the individual has expressed [their] gender in a non-stereotypical fashion, because the employer is uncomfortable with the fact that the person has transitioned," or "because the employer simply does not like that the person is identifying as a transgender person."[83] Accordingly, the EEOC found "intentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination based on . . . sex" and violates Title VII.[84]

Following *Macy*, the EEOC interpreted Title VII sex discrimination to also include sexual orientation in the 2015 decision *Baldwin v. Foxx*.[85] The EEOC ruled that the proper inquiry is "whether the agency has 'relied on sex-based considerations' or 'take[n] gender into account' . . . rather than whether the statute includes the phrase 'sexual orientation.'"[86] The EEOC reasoned that sexual orientation is inherently linked to sex in three ways. First, sexual orientation discrimination "necessarily entails treating an employee less favorably because of the employee's sex."[87] Second, the EEOC found sexual orientation discrimination is a form of "associational discrimination," where employers are prohibited from "taking adverse employment actions against an individual on the basis of a relationship with a member of the same sex."[88] Third, the EEOC used a *Price Waterhouse* rationale to explain discrimination because of sexual orientation "inherently consists of discrimination on the basis of gender stereotypes."[89]

82. Dreiband & Swearingen, *supra* note 10, at 9 (citing Price Waterhouse v. Hopkins, 490 U.S. 228, 244 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, *as recognized in* Landgraf v. USI Film Prods., 511 U.S. 244 (1994)).

83. *Macy*, 2012 WL 1435995, at *5.

84. *Id.* at *8 (alteration in original) (internal quotation marks omitted).

85. Register, *supra* note 75, at 1399.

86. *Id.* at 1416 (quoting Baldwin v. Foxx, Appeal No. 0120133080, 2015 WL 4397641, at *4–5 (E.E.O.C. July 15, 2015)).

87. *Id.* (quoting *Baldwin*, 2015 WL 4397641 at *5).

88. *Id.* at 1416–17 (citing *Baldwin*, 2015 WL 4397641 at *7).

89. *Id.* at 1417 (citing *Baldwin*, 2015 WL 4397641 at *7).

Like the EEOC, lower courts have utilized *Price Waterhouse* to incorporate discrimination because of sexual orientation and gender identity into sex discrimination. The sex-stereotyping theory of *Price Waterhouse* was extended by some circuit courts to cover trans plaintiffs before the Supreme Court took up the issue. The Sixth Circuit was the first court to do so in *Smith v. City of Salem*, holding *Price Waterhouse* does not "provide any reason to exclude Title VII coverage for non sex-stereotypical behavior simply because the person is a transsexual."[90] The Second Circuit also applied similar reasoning prior to *Bostock* in *Zarda v. Altitude Express, Inc*., finding that when an employer acts on the belief that a male or female employee should not be attracted to another male or female employee, respectively, the employer has discriminated on the basis of gender.[91]

By omitting any application of *Price Waterhouse* in *Bostock*, the Court failed to incorporate one of the critical factors that led the EEOC and lower courts to reach the conclusion that sex discrimination includes sexual orientation and gender identity: *Price Waterhouse* is about perceived sex.[92] Because sex and gender are intimately linked, a person's perceived sex dictates which gender norms they are held to.[93] Ann Hopkins both held herself out as a woman, likely marking "female" on her job application or indicating "female" on identifying work documents, and was perceived to be female by her employer.[94] Because she was understood by her employer to be female, she was expected to behave femininely too.[95]

Even though the majority opinion did not rely on *Price Waterhouse*, Justice Alito addresses this argument in his dissent.[96] Counsel for *Bostock* argued, resting on the authority of *Price Waterhouse*, that Title VII prohibits discrimination based on stereotypes "about the way men and women should behave."[97] When an employer discriminates because of sexual orientation or

90. Smith v. City of Salem, 378 F.3d 566, 575 (6th Cir. 2004).
91. *See* Zarda v. Altitude Express, Inc., 883 F.3d 100, 120–21 (2d Cir. 2018).
92. Rachel Slepoi, *Bostock's Inclusive Queer Frame*, 107 VA. L. REV. 67, 72 (2021).
93. *Id.*
94. *Id.*
95. *Id.*
96. *See* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1763–64 (2020) (Alito J., dissenting).
97. *Id.* at 1763.

gender identity, they are relying on the stereotype that individuals should only be attracted to persons of the opposite sex and the belief that a person should identify with their sex at birth.[98] Justice Alito believes the argument fails because Title VII "prohibits discrimination because of 'sex'" which is a distinct concept from sex stereotypes.[99] While the two concepts are technically distinct from one another, evidence of sex stereotypes is "relevant to prove discrimination because of sex," as Justice Alito concedes.[100] While Justice Alito believes this argument fails because the discrimination applies "equally to men and women," he fails to take into consideration that the inquiry at issue in Title VII is about the individual.[101] It does not matter if the employer discriminates against both lesbians and gay men because of sex stereotypes; what matters is the discrimination faced by the individual because of sex.[102]

The majority opinion in *Bostock* does not rely on *Price Waterhouse* or a theory of sex stereotypes in its holding. However, the holding of *Price Waterhouse* remains valuable to nonbinary and bisexual individuals, more so than the reasoning used by the *Bostock* majority. For instance, suppose an employer has a lesbian employee and a female bisexual employee. The two employees are materially identical except one exclusively dates women and the other dates multiple genders. If the employer fires the bisexual employee for dating multiple genders, the employer is relying on a sex stereotype that women can only be attracted to a singular gender.[103] Likewise, imagine an employer has a trans female employee, a trans male employee, and a nonbinary employee who are materially identical except two identify as a male or female and one does not identify as male or female. If the employer fires the nonbinary employee for identifying with a gender outside of the traditional gender binary, the employer is relying on a sex

98. *Id.*

99. *Id.* at 1764.

100. *Id.*

101. *Id.*; City of L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 702 (1978).

102. *See Bostock,* 140 S. Ct. at 1764.

103. The same reasoning applies to any scenario where there are two materially identical employees of any gender, one dates exclusively one gender and the other dates multiple genders, and the one who dates multiple genders is fired for dating multiple genders.

stereotype that individuals must identify with either the male or female gender.[104]

Because Title VII prohibits "certain motives, regardless of the state of the actor's knowledge,"[105] incorporating a *Price Waterhouse* analysis is critical to provide a cause of action to Title VII claims by trans employees. Suppose an employer has two employees, both trans women. One employee started hormone therapy when she was sixteen, marks "female" on all her identifying documents, and is perceived to be female by her employer. The other employee, however, only recently came out as trans and has not undergone any hormone therapy or other gender affirming care, but also marks "female" on all her identifying documents. The employer likely perceives a "clash" of maleness and femininity in the second employee but may not perceive a "clash" in the first employee. The employer can see the misalignment and "can use it to infer transness, and that inference can motivate discrimination."[106] Under the theory of *Price Waterhouse*, which prohibits perceptive sex discrimination, the second employee is protected, as is the first, because discrimination against employees who are performing gender "wrong" is likely impermissible.[107] "Because perceived sex determines how one interprets gender performance, perceived sex is central" to trans identity and discrimination.[108] However, because *Bostock* does not incorporate sex stereotypes, the employer could fire the second employee who does not present gender in the way the employer expects, but be found to have not discriminated because of sex because the employer did not fire the other trans employee.

Bostock should have relied, at least in part, on *Price Waterhouse* to determine that sex discrimination includes discrimination because of sexual orientation and gender identity. Discrimination against LGBTQ+ individuals "cannot be separated from gender norms and stereotypes."[109] That approach would have "been

104. Again, this rationale is applicable to any scenario where there are two materially identical employees, one who identifies within the traditional binary and one who is outside of the gender binary, and the one who does not conform with the gender binary is fired for not being male or female.

105. EEOC v. Abercrombie & Fitch Stores, Inc., 575 U.S. 768, 768 (2015).

106. Slepoi, *supra* note 92, at 74.

107. *See id.* at 75.

108. *Id.*

109. McGinley et al., *supra* note 3, at 12–13.

rooted in solid precedent," provided "clarity," and created a "more solid foundation for future cases" for all LGBTQ+ individuals.[110]

B. Consideration of Implications for Bisexual and Nonbinary Individuals

In the majority's analysis, the Court only directly addresses the "LGT" portion of LGBTQ+.[111] The Court does not devote any analysis to bisexual, pansexual, nonbinary, or queer individuals. The only indication to the "+" was a broad "whatever other labels might attach" statement that serves as a general acknowledgement that the labels discussed in the opinion are not exhaustive.[112] While the analysis of the majority indicates that people with other sexualities besides gay and lesbian or nonbinary gender identities are protected from discrimination, the failure of the Court to directly address other individuals creates additional litigation barriers for employees seeking redress under Title VII. For instance, the "omission of bisexuals forces advocates into a complicated and messy posture, having to explain how it is that in an opinion based on textualism, it does not matter that bisexuals are not included in the opinion's text."[113] As previously discussed, the omission of bisexual identity from the opinion, along with the failure to incorporate *Price Waterhouse*'s reasoning, may result in discrimination against bisexual individuals not amounting to sex discrimination.

The possibility that *Bostock* does not prohibit discrimination based on "bisexuality . . . , pansexuality . . . , asexuality . . . , or demisexuality or graysexuality" is rooted in the fact that none of these sexualities "definitionally rely on the sex of the employee" in the same way that gay and lesbian sexualities do.[114] Because these sexualities can "easily be defined without regard to the employee's sex," the basic logic paradox presented in *Bostock* to illustrate the Court's reasoning does not apply neatly.[115]

The omission of *Price Waterhouse*, a case that has played a "huge part in advancing" trans rights, as evidenced by the EEOC and

110. *Id.* at 13.

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

112. *Id.* at 1747.

113. Nancy C. Marcus, Bostock v. Clayton County *and the Problem of Bisexual Erasure*, 115 NW. U. L. REV. 223, 230 (2020) (emphasis omitted).

114. McGinley et al., *supra* note 3, at 10.

115. *Id.*

lower courts utilizing the case in their decisions that advance trans rights, puts nonbinary employees at risk of falling outside Title VII's protections.[116] Trans individuals, "by definition, do not conform to certain sex stereotypes."[117] If an employer has a policy that it "simply will not tolerate any individual who does not identify as male or female," this discriminatory policy is not, on its face, explicitly prohibited by *Bostock*.[118] Furthermore, employers can potentially make firing decisions based not on gender identity but on other prohibited behaviors. In *Bostock*, the majority states "we do not purport to address bathrooms, locker rooms, or anything else of the kind."[119] Under a close reading of *Bostock*, an employer could "simply state that it was firing a [trans] employee, not for being [trans], but simply for using the 'wrong' bathroom."[120] This firing policy would allow the employer to "circumvent the Supreme Court's explicit holding that discriminating against an employee simply for being [trans] is not permitted" by using a ground that falls outside of the Court's opinion.[121]

While the majority opinion in *Bostock* takes a "very simple, literal approach" to interpreting Title VII, the simplicity fails to reflect the complicated realities of sexual orientation and gender identity.[122] In order for the law to serve and reflect "the existence of all persons, not just those who fall within black-and-white polarized binaries," courts should "acknowledge the existence and realities" of all people, including nonbinary, gender fluid, queer, bisexual, and pansexual individuals, "who do not fit within rigid binary definitional boxes."[123]

C. Unanswered Questions

Bostock leaves unaddressed significant policy questions that will unquestionably have massive impacts on the daily lives of many. Professor Rena Lindevaldsen has persuasively identified a

116. *Id.* at 14–15.

117. *Id.* at 14.

118. *Id.* at 15.

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

120. McGinley et al., *supra* note 3, at 15.

121. *Id.*

122. Justin Blount, *Sex-Differentiated Appearance Standards Post-*Bostock, 31 GEO. MASON U. C.R. L.J. 217, 217 (2021).

123. Marcus, *supra* note 113, at 234.

number of questions left open by *Bostock*.[124] This Part adopts much of her analysis. Among these questions are (1) whether sex discrimination in other federal statutes also includes sexual orientation and gender identity, (2) whether *Bostock* "mandate[s] a conclusion" that individuals have a legally actionable right to use bathrooms consistent with gender identity, (3) what implications the decision has on Title IX's prohibition of sex discrimination in education programs, (4) what implications the decision has on access to medical services, (5) whether religious employers with "sincerely held religious beliefs that conflict" with the principle that "people can change their sex or that same-sex attraction is acceptable" are exempt from the prohibition of sex discrimination, and (6) whether the ministerial exception protects religious employer's decisions to employ or terminate LGBTQ+ employees.[125]

To the first issue—whether the definition of sex discrimination under *Bostock* will also change the definition of sex discrimination under other federal statutes—there will likely be extended litigation in the upcoming years to resolve these challenges. Justice Alito was greatly concerned by this prospect in his dissent, noting that "over 100 federal statutes prohibit discrimination because of sex," including the Fair Housing Act and the Equal Credit Opportunity Act.[126] Because the majority holding does not explicitly state how far the decision extends, it remains unclear how or whether enforcement of these federal statutes will change in the upcoming years to conform with the *Bostock* decision.

Second, the majority opinion "dismisses questions about 'bathrooms, locker rooms, or anything else of the kind.'"[127] As a result, the "brusque refusal to consider the consequences of its reasoning"[128] will likely lead to protracted litigation on whether anti-trans bathroom bills constitute prohibited sex discrimination. Indeed, not long after the *Bostock* ruling, two federal courts of appeals took up the bathroom issue and found that "a district policy requiring students to use a single-stall restroom or the

124. *See* Rena M. Lindevaldsen, Bostock v. Clayton County*: A Pirate Ship Sailing Under a Textualist Flag*, 33 REGENT U. L. REV. 39, 40 (2020).

125. *Id.*

126. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1778 (2020) (Alito, J., dissenting).

127. *Id.*

128. *Id.*

restroom that corresponded with the student's biological sex" violated Title IX and the Equal Protection Clause of the Fourteenth Amendment.[129] Though the Fourth and Eleventh Circuits found these bathroom policies to constitute sex-based discrimination, as states continue to introduce and push anti-trans legislation, there is a strong likelihood a circuit split may emerge as to whether these bathroom policies amount to sex-based discrimination.

Third, it is unclear whether *Bostock*'s definition of sex discrimination applies to Title IX of the Civil Rights Act and how this will impact schools and universities. Title IX provides that schools can maintain "separate living facilities for the different sexes."[130] If sexual orientation and gender identity are included in this definition of sex, there will likely be protracted litigation as to how this impacts sex-based housing in schools. Additionally, *Bostock* may impact Title IX sports; the holding would suggest that prohibiting trans women from competing on women's sports teams constitutes discrimination.[131] However, because the holding in *Bostock* only addressed Title VII, how Title IX will be enforced going forward remains uncertain.

Fourth, it is possible *Bostock* may act as a cause of action for LGBTQ+ individuals suing healthcare providers for discrimination, particularly religious-based healthcare providers who refuse to perform gender affirming care. Shortly following the issuance of the decision, a trans man sued Catholic Hospitals for its "refusal to remove" his uterus as part of gender affirming care.[132] The complaint "specifically cited *Bostock*" in support of the claim.[133] Again, the textual-focused nature of the majority opinion makes it unclear whether *Bostock* will support sexual orientation and gender identity-based discrimination lawsuits against healthcare providers that refuse to provide services.

Fifth, the Court explicitly acknowledges in the majority opinion that "[b]ecause RFRA operates as a kind of super statute . . . it might

129. Lindevaldsen, *supra* note 124, at 68.

130. *Id.* at 69.

131. *Id.*

132. *Transgender Lawsuit Against Catholic Hospital Cites New US Supreme Court Precedent*, CATHOLIC NEWS AGENCY (Jul. 20, 2020, 4:47 PM), https://www.catholicnewsagency.com/news/45241/transgender-lawsuit-against-catholic-hospital-cites-new-us-supreme-court-precedent.

133. *Id.*

supersede Title VII's commands in appropriate cases" and does not actually reconcile how these doctrines interact.[134] There are two primary issues that arise in this conflict—whether religious employers can "engage in sex, sexual orientation, and gender identity discrimination" in their employment decision, and how the ministerial exception applies.[135] The recent Supreme Court case *Our Lady of Guadalupe School v. Morrissey-Berru*, decided in the same term as *Bostock*, provides "[w]hen a school with a religious mission entrusts a teacher with the responsibility of educating and forming students in the faith, judicial intervention into disputes between the school and the teacher threatens the school's independence in a way that the First Amendment does not allow."[136] The broad reading of the ministerial exception, providing that "educating young people in their faith" is a responsibility "at the very core of the mission of a private religious school,"[137] indicates that ministers, teachers, and other faith leaders all fall under the ministerial exception. Thus, it seems to follow that religious institutions can discriminate because of sexual orientation and gender identity when making employment decisions in positions falling under the ministerial exception. However, it remains unanswered by *Bostock* and *Our Lady of Guadalupe* whether religious organizations can discriminate in employment decisions for roles outside of the ministerial exception.

All of these unresolved questions regarding the extent to which *Bostock*'s holding will impact other areas of the law will likely involve protracted litigation with a high possibility of circuit splits unless the legislature passes the Equality Act to resolve these questions definitely and consistently.

III. CONGRESS MUST PASS THE EQUALITY ACT TO EXPAND PROHIBITIONS ON DISCRIMINATION FOR ALL LGBTQ+ INDIVIDUALS

The Equality Act is a vital piece of legislation that will extend protections to all LGBTQ+ individuals. While *Bostock* is a historic and watershed moment for LGBTQ+ rights, it applies only to a narrow area of law. In the Civil Rights Act, sex is only a protected

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

135. Lindevaldsen, *supra* note 124, at 71.

136. *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2069 (2020).

137. *Id.* at 2054, 2064.

ground in Title VII, meaning the expansion of sex discrimination to include sexual orientation and gender identity is limited to the scope of Title VII employment protections. Passing the Equality Act will (1) ensure that the protections against sex discrimination are not limited only to narrow Title VII actions, (2) rectify the Court's error of not relying on *Price Waterhouse* in *Bostock*'s holding, (3) provide a clear, inclusive definition of sexual orientation and gender identity, and (4) answer some of the questions left unanswered in *Bostock*.

The Equality Act, as most recently presented to the Senate in February of 2021,[138] will amend the Civil Rights Act to include protections for LGBTQ+ individuals and will prohibit discrimination on the basis of sex in more areas outside of employment. The Equality Act will amend sections of the Civil Rights Act by inserting the language "sex (including sexual orientation and gender identity)" into the provisions that prohibit discrimination in public accommodations, public facilities, public education, housing, and more.[139] Additionally, the Equality Act will update and clarify the public spaces and services covered by the Act, extending inclusion to "retail stores, such as banks and legal services" as well as transportation services.[140]

A. The Equality Act Will Prevent Circuit Splits and the Overturning of Bostock

Since *Bostock* was decided, the number of anti-trans bills introduced in state legislatures has skyrocketed. The first three months of 2021 saw over eighty anti-trans bills introduced, surpassing the total number of anti-trans bills introduced in the entirety of 2020.[141] Bills range from prohibitions on healthcare for trans youth, exclusions in athletics, and restrictions on identification documents.[142] A similar pattern emerged after the

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

139. *See Equality Act NOW*, HUM. RTS. CAMPAIGN, https://www.hrc.org/resources/equality (last visited Oct. 12, 2021).

140. *Id.*

141. Wyatt Ronan, *Breaking: 2021 Becomes Record Year for Anti-Transgender Legislation*, HUM. RTS. CAMPAIGN (Mar. 13, 2021), https://www.hrc.org/press-releases/breaking-2021-becomes-record-year-for-anti-transgender-legislation.

142. *Legislation Affecting LBGT Rights Across the Country*, ACLU (Jul. 9, 2021), https://www.aclu.org/legislation-affecting-lgbt-rights-across-country.

legalization of gay marriage in 2015. Following *Obergefell*, states introduced and passed laws providing religious exemptions for services, "bathroom bills," and other anti-LGBTQ+ legislation in backlash to the decision.[143] The "introduction and passage of anti-LGBT legislation following *Obergefell* reflects a backlash that is distinct from public opinion," as it was largely amongst conversative and far-right legislative groups.[144]

The status of *Obergefell* as good law has continued to be questioned and challenged, both by state courts and justices on the Supreme Court. Justice Thomas and Justice Alito have continued to urge the Court to reconsider the ruling in *Obergefell*. In October of 2020, Justice Thomas wrote "the religious liberty of the many Americans who believe that marriage is a sacred institution between one man and one woman" is threatened by *Obergefell*.[145] He asserted: "Due to *Obergefell*, those with sincerely held religious beliefs concerning marriage will find it increasingly difficult to participate in society without running afoul of *Obergefell* and its effect on other antidiscrimination laws."[146]

As the makeup of the Court continues to change, it remains uncertain whether rights for LGBTQ+ individuals will remain protected. Of the five judges who ruled with the majority in *Obergefell*, only three remain on the bench. The ongoing criticism of *Obergefell*, more than five years following the decision, will likely remain an issue on the Court for years to come.

Bostock was ruled in a 6-3 decision, with Justice Thomas and Justice Alito among the dissenters, as was the case in *Obergefell*. Given the vigorous opposition to *Bostock* by the dissenters and ongoing sentiment that *Obergefell* was decided incorrectly, if a case challenging *Obergefell* or *Bostock* were to come before the Court, there is a possibility the Court could overturn *Bostock* and declare sex discrimination does not include sexual orientation and gender identity discrimination. Laws created by Supreme Court decisions are subject to changes in ideology of the court, a body of unelected judges. Contrastingly, laws passed by Congress are

143. Emily Kazyak & Mathew Stange, *Backlash or a Positive Response? Public Opinion of LGB Issues after* Obergefell v. Hodges, SOCIO. DEP'T FAC. PUBL'NS (Jan. 10, 2018), https://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1526&context=sociologyfacpub.

144. *Id.* at 26.

145. Davis v. Ermold, 141 S. Ct. 3, 3 (2020).

146. *Id.*

created by elected public officials; changes to those laws are done by the elected officials. The Equality Act will protect against the possibility of *Bostock* being overturned by a future court by explicitly amending all mentions of sex in the Civil Rights Act to be clarified with the language "including sexual orientation and gender identity."

Additionally, even if *Bostock* is not overturned, as lower courts interpret the holding that excludes *Price Waterhouse* and LGBTQ+ individuals who are not lesbian, gay, or trans, the Equality Act will ensure that lower courts do not interpret sex discrimination narrowly, excluding protections for some individuals.

B. Reconciling Religious Freedom Concerns to Ensure the Act Passes in the Senate

One notable provision of the Equality Act that has been subject to a high volume of controversy is Section 1107 that states "[t]he Religious Freedom Restoration Act of 1993 shall not provide a claim concerning, or a defense to a claim under, a covered title, or provide a basis for challenging the application or enforcement of a covered title."[147]

This portion of the Act will take a step in resolving the question of how to balance freedom of religion with sex discrimination prohibitions. However, opponents to the Equality Act argue that this provision goes too far and does not strike a proper balance between the First Amendment and prohibitions against discrimination. If this portion of the Act remains in its current form, it is unlikely that the Act will be passed in the Senate.[148] Even if, somehow, it is passed, this provision will likely bring about protracted litigation as to its constitutionality. Therefore, for an effective version of the Equality Act to be passed, this provision

147. Equality Act, H.R. 5, 116th Cong. § 1107 (2020).

148. In the current Senate, Democrats have a narrow 50-50 majority. Due to the Senate's 60-vote filibuster rule, assuming that every democratic senator would vote in favor of the act, a minimum of 10 Republican Senators would need to support the Equality Act in order for it to pass. Republican representatives, such as Senator Susan Collins, who have either supported or been amenable to previous versions of the Equality Act, have expressed their opposition to the current religious balancing language. Thus, the possibility of 10 Republican Senators voting in favor of the Equality Act is low unless the bill is amended to provide more religious accommodations. Grace Segers, *Senate Could Expand LGBTQ Protections with Equality Act*, CBS NEWS (Jun. 10, 2021, 8:50 PM), https://www.cbsnews.com/news/equality-act-lgbtq-protection-bill-senate/.

likely needs to be amended to better consider the question of how to balance freedom of religion and LGBTQ+ rights. One possibility that might gain sufficient support from Republican Senators to pass the Equality Act would be to amend the Act to mirror some of the language of the Do No Harm Act, a bill introduced in the House in February of 2021.[149] The Do No Harm Act attempts to prevent RFRA from being "interpreted to authorize an exemption from generally applicable law that imposes meaningful harm, including dignitary harm, on a third party."[150] The Equality Act could be amended to clarify that RFRA claims can be brought but cannot be sustained if doing so would impose meaningful harm or would be in opposition to the equal opportunities protected by the Civil Rights Act. Additionally, the Do No Harm Act would clarify that RFRA is applicable to "judicial proceeding[s] to which the government is a party"; it may be useful to make this same clarification in an amendment to the Equality Act.[151]

CONCLUSION

Bostock is a landmark case that is humanizing in its straightforwardly textual argument, firmly asserting gender, presentation, expression, sexuality, and physicality are inextricable from sex.[152] However, the failure to incorporate the precedent of *Price Waterhouse* into the majority's holding can potentially exclude bisexual, nonbinary, and other individuals under the LGBTQ+ umbrella who are not gay, lesbian, or trans men or women from protections under Title VII. In order for sex discrimination to truly protect all LGBTQ+ individuals without the risk of the opinion being overturned or discrepancy in protections across geographic areas, Congress must pass the Equality Act to ensure that these rights are entrenched.

149. Do No Harm Act, H.R. 1378, 117th Cong. (2021).

150. *Id.*

151. *Id.*

152. Slepoi, *supra* note 92.