BOSTOCK: AN INEVITABLE GUARANTEE OF HEIGHTENED SCRUTINY FOR SEXUAL ORIENTATION AND TRANSGENDER CLASSIFICATIONS

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In June 2020, the Supreme Court decided Bostock v. Clayton County. *In* Bostock, *the Court held that discrimination on the basis of*

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sexual orientation and transgender status per se constitutes discrimination "because of sex" for purposes of Title VII. But Bostock *inspires the question of whether its holding and reasoning apply in other contexts, including the Equal Protection Clause context. While the Supreme Court has held intermediate scrutiny applies to sex classifications analyzed under the Equal Protection Clause, the Court has yet to elucidate the level of scrutiny that applies to LGBTQ classifications. Meanwhile, state and federal courts have developed vastly diverging approaches.*

This Article is the first to catalogue Bostock's *citing cases that extend* Bostock *beyond the Title VII context. More importantly, this Article recognizes for the first time that courts will inevitably extend Justice Gorsuch's opinion in* Bostock *to the Equal Protection Clause context and thus apply intermediate scrutiny to LGBTQ classifications in future cases. This is so because the reasoning that Justice Gorsuch provides in* Bostock*—that LGBTQ discrimination is necessarily sex discrimination because one cannot discriminate against an LGBTQ person absent considering the person's sex—is not limited to the text of Title VII. And because LGBTQ discrimination is sex discrimination after* Bostock*, logically, courts should assess both forms of discrimination under the same standard of review.*

INTRODUCTION

"Sometimes small gestures can have unexpected consequences."[1]

In recent years, advocates have utilized the Equal Protection Clause and the Fourteenth Amendment Due Process Clause to further LGBTQ rights. In the last twenty years alone, the Supreme Court has recognized significant LGBTQ rights, including the right of same-sex couples to be intimate in the privacy of their own homes[2] and the right of same-sex couples to marry.[3] At the same time, the Court has balanced LGBTQ rights with other rights specifically enumerated in the Constitution, such as religious liberty,[4] and changes in the Court's

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

2. *See* Lawrence v. Texas, 539 U.S. 558, 578 (2003); *see also id.* at 579 (O'Connor, J., concurring) (asserting that a state ban on same-sex sodomy was unconstitutional under the Due Process Clause rather than the Equal Protection Clause).

3. *See* Obergefell v. Hodges, 576 U.S. 644, 665 (2015).

4. *See* Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1727 (2018) ("Our 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. . . . At the same

composition will undoubtedly shape the expansion or retraction of these rights in the future.

The Supreme Court, however, has refused to fully elucidate the meaning of the Equal Protection Clause as it applies to sexual orientation and transgender classifications (LGBTQ classifications)[5] because the Court has refused to define the applicable level of scrutiny for LGBTQ classifications. Recent Supreme Court cases have only compounded this confusion by failing to apply the traditional *Carolene Products* framework to LGBTQ classifications or otherwise by conflating the analysis of the Equal Protection and Due Process Clauses where challenges under both Clauses are at issue.[6] What is more, many lower courts have evaded the issue altogether by applying the constitutional avoidance doctrine or otherwise.[7] In the face of this lack of guidance, commentators have demanded clarity.[8] Yet the Court has refused to identify the level of scrutiny courts should apply when analyzing LGBTQ classifications.

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time, the religious and philosophical objections to gay marriage are protected views and in some instances protected forms of expression."). Interestingly, the Court recently denied certiorari when, for religious reasons, Kim Davis took action impeding others' same-sex right to marry. *See generally* Davis v. Ermold, 141 S. Ct. 3 (2020) (Thomas, J., concurring). Justice Thomas concurred with denying certiorari but noted *Obergefell* has had "ruinous consequences on religious liberty." *Id.* at 4 (quoting *Obergefell*, 576 U.S. at 734 (Thomas, J., dissenting)).

5. This Article recognizes that in other contexts, the acronym "LGBTQ" refers to classifications in addition to sexual orientation and transgender status. This Article defines "LGBTQ" narrowly because *Bostock*'s holding relates exclusively to these types of classifications.

6. *See generally Obergefell*, 576 U.S. at 644; Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 748–49 (2011) (discussing the intermingling of the equal protection and due process analyses).

7. *See* Doe v. Triangle Doughnuts, LLC, 472 F. Supp. 3d 115, 134 (E.D. Pa. 2020) (quoting Blatt v. Cabela's Retail, Inc., No. 5:14-CV-04822, 2017 WL 2178123, at *4 (E.D. Pa. May 18, 2017)).

8. *See, e.g.*, Michael J. Higdon, *(In)Formal Marriage Equality*, 89 FORDHAM L. REV. 1351, 1370–71 (2021); Russell K. Robinson, *Unequal Protection*, 68 STAN. L. REV. 151, 164–65 (2016); Stacey L. Sobel, *When* Windsor *Isn't Enough: Why the Court Must Clarify Equal Protection Analysis for Sexual Orientation Classifications*, 24 CORNELL J. L. & PUB. POL'Y 493, 495 (2015); Katherine M. Franke, *Opinion of Justice Katherine Franke in* Obergefell v. Hodges*: What* Obergefell *Should Have Said* 6 (Columbia Law Sch. Pub. Law Research Paper, Paper No. 14-533, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2847213 (suggesting *Obergefell* should have recognized the Equal Protection Clause contains an anti-subordination rather than anti-classification principle).

In June 2020, the Court released its opinion in *Bostock v. Clayton County*,[9] one which many LGBTQ rights activists celebrate as a hard-fought victory, but one which also may answer the Equal Protection Clause question. In *Bostock*, the Court held discrimination on the basis of sexual orientation or transgender status per se constitutes sex discrimination.[10] While many reasonably argue that *Bostock*'s reasoning applies (or should apply) only in Title VII cases,[11] the persuasive explanations Justice Gorsuch provided in *Bostock* are not unique to the word "sex" as it appears in Title VII. Since the *Bostock* decision, federal courts have already consistently utilized *Bostock* to hold that LGBTQ discrimination is sex discrimination in contexts outside of Title VII and indeed even in the equal protection context.[12]

This Article argues for the first time that *Bostock*'s reasoning—either along with or apart from the Court's current *Carolene Products* framework—should inevitably lead courts to conclude that intermediate scrutiny applies to LGBTQ classifications, regardless whether one normatively believes *Bostock* should lead to that conclusion or whether *Bostock* itself was correctly decided.[13] The Equal Protection Clause renders illegal state classifications that discriminate on the basis of sex.[14] In the past, courts held LGBTQ discrimination did not constitute sex discrimination under the Clause because they understood LGBTQ discrimination to be distinct from sex discrimination. But *Bostock* undercuts this reasoning by making clear that LGBTQ discrimination is itself sex discrimination because "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."[15]

If LGBTQ discrimination is simply discrimination for the reasons set forth in *Bostock*, then courts should treat LGBTQ discrimination at least equally with sex discrimination as traditionally defined under

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9. 140 S. Ct. 1731 (2020).

10. *See infra* Part II.A.

11. *See infra* Part III.B.1. Title VII of the Civil Rights Act is the central federal legislation prohibiting employment discrimination. 2 JAMES A. RAPP, EDUCATION LAW § 6B.03 (2020).

12. *See, e.g.*, Adams *ex rel.* Kasper v. Sch. Bd. of St. Johns Cnty., 968 F.3d 1286, 1296 (11th Cir. 2020) (quoting *Bostock*, 140 S. Ct. at 1741)), *vacated*, 3 F.4th 1299 (11th Cir. 2021); Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 618 (4th Cir. 2020) (quoting *Bostock*, 140 S. Ct. at 1753)); Monegain v. Va. Dep't of Motor Vehicles, 491 F. Supp. 3d 117, 141–44 (E.D. Va. 2020); Birdo v. Duluky, No. 20-CV-1108 (SRN/HB), 2020 WL 5549115, at *3 (D. Minn. Aug. 27, 2020).

13. *See generally* Nelson Lund, *Unleashed and Unbound: Living Textualism in* Bostock v. Clayton County, 21 FEDERALIST SOC'Y REV. 158 (2020) (arguing *Bostock* was "an outlandish judicial performance").

14. *See infra* Part I.A.

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

the Clause for all purposes. This thesis is not far-fetched. In fact, the dissenting opinions in *Bostock* itself warned the majority's reasoning expands beyond Title VII, and federal courts have already held *Bostock* supports intermediate scrutiny for LGBTQ classifications. All that remains is for the Supreme Court to adopt this common-sense conclusion. It is a basic syllogism: (1) if transgender and sexual orientation discrimination are simply sex discrimination; and (2) sex discrimination warrants intermediate scrutiny analysis in equal protection cases; then (3) transgender and sexual orientation discrimination warrant intermediate scrutiny analysis in equal protection cases.

Other commentators have argued intermediate (or perhaps strict) scrutiny should apply to classifications based on sexual orientation or gender identity under the *Carolene Products* framework or otherwise.[16] However, this Article is the first to comprehensively collect and categorize *Bostock* and its citing cases that apply its reasoning outside of the Title VII context. Moreover, this Article is the first to explain how this precedent, along with *Bostock*'s reasoning, supports that courts should—and likely will—apply intermediate scrutiny to LGBTQ classifications in future cases.

This Article is timely in light of *Bostock*'s recency, but it is also critical given the effect that application of the tiers of scrutiny has in practice. When a classification is subject to heightened scrutiny, legislatures cease explicitly classifying on those bases.[17] Yet today, likely due to the lower scrutiny that applies, numerous explicit classifications based on LGBTQ status still remain.[18] Even more, the standard of review a classification receives is often outcome-determinative: courts tend to uphold classifications under rational basis scrutiny and strike classifications under strict

16. *See, e.g.*, Kevin M. Barry et al., *A Bare Desire to Harm: Transgender People and the Equal Protection Clause*, 57 B.C. L. REV. 507, 551 (2016); Darren Lenard Hutchinson, *"Not Without Political Power": Gays and Lesbians, Equal Protection and the Suspect Class Doctrine*, 65 ALA. L. REV. 975, 1030–32 (2014); Courtney A. Powers, *Finding LGBTs a Suspect Class: Assessing the Political Power of LGBTs as a Basis for the Court's Application of Heightened Scrutiny*, 17 DUKE J. GENDER L. & POL'Y 385, 386 (2010).

17. *See* Robinson, *supra* note 8, at 173 (discussing that few explicit racial classifications exist today).

18. *See, e.g.*, IDAHO CODE § 33-6203 (2020) (prohibiting transgender students from participating on sports teams for the gender with which the students identify); Karnoski v. Trump, 926 F.3d 1180, 1191–92 (9th Cir. 2019) (discussing the transgender military ban).

scrutiny.[19] Consequently, adoption of this Article's approach would likely affect results in future cases.

This Article proceeds as follows: Part I examines the standards of review courts apply in equal protection cases, and it describes the types of classifications that warrant each standard of review. Part I then explains that the Supreme Court's opinions in *Romer*, *Lawrence*, *Windsor*, and *Obergefell* have left unanswered the question of which level of scrutiny applies to LGBTQ classifications. Part I finally details the piecemeal approaches circuit courts have adopted in the absence of a definitive ruling from the Supreme Court: namely, with exceptions, rational basis review for sexual orientation classifications and intermediate scrutiny for transgender classifications.

Part II discusses *Bostock*'s majority and dissenting opinions. It reviews *Bostock*'s procedural history and provides *Bostock*'s landmark holding that LGBTQ discrimination is sex discrimination because it is impossible to discriminate against a person based on LGBTQ status without first considering the person's sex. Further, Part II summarizes *Bostock*'s dissenting opinions, which suggest that *Bostock*'s reasoning supports intermediate scrutiny in sex discrimination cases under the Equal Protection Clause. Part II finally recounts the contexts outside of Title VII to which courts have already applied *Bostock*'s reasoning, including Title IX, the Fair Housing Act, and even the Equal Protection Clause.

Part III contains this Article's thesis: In light of *Bostock*, courts should apply intermediate scrutiny to LGBTQ classifications. *Bostock* recognizes LGBTQ discrimination is sex discrimination, and it does not limit that conclusion to the Title VII context. What is more, while *Bostock* is a Title VII case, Title VII cases often guide courts in their equal protection jurisprudence. Part III also addresses anticipated counterarguments. It explains that *Bostock*'s reasoning is not limited to statutory prohibitions of sex discrimination, and it recognizes scholarship that suggests strict scrutiny should apply to LGBTQ classifications. A brief conclusion follows.

I. CLASSIFICATIONS BASED ON SEXUAL ORIENTATION AND TRANSGENDER STATUS PRE-*BOSTOCK*: THE *OBERGEFELL* PROBLEM

Before understanding *Bostock*'s guarantee of intermediate scrutiny for LGBTQ classifications, one must understand the present void in the equal protection framework. Accordingly, Part I.A sets forth foundational equal protection principles. Then, Part I.B

19. *See* Christopher R. Leslie, *The Geography of Equal Protection*, 101 MINN. L. REV. 1579, 1580 (2017); Kristapor Vartanian, *Equal Protection*, 10 GEO. J. GENDER & L. 227, 229 (2009).

describes the few equal protection principles the Supreme Court has provided with respect to LGBTQ classifications, and it explains how the Court's jurisprudence has not identified the level of scrutiny that applies to LGBTQ classifications. Finally, Part I.C categorizes circuit courts' approaches to LGBTQ classifications in light of the Supreme Court's perplexing guidance.

A. General Equal Protection Principles

The Equal Protection Clause provides, "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."[20] Simply put, the Equal Protection Clause requires state actors to treat similarly situated persons in a similar manner.[21]

Courts review state actions that treat similarly situated individuals differently with varying levels of deference. At one extreme, where a classification employs no suspect or quasi-suspect criteria, rational basis scrutiny applies.[22] Applying rational basis review, a court will uphold the classification at issue so long as it rationally relates to a legitimate government purpose.[23] On the opposite extreme, for classifications that employ suspect criteria (such as race), courts apply strict scrutiny.[24] Applying strict scrutiny, a court will only uphold the classification if it is narrowly tailored to serve a compelling government interest.[25]

Between these extremes, where the classification at issue utilizes quasi-suspect criteria, courts apply intermediate scrutiny.[26] The Court has applied intermediate scrutiny to classifications based on sex[27] and a child's illegitimacy.[28] Applying intermediate scrutiny, courts will uphold the classification if the government shows the classification substantially relates to an important government objective.[29] Even more, though, the court must find that an

20. U.S. CONST. amend. XIV, § 1.
21. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 439 (1985).
22. Plyler v. Doe, 457 U.S. 202, 216 (1982).
23. *Id.*
24. *Cleburne*, 473 U.S. at 440.
25. *Id.*
26. *See* United States v. Virginia, 518 U.S. 515, 532–33 (1996).
27. *See id.*
28. Lalli v. Lalli, 439 U.S. 259, 265 (1978) (citing Matthews v. Lucas, 427 U.S. 495, 506 (1976)).
29. *See Virginia*, 518 U.S. at 533.

"exceedingly persuasive" justification supports the classification,[30] and the justification must be genuine and not based on stereotypes.[31]

The Court set forth the framework courts must utilize to decide which tier of scrutiny applies to various classifications in *Carolene Products*.[32] In essence, courts consider whether the following attributes burden members of the classification: (1) immutable characteristics; (2) political powerlessness; and (3) a history of discrimination or stigmatization.[33] Courts, too, consider whether members of the classification are less suited to contribute to society than non-class members or otherwise have characteristics that support differential treatment.[34] With this framework in mind, it is possible to consider the federal courts' approaches to LGBTQ classifications.

B. Classifications Based on Sexual Orientation and Transgender Status: Supreme Court Jurisprudence

Commentators agree that the level of scrutiny that applies to LGBTQ classifications is uncertain.[35] As discussed in more detail in Part II.C, academics have argued under the *Carolene Products* framework that LGBTQ classifications should be subject to intermediate (if not strict) scrutiny.[36] Nonetheless, the Supreme

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30. *See id.* at 532–33.

31. *See id.* Lower courts emphasize that the purpose of intermediate scrutiny is to prevent perpetuation of "unfounded stereotypes or second-class treatment." Latta v. Otter, 19 F. Supp. 3d 1054, 1073 (D. Idaho 2014).

32. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

33. JAMES A. KUSHNER, GOVERNMENT DISCRIMINATION: EQUAL PROTECTION LAW AND LITIGATION § 5:1 (2019–2020 ed. 2021).

34. 1 IVAN E. BODENSTEINER & ROSALIE BERGER LEVINSON, STATE AND LOCAL GOVERNMENT CIVIL RIGHTS LIABILITY § 1:15 (July 2020 ed. 2020).

35. *See, e.g.*, Megan Brodie Maier, *Altering Gender Markers on Government Identity Documents: Unpredictable, Burdensome, and Oppressive*, 23 U. PA. J.L. & SOC. CHANGE 203, 237 (2020) ("At this point, it is unclear what level of scrutiny is to be used to review the laws that discriminate based on sexual orientation and gender identity."). Courts agree as well. *See, e.g.*, Campaign for S. Equal. v. Miss. Dep't of Hum. Servs., 175 F. Supp. 3d 691, 709–10 (S.D. Miss. 2016) (discussing *Obergefell* and noting that it is "hard to discern a precise test" from the holding).

36. *See, e.g.*, Heather L. Mckay, *Fighting for Victoria: Federal Equal Protection Claims Available to American Transgender Schoolchildren*, 29 QUINNIPIAC L. REV. 493, 504–23 (2011) (applying the *Carolene Products* factors to transgender children and concluding transgender children are a quasi-suspect class and therefore intermediate scrutiny should apply when courts review transgender classifications). *See generally* KATHARINE T. BARTLETT ET AL., GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY 75–77 (Wolters Kluwer 8th ed. 2020); Rishita Apsani, *Are Women's Spaces Transgender Spaces? Single-Sex Domestic Violence Shelters, Transgender Inclusion, and the Equal Protection Clause*, 106 CALIF. L. REV. 1689 (2018).

Court has been silent on the issue, and this silence has led to inconsistency among the circuits.

The Supreme Court has never applied its *Carolene Products* framework to transgender classifications and correspondingly has offered no guidance as to the applicable level of scrutiny for transgender classifications.[37] Similarly, while the Court has at least considered equal protection cases involving sexual orientation classifications, its cases provide little guidance as well.[38] The relevant cases are *Romer*, *Lawrence*, *Windsor*, and *Obergefell*.

In *Romer v. Evans*,[39] the Court seemed to apply a heightened form of rational basis review to a sexual orientation classification.[40] Colorado voters amended the Colorado Constitution to prohibit Colorado and its municipalities from passing laws or ordinances to protect persons from sexual orientation discrimination.[41] The Court held the amendment violated the Equal Protection Clause.[42] The Court first recognized that the "bare desire to harm a politically unpopular group" is not a legitimate government interest and thus legislative classifications formed for that purpose do not survive even rational basis scrutiny.[43] From there, the Court held the amendment violated the Equal Protection Clause because it reflected animosity towards, and a simple desire to harm, gay and lesbian persons.[44] While the Court seemingly applied a less deferential version of rational basis, the Court did not hold sexual orientation classifications

37. BARTLETT ET AL., *supra* note 36, at 75.

38. Robinson, *supra* note 8, at 164–65; *see also* Jack B. Harrison, *On Marriage and Polygamy*, 42 OHIO N.U. L. REV. 89, 126–30 (2015) (noting that *Romer*, *Lawrence*, and *Windsor* do not adequately explain the standard of review that applies).

39. 517 U.S. 620 (1996).

40. *See* Katherine Erickson, *Harvey Milk and Judicial Review: The End of Rational Basis with Bite, and LGBT Schools, Too?*, 41 N.Y.U. REV. L. & SOC. CHANGE 143, 154–55 (2017). Scholars have referred to this heightened level of review as "rational basis with a bite." *Id.*; Robinson, *supra* note 8, at 165. *See generally* Brendan Beery, *Rational Basis Loses Its Bite: Justice Kennedy's Retirement Removes the Most Lethal Quill from LGBT Advocates' Equal Protection Quiver*, 69 SYRACUSE L. REV. 69 (2019) (arguing LGBTQ advocates will have more difficulty proceeding under the "rational basis with a bite" framework after Justice Kennedy's retirement); Michael J. Higdon, *Queer Teens and Legislative Bullies: The Cruel and Invidious Discrimination Behind Heterosexist Statutory Rape Laws*, 42 U.C. DAVIS L. REV. 195, 230–38 (2008).

41. *Romer*, 517 U.S. at 623–24.

42. *Id.* at 632.

43. *Id.* at 634–35 (quoting Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).

44. *Id.*

necessarily receive rational basis review under *Carolene Products* or otherwise.[45]

In *Lawrence v. Texas*,[46] the Court further muddled its equal protection framework as applied to sexual orientation classifications.[47] Texas passed a law criminalizing same-sex intercourse.[48] The Court struck down the law, explaining that individuals have a "liberty" interest "in deciding how to conduct their private lives in matters pertaining to sex" and thus that the law violated the Due Process Clause.[49] The Court implied but did not hold that *Romer*'s reasoning rendered the law unconstitutional under the Equal Protection Clause as well; though, the Court again did not identify the tier of scrutiny that applies to sexual orientation classifications.[50]

Next, in *United States v. Windsor*,[51] Congress passed the Defense of Marriage Act (DOMA), which in part defined marriage as only between heterosexual partners.[52] The Court held DOMA's definition of marriage was unconstitutional on due process grounds.[53] The Court applied *Romer* and concluded Congress defined marriage under DOMA specifically to harm persons based on their sexual orientation.[54] Though, as in *Lawrence*, the Court did not elucidate whether it decided the case on equal protection grounds as well, and again, the Court did not define a level of scrutiny for sexual orientation classifications.[55]

In many ways, the Supreme Court had a perfect opportunity to clarify its equal protection framework for sexual orientation

45. *See id.* at 640 n.1 (Scalia, J., dissenting) ("The Court evidently agrees that 'rational basis'—the normal test for compliance with the Equal Protection Clause—is the governing standard.").

46. 539 U.S. 558 (2003).

47. Harrison, *supra* note 38, at 129.

48. *Lawrence*, 539 U.S. at 563.

49. *Id.* at 572.

50. *See id.* at 574–75. Justice O'Connor agreed the law was unconstitutional but on equal protection grounds only. *Id.* at 579 (O'Connor, J., concurring) (applying rational basis scrutiny). Justice O'Connor repeated *Romer*'s holding that moral disapproval of a class of persons is not a legitimate government interest and thus the law was unconstitutional because the Texas legislature enacted the statute specifically to harm persons based on their sexual orientation. *Id.* at 583–84.

51. 570 U.S. 744 (2013).

52. *Id.* at 752.

53. *Id.* at 769–70.

54. *Id.* at 770–75.

55. *Id.* at 793 (Scalia, J., dissenting) ("[I]f this is meant to be an equal-protection opinion, it is a confusing one. The opinion does not resolve and indeed does not even mention . . . whether, under the Equal Protection Clause, laws restricting marriage to a man and a woman are reviewed for more than mere rationality.").

classifications in 2015 when it decided *Obergefell v. Hodges*.[56] In *Obergefell*, the issue was whether the Fourteenth Amendment guarantees to same-sex couples the right to marry.[57] The Court held it does.[58] The Court explained that there are four important reasons marriage is a fundamental right and that these principles "apply with equal force to same-sex couples."[59] Namely: (1) marriage permits parties to exercise personal autonomy and expression; (2) marriage allows parties to express their commitment to each other; (3) marriage safeguards children of the married parties; and (4) marriage is a "keystone of our social order," conveying social and legal benefits.[60] As it had done in *Lawrence* and *Windsor*, the Court explained that liberty under the Due Process Clause and equality as protected by the Equal Protection Clause are closely related.[61] The Court described that denying liberty based on arbitrary classifications—such as sexual orientation—is a denial of due process.[62] Therefore, the Court held the government may not prohibit same-sex marriage because to do so is to deny liberty on the basis of an unfair classification.[63]

Unfortunately, the Court in *Obergefell* yet again failed to apply an ordinary equal protection analysis, and Chief Justice Roberts noted this error in his dissent.[64] While the Court identified that the laws at issue treated persons differently with respect to marriage based on their sexual orientation, it did not apply a usual equal protection analysis. To do so, the Court would have analyzed sexual orientation classifications under the *Carolene Products* framework, and it would have determined whether such classifications employ suspect, quasi-suspect, or non-suspect criteria. Finally, the Court would have considered whether the states' laws at issue in the case were sufficiently tailored under the applicable level of scrutiny. This

56. 576 U.S. 644 (2015).

57. *Id.* at 656. Prior to *Obergefell*, Kentucky, Michigan, Ohio, and Tennessee defined marriage as necessarily between heterosexual partners and thus prevented same-sex couples from marrying. *Id.* at 653.

58. *Id.* at 680.

59. *Id.* at 665.

60. *Id.* at 665–71.

61. *Id.* at 672–75.

62. *Id.* at 673.

63. *Id.*

64. *Id.* at 706–07 (Roberts, C.J., dissenting) ("Absent from this portion of the opinion, however, is anything resembling our usual framework for deciding equal protection cases.").

traditional equal protection analysis is as absent from *Obergefell* as it was from *Romer*, *Lawrence*, and *Windsor*.[65]

Scholars have contemplated the meaning of this line of cases. Sunstein contends *Romer* simply applied rational basis scrutiny and found that the laws served no legitimate government purpose.[66] On the other hand, Robinson contends these cases established that sexual orientation classifications are subject to a unique level of scrutiny, separate from the traditional three-tier equal protection framework.[67] This scholarly debate emphasizes that these cases only confused rather than clarified the applicable level of scrutiny for sexual orientation classifications.

This Article does not seek to question the result or reasoning in *Romer* through *Obergefell*. Rather, this Article highlights that the Court missed numerous opportunities to define the applicable level of scrutiny for sexual orientation classifications (and possibly by analogy, transgender classifications). What is more, the Court has provided no guidance since *Obergefell* despite that such direction would aide lower courts in adjudicating their equal protection cases involving LGBTQ classifications. In the meantime, the lower courts have inconsistently analyzed LGBTQ classifications.

C. Classifications Based on Sexual Orientation and Transgender Status: Circuit Court Jurisprudence

While the Supreme Court has refused to establish an intelligible equal protection framework for LGBTQ classifications, the lower

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65. Commentators have equally pointed out *Obergefell*'s absence of an identifiable equal protection analysis. *See* Shannon Gilreath, *A Comprehensive Rethinking of Equal Protection Post-*Obergefell*: A Plea for Substantivity in Law*, 24 BARRY L. REV. 19, 45 (2019) ("Kennedy's opinion merely gestures to the equal protection framework; it does not engage it directly."); Higdon, *supra* note 8, at 1370–71; Andrew Koppelman, Bostock, *LGBT Discrimination, and the Subtractive Moves*, 105 MINN. L. REV. HEADNOTES 1, 36 n.205 (2020) (explaining that *Bowers*, *Romer*, *Lawrence*, *Windsor*, and *Obergefell* would have been simpler cases had the Court previously decided sexual orientation discrimination is simply sex discrimination and thus subject to intermediate scrutiny); Maier, *supra* note 35, at 238; Sobel, *supra* note 8, at 495; *see also* David Schraub, *The Siren Song of Strict Scrutiny*, 84 UMKC L. REV. 859, 860 (2016) (noting that *Lawrence*, *Windsor*, and *Obergefell* did not apply traditional equal protection analyses); Erwin Chemerinsky, *Gorsuch Wrote His 'Most Important Opinion' in SCOTUS Ruling Protecting LGBTQ Workers*, AM. BAR ASS'N J. (July 1, 2020, 8:00 AM), https://www.abajournal.com/news/article/chemerinsky-justice-gorsuch-just-wrote-his-most-important-opinion (noting that neither *Obergefell* nor *Windsor* described the applicable level of scrutiny for classifications based on sexual orientation).

66. Cass Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 61–62 (1996) (discussing *Romer* only).

67. Robinson, *supra* note 8, at 165.

courts have been decisive, though taking a variety of approaches.[68] The remainder of this Part discusses these approaches.

Most circuits apply rational basis scrutiny to sexual orientation classifications. Indeed, with the exception of the Second[69] and Ninth[70] Circuits, every circuit that has addressed the issue applies rational basis scrutiny.[71] Most of these circuits explain rational basis scrutiny applies because sexual orientation classifications are not based on suspect or quasi-suspect criteria.[72] Markedly, though, the Fourth, Seventh, and Eighth Circuits' rationale for applying rational basis scrutiny derives from *Bowers v. Hardwick*,[73] which recognized gay persons have no right to engage in same-sex intercourse.[74] Of course, *Lawrence* explicitly overruled *Bowers*, so it is unclear what conclusions these circuits would reach if they revisited the issue today.

Conversely, the Second and Ninth Circuits apply heightened scrutiny to sexual orientation classifications, though for different reasons. The Second Circuit holds sexual orientation classifications are quasi-suspect under *Carolene Products* and thus deserve intermediate scrutiny.[75] The Ninth Circuit reasons that sexual orientation classifications necessarily involve fundamental privacy

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68. Of course, some lower courts have avoided addressing the issue by applying the constitutional avoidance doctrine. *See, e.g.*, Whitman-Walker Clinic, Inc. v. U.S. Dep't of Health & Hum. Servs., 485 F. Supp. 3d 1, 25–26, (D.D.C. 2020).

69. Windsor v. United States, 699 F.3d 169, 185 (2d Cir. 2012) (applying intermediate scrutiny).

70. *See* Karnoski v. Trump, 926 F.3d 1180, 1200–01 (9th Cir. 2019) (quoting Witt v. Dep't of the Air Force, 527 F.3d 806, 819 (9th Cir. 2008)) (applying heightened scrutiny).

71. Ondo v. City of Cleveland, 795 F.3d 597, 609 (6th Cir. 2015); Kitchen v. Herbert, 755 F.3d 1193, 1233 (10th Cir. 2014) (citing Price-Cornelison v. Brooks, 524 F.3d 1103, 1113 n.9 (10th Cir. 2008)); Cook v. Gates, 528 F.3d 42, 61 (1st Cir. 2008); Thomasson v. Perry, 80 F.3d 915, 928 (4th Cir. 1996); Richenberg v. Perry, 97 F.3d 256, 261 (8th Cir. 1996); Ben-Shalom v. Marsh, 881 F.2d 454, 464–65 (7th Cir. 1989); Bailey v. Mansfield Indep. Sch. Dist., 425 F. Supp. 3d 696, 716 (N.D. Tex. 2019) (Fifth Circuit); Inniss v. Aderhold, 80 F. Supp. 3d 1335, 1358 (N.D. Ga. 2015) (Eleventh Circuit); Nat'l Ass'n for the Advancement of Multijurisdiction Practice v. Roberts, 180 F. Supp. 3d 46, 65 (D.D.C. 2015). The Third Circuit's precedent is unclear on the issue. *See* RHJ Med. Ctr., Inc. v. City of DuBois, 754 F. Supp. 2d 723, 773 (W.D. Pa. 2010).

72. *See, e.g.*, *Cook*, 528 F.3d at 61 ("As neither *Romer* nor *Lawrence* mandate heightened scrutiny . . . the district court was correct to analyze . . . under the rational basis standard.").

73. 478 U.S. 186 (1986).

74. *Thomasson*, 80 F.3d at 928–29; *Richenberg*, 97 F.3d at 261; *Ben-Shalom*, 881 F.2d at 464–65.

75. Windsor v. United States, 699 F.3d 169, 185 (2d Cir. 2012).

interests and consequently some form of scrutiny greater than rational basis (though not necessarily strict scrutiny) must apply.[76] However, the Ninth Circuit imposes a tier of scrutiny more exacting than intermediate scrutiny yet not as exacting as strict scrutiny. Specifically, under the Ninth Circuit's approach, the government has the burden of satisfying three elements to survive an equal protection challenge to a sexual orientation classification: (1) the government must offer an important government interest; (2) the classification must significantly further that interest; and (3) means less intrusive than the classification must have been unlikely to substantially further the government's interest.[77] While the first and second elements appear to be the requirements of intermediate scrutiny, the third element resembles the "narrowly tailored" requirement of strict scrutiny.

Regarding transgender classifications, every circuit that has addressed the issue applies a form of intermediate scrutiny.[78] The Ninth Circuit applies the same three-element framework explained above.[79] Some courts reason that transgender status is a quasi-suspect classification under *Carolene Products*[80] because: (1) approximately half of 1% of all American adults are transgender[81] and therefore transgender persons have little political power and are a

76. Witt v. Dep't of the Air Force, 527 F.3d 806, 817–19 (9th Cir. 2008).

77. *Id.* at 819 (explaining this three-part framework applies to as-applied rather than facial challenges).

78. *See* Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 608–09 (4th Cir. 2020); Karnoski v. Trump, 926 F.3d 1180, 1200 (9th Cir. 2019) (quoting *Witt*, 527 F.3d at 819); Glenn v. Brumby, 663 F.3d 1312, 1320 (11th Cir. 2011); Doe v. Mass. Dep't of Corr., No. 17-12255-RGS, 2018 WL 2994403, at *9 (D. Mass. June 14, 2018) (First Circuit); Evancho v. Pine-Richland Sch. Dist., 237 F. Supp. 3d 267, 288 (W.D. Pa. 2017) (Third Circuit); Doe v. Trump, 275 F. Supp. 3d 167, 208–10 (D.D.C. 2017); Bd. of Educ. v. U.S. Dep't of Educ., 208 F. Supp. 3d 850, 872–75 (S.D. Ohio 2016) (Sixth Circuit); Adkins v. City of New York, 143 F. Supp. 3d 134, 139 (S.D.N.Y. 2015) (Second Circuit). The Fifth, Eighth, and Tenth Circuits have not decided the issue. *See, e.g.*, Brown v. Dep't of Health & Hum. Servs., 8:16CV377, 2016 WL 6637937, at *4 (D. Neb. Nov. 9, 2016) (Eighth Circuit). Similarly, the Seventh Circuit has held as-applied, intermediate scrutiny was appropriate in at least one case; however, it has not universally adopted intermediate scrutiny. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1051 (7th Cir. 2017). The Tenth Circuit has held transsexual classifications are not suspect classifications and thus rational basis scrutiny applies to transsexual classifications. Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1227–28 (10th Cir. 2007).

79. *Karnoski*, 926 F.3d at 1200 (quoting *Witt*, 527 F.3d at 819).

80. *See* F.V. v. Barron, 286 F. Supp. 3d 1131, 1144–45 (D. Idaho 2018); *Adkins*, 143 F. Supp. 3d at 139.

81. *Grimm*, 972 F.3d at 594.

discrete group;[82] and (2) a person's transgender status does not affect the person's ability to contribute to society or in the workplace.[83] On the other hand, some jurisdictions apply intermediate scrutiny, reasoning (like *Bostock*) that transgender discrimination is simply a form of sex discrimination.[84] These jurisdictions reason that transgender discrimination necessarily involves classifications based on gender nonconformity and sex stereotyping.[85] Lastly, some courts apply intermediate scrutiny for both of the above reasons.[86] Confusingly, even courts that have explicitly adopted an intermediate scrutiny standard have not held steadfast in their decisions.[87]

While at least one Ninth Circuit case (later overturned) held transgender classifications constitute suspect classifications and thus warrant strict scrutiny,[88] courts rarely apply strict scrutiny to LGBTQ classifications. In fact, the Middle District of Florida suggested it is not aware of any courts that apply strict scrutiny to transgender classifications.[89] Strict scrutiny application for sexual orientation classifications is equally rare as discussed *supra*.

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82. *Evancho*, 237 F. Supp. 3d at 288; *see also* Flack v. Wis. Dep't of Health Servs., 328 F. Supp. 3d 931, 952–53 (W.D. Wis. 2018) (describing the history of transgender discrimination in healthcare and otherwise).

83. *Evancho*, 237 F. Supp. 3d at 288.

84. *See, e.g.*, Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1051 (7th Cir. 2017).

85. *See id.*; Glenn v. Brumby, 663 F.3d 1312, 1320 (11th Cir. 2011).

86. *See, e.g.*, Monegain v. Va. Dep't of Motor Vehicles, 491 F. Supp. 3d 117, 141–44 (E.D. Va. 2020); Doe v. Trump, 275 F. Supp. 3d 167, 208–10 (D.D.C. 2017); Bd. of Educ. v. U.S. Dep't of Educ., 208 F. Supp. 3d 850, 873–74 (S.D. Ohio 2016). In other words, these jurisdictions employ both the *Carolene Products* factors and the transgender discrimination as sex discrimination framework.

87. *Compare* Adkins v. City of New York, 143 F. Supp. 3d 134, 140 (S.D.N.Y. 2015) (conclusively holding intermediate scrutiny is the appropriate standard for LGBTQ classifications), *with* White v. City of New York, 206 F. Supp. 3d 920, 936 (S.D.N.Y. 2016) (assuming intermediate scrutiny is the appropriate standard but stating the court did not need to conclusively decide whether intermediate scrutiny is the appropriate standard for LGBTQ classifications).

88. *See* Karnoski v. Trump, No. C17-1297-MJP, 2018 WL 1784464, at *14 (W.D. Wash. Apr. 13, 2018), *rev'd*, 926 F.3d 1180 (9th Cir. 2019).

89. Adams *ex rel.* Kasper v. Sch. Bd. of St. Johns Cnty., 318 F. Supp. 3d 1293, 1311 n.36 (M.D. Fla. 2018); *see also* N.H. v. Anoka-Hennepin Sch. Dist. No. 11, 950 N.W.2d 553, 570 (Minn. Ct. App. 2020) ("[No] federal courts [have] determined that transgender persons qualify as a suspect class receiving strict scrutiny, and we decline to do so here."). *But see* McKibben v. McMahon, No. EDCV 14-2171 JGB (SPx), 2019 WL 1109683, at *8 (C.D. Cal. Feb. 28, 2019) ("Plaintiffs considered their liability case to be strong, especially since California *expressly applies strict scrutiny to claims of sexual orientation discrimination*." (emphasis added)).

Notwithstanding courts' opposition, academics continue to advocate for strict scrutiny for LGBTQ classifications under the *Carolene Products* framework.[90] Barry argues LGBTQ persons have immutable characteristics because they do not choose their sexual orientation or gender identity and that they often begin exhibiting characteristics of their sexual orientation or transitioning during early childhood.[91] Similarly, Barry asserts LGBTQ persons lack political power because they constitute only a small percentage of the population, and lawmakers have historically ignored LGBTQ persons.[92] Barry also claims LGBTQ persons have suffered a long history of discrimination via exclusion from public accommodations and employment and because LGBTQ practices have historically been illegal.[93] Finally, Barry maintains a person's LGBTQ status does not affect the person's ability to contribute to society in any meaningful way, and thus there is no basis for the person's differential treatment.[94] Despite this literature, courts refuse to hold that LGBTQ classifications are suspect classifications.[95]

II. *BOSTOCK*: TITLE VII AND BEYOND

This Part explores the Court's landmark decision in *Bostock v. Clayton County*, and it describes contexts outside of Title VII to which courts have already applied *Bostock*'s reasoning. Part III.A recounts the *Bostock* opinions in detail. Part III.B explains that courts and other government entities have applied *Bostock*'s reasoning in contexts outside of Title VII. With this background, it becomes possible to understand that *Bostock*'s reasoning should lead the Court

90. *See, e.g.*, Barry et al., *supra* note 16, at 551; Daniel J. Galvin, Jr., *There's Nothing Rational About It: Heightened Scrutiny for Sexual Orientation Is Long Overdue*, 25 WM. & MARY J. RACE, GENDER & SOC. JUST. 405, 424–31 (2019); Hutchinson, *supra* note 16, at 1030–32; Jennifer L. Levi & Kevin M. Barry, *Transgender Tropes & Constitutional Review*, 37 YALE L. & POL'Y REV. 589, 606 (2019); Powers, *supra* note 16, at 386.

91. Barry et al., *supra* note 16, at 560–61. *See generally* Edward Stein, *Immutability and Innateness Arguments About Lesbian, Gay, and Bisexual Rights*, 89 CHI.-KENT L. REV. 597 (2014) (analyzing arguments for and against the proposition that LGBTQ status is an immutable characteristic).

92. Barry et al., *supra* note 16, at 563–67.

93. *Id.* at 551–56.

94. *Id.* at 558–59; William N. Eskridge, Jr., Hardwick *and Historiography*, 1999 U. ILL. L. REV. 631, 673 (1999) ("[G]ay people are normal human beings and not kooky aliens. Scientists have found gay people to be biologically as sound and physiologically as functional as straight people.").

95. *See* N.H. v. Anoka-Hennepin Sch. Dist. No. 11, 950 N.W.2d 553, 570 (Minn. Ct. App. 2020).

to employ intermediate scrutiny in equal protection cases involving LGBTQ classifications.

A. Bostock v. Clayton County

1. The *Bostock* Majority Opinion

A detailed discussion of the *Bostock* opinions is necessary. Justice Gorsuch, the author of the *Bostock* majority opinion, spent little time discussing the facts giving rise to *Bostock*'s consolidated cases as the statutory construction question before the Court was primarily legal.[96] In short, three employees—two gay men and one transgender woman—worked for various government employers.[97] The employees were terminated after revealing their sexual orientation or transgender status, and the employees claimed their terminations were due to their sexual orientation or transgender status and therefore "because of [their] sex" under Title VII.[98]

A brief detour through the procedural history of *Bostock*'s consolidated cases is warranted to fully understand the majority opinion. Gerald Bostock, a gay man, brought his claim before the Eleventh Circuit. The Eleventh Circuit rejected Bostock's claim, relying on Eleventh Circuit precedent holding Congress intended Title VII to reach only discrimination based solely on an employee's sex (versus based on sex in addition to other factors).[99]

Meanwhile, Donald Zarda, a gay man, brought his claim in the Second Circuit. Unlike the Eleventh Circuit, the Second Circuit reversed the district court's grant of summary judgment for Zarda's employer.[100] The Second Circuit reasoned that sexual orientation is a function of sex because one cannot define a person's sexual orientation without first knowing the person's sex.[101] The Second Circuit further

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96. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1737 (2020) ("Few facts are needed to appreciate the legal question we face.").

97. *Id.* at 1737–38.

98. *Id.*

99. Bostock v. Clayton Cnty. Bd. of Comm'rs, 723 F. App'x 964, 964–95 (11th Cir. 2018) (citing Blum v. Gulf Oil Corp., 597 F.2d 936, 938 (5th Cir. 1979)). Courts have coined the latter approach "sex plus." The "sex plus" approach covers sexual orientation discrimination because sexual orientation discrimination is discrimination based on a person's sex "plus" another factor: the person's affectional or sexual preferences or feminine or masculine qualities. *See* Smith v. Liberty Mut. Ins. Co., 569 F.2d 325, 326–27 (5th Cir. 1978).

100. Zarda v. Altitude Express, Inc., 883 F.3d 100, 132 (2d Cir. 2018).

101. *Id.* at 113.

highlighted that Title VII's plain language broadly prohibits all discrimination where "sex" is a "motivating factor."[102] Alternatively, the Second Circuit reasoned that sexual orientation discrimination is per se sex discrimination because sexual orientation discrimination necessarily involves associational discrimination based on sex and sex stereotyping.[103] This is so, the Second Circuit explained, because sexual orientation discrimination necessarily involves a decision based on the employee's sexual preference for members of the opposite sex.[104] In passing, the Second Circuit rejected the argument that Congress did not intend the word "sex" in Title VII to prohibit sexual orientation discrimination; instead, the Second Circuit reasoned Congress intended Title VII to broadly prohibit all sex discrimination.[105]

Finally, Aimee Stephens, a transgender woman, brought her Title VII claim in the Sixth Circuit. The Sixth Circuit held Stephens's claim survived the employer's motion for summary judgment.[106] Like the Second Circuit, the Sixth Circuit reasoned transgender discrimination is necessarily sex discrimination.[107] The Sixth Circuit clarified that transgender discrimination necessarily rests on sex stereotypes because transgender discrimination is necessarily based on the employee's decision not to represent himself or herself in a manner stereotypically consistent with the employee's biological sex.[108] Unlike the Second Circuit, though, the Sixth Circuit did not reference associational discrimination.[109]

Turning now to the *Bostock* majority, the Court first explained it interprets statutes according to their plain meaning. When a statute's plain meaning is clear, a court need not consider legislative intent.[110] Indeed, the Court noted "only the words on the page constitute the law adopted by Congress and approved by the President."[111]

Applying these principles, the Court concluded Title VII's meaning is clear and unambiguous. Title VII renders it unlawful for an employer to "discriminate against" an employee "because of" the

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102. *Id.* at 115.

103. *Id.* at 119, 124. *See generally* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (recognizing that taking action adverse to an employee because of the employee's nonconformity with gender stereotypes is sex discrimination).

104. *See Zarda*, 883 F.3d at 120–22, 124.

105. *Id.* at 114–15.

106. Equal Emp. Opportunity Comm'n v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 600 (6th Cir. 2018).

107. *Id.* at 571.

108. *Id.* at 572.

109. *See generally id.*

110. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1738 (2020).

111. *Id.*

employee's "sex."[112] The Court explained the words "because of" unambiguously imply a "but-for" causation standard.[113] Sex is a but-for cause of discrimination when the discrimination depends at least in part on sex, even if the discriminator has more than one discriminatory purpose.[114] Thus, at least under Title VII, sex discrimination unambiguously broadly prohibits discrimination where sex is at least one but-for cause of the discrimination.[115] The Court next analyzed the word "discriminate" and concluded it, too, is unambiguous because the term clearly refers to intentional, differential treatment between similarly situated persons.[116] From there, the Court concluded Title VII as a whole unambiguously prohibits an employer from intentionally treating an employee differently if the differential treatment is at least in part caused by the employee's sex.[117]

Utilizing this reasoning, the Court stated its momentous holding, which resembles the Second and Sixth Circuits' holdings in *Zarda* and *Harris Funeral Homes*: LGBTQ discrimination is per se sex discrimination because *"it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."*[118] The Court provided examples to elucidate its rationale. The Court explained that when an employer fires a male employee because he is attracted to men, the employer necessarily fires the employee for a trait it would accept in a female employee and thus necessarily fires the male employee at least in part "because of" sex.[119] Likewise, the Court explicated that when an employer fires a transgender female employee because she represents herself as a female yet retains a cisgender female employee, the employer necessarily fires the transgender female employee based on a trait it accepts in the cisgender female employee and consequently fires the transgender female employee at least in part "because of" sex.[120]

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112. *See generally* 42 U.S.C. § 2000e-2 (2018).

113. *Bostock*, 140 S. Ct. at 1739. The Court noted a plaintiff may also establish causation under the "motivating factor" test, but the Court relied on the but-for causation standard instead because its analysis did not depend on the "motivating factor" test. *Id.* at 1739–40.

114. *Id.* at 1739.

115. *Id.* at 1741.

116. *Id.* at 1740–41.

117. *Id.* at 1741.

118. *Id.* (emphasis added).

119. *Id.*

120. *Id.* at 1741–42.

Consequently, the Court clarified that when an employer treats an employee differently because of the employee's LGBTQ status, the employer "necessarily and intentionally discriminates against that individual in part because of sex."[121] Like the Second Circuit in *Zarda*, the Court explained this conclusion is true regardless whether the employer intends to engage in sex discrimination because the employer must determine an employee's sex before determining the employee's sexual orientation or transgender status.[122]

To further support its rationale, the Court analogized to its decision in *Los Angeles Department of Water & Power v. Manhart*.[123] "In *Manhart*, an employer required women to make larger pension fund contributions than men" because women generally live longer than men.[124] The Court held the employer committed sex discrimination—even though the employer's primary motivation was to ensure women proportionately contributed to the pension fund—because the contribution requirement necessarily required the employer to consider employees' sex.[125] Like in *Manhart*, the Court reasoned an employer cannot discriminate against an LGBTQ employee without first considering the employee's sex, even if the employer has other, more significant motivations for its differential treatment.[126]

The Court rejected a number of the employers' arguments. First, the Court dismissed the argument that "sex" does not refer to transgender status or sexual orientation in common parlance.[127] The Court reasoned this argument ignores the Court's rationale that regardless whether an employer intends to engage in sex discrimination when discriminating on the basis of an employee's LGBTQ status, the employer necessarily does so.[128] Second, the Court dismissed the employers' argument that sexual orientation and transgender status do not appear as separate categories in Title VII's list of protected classes.[129] The Court agreed "sex" is a different concept than "sexual orientation" and "transgender status," but again, the Court explained discrimination on the basis of the latter categories necessarily involves sex discrimination.[130] Third, the Court refused to consider legislative history that suggests Congress did not

121. *Id.* at 1744.
122. *Id.* at 1742.
123. 435 U.S. 702 (1978).
124. *Bostock*, 140 S. Ct. at 1743 (citing *Manhart*, 435 U.S. at 707–08).
125. *Id.* (citing *Manhart*, 435 U.S. at 708, 711).
126. *Id.* at 1744.
127. *Id.* at 1745.
128. *Id.*
129. *Id.* at 1746–47.
130. *Id.*

intend for Title VII to prohibit LGBTQ discrimination.[131] Unlike the Eleventh Circuit's *Bostock* decision, the Court reasoned it could not consider legislative history because Title VII unambiguously prohibits LGBTQ discrimination on its face.[132]

In passing, the Court expressly disavowed that its holding addressed the issue of whether religious exemptions exist or whether the Court's reasoning applies in contexts beyond workplace discrimination, such as schools' sex-specific bathroom policies or dress codes.[133] Pertinently, the Court neither affirmed nor denied that its reasoning applies to the Equal Protection Clause or other federal prohibitions of sex discrimination beyond Title VII.

In sum, the *Bostock* majority made clear LGBTQ discrimination necessarily involves sex discrimination because it is impossible to determine a person's transgender status or sexual orientation without first knowing the person's sex. While *Bostock* is a Title VII opinion, its holding is revolutionary because it represents the first time the Court has recognized in any context that LGBTQ discrimination necessarily involves sex discrimination.

2. The *Bostock* Dissents

Justice Alito dissented, and he primarily argued the majority violated separation of powers principles by usurping Congress's legislative authority.[134] He explained that Congress has on numerous occasions considered adding textual categories for sexual orientation and gender identity classifications to Title VII, yet Congress has consistently refused to do so.[135] Justice Alito further averred the meaning of "sex" when Congress enacted Title VII is distinct from the meaning of sexual orientation and gender identity and thus that Congress did not intend Title VII to proscribe LGBTQ discrimination.[136]

Furthermore, Justice Alito rebuffed the majority's reasoning that an employer necessarily considers an employee's sex when discriminating on the basis of LGBTQ status. Specifically, Justice Alito exemplified that an employer can refuse to hire gay or lesbian

131. *Id.* at 1749.

132. *See id.* The Court also rejected various policy arguments on separation of powers grounds. *Id.* at 1753.

133. *Id.* at 1753–54.

134. *Id.* at 1754 (Alito, J., dissenting) ("There is only one word for what the Court has done today: legislation."). Justice Thomas joined Justice Alito's dissent.

135. *Id.* at 1755.

136. *Id.* at 1755–56.

employees without considering their sex simply by enacting a general policy against hiring homosexual applicants, regardless of their sex.[137]

Most pertinently, though, Justice Alito recognized the majority opinion would "have far-reaching consequences."[138] Justice Alito noted *Bostock* would cause future courts to construe all prohibitions of sex discrimination to include prohibitions of LGBTQ discrimination.[139] Justice Alito reasoned that over one hundred federal statutes preclude sex discrimination, including Title IX of the Civil Rights Act and the Fair Housing Act.[140] But Justice Alito also prophesized that future courts would expand the majority's holding beyond statutory contexts to constitutional contexts and more pertinently the equal protection context.[141] Prominently, Justice Alito declared, "[b]y equating discrimination because of sexual orientation or gender identity with discrimination because of sex, *the Court's decision will be cited as a ground for subjecting all three forms of discrimination to the same exacting standard of review.*"[142]

Justice Kavanaugh also dissented. While conceding the majority was literally correct that LGBTQ discrimination necessarily includes consideration of the employee's sex, he argued the ordinary meaning of "sex" does necessarily involve the separate concepts of sexual orientation and transgender discrimination.[143] Justice Kavanaugh emphasized that all of the first circuit courts to hear the issue concluded LGBTQ discrimination is not per se sex discrimination.[144]

Like Justice Alito, Justice Kavanaugh implied the majority's opinion would have far-extending consequences. Justice Kavanaugh explained the Court has never understood LGBTQ discrimination to be a form of sex discrimination.[145] Justice Kavanaugh reasoned, "*Romer* to *Lawrence* to *Windsor* to *Obergefell* would have been far easier to analyze and decide if sexual orientation discrimination were just a form of sex discrimination and therefore received the same

137. *Id.* at 1763.
138. *Id.* at 1778.
139. *Id.*
140. *Id.* at 1778, 1780.
141. *Id.* at 1783.
142. *Id.* (emphasis added).
143. *Id.* at 1824–25 (Kavanaugh, J., dissenting). Interestingly, Justice Kavanaugh analogized that while "tomatoes are literally 'the fruit of a vine,'" ordinary people consider them to be vegetables in common parlance. *Id.* at 1825 (quoting Nix v. Hedden, 149 U.S. 304, 307 (1893)).
144. *Id.* at 1833–34.
145. *Id.* at 1832.

heightened scrutiny as sex discrimination under the Equal Protection Clause."[146]

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As the remainder of this Part discusses, post-*Bostock* lower court decisions validated Justices Alito and Kavanaugh's dissenting opinions. In only a short period following *Bostock*, courts and other government actors quickly applied its reasoning well beyond the Title VII context.

B. Bostock*'s "Far-Reaching Consequences"*

Courts quickly applied Bostock's reasoning and conclusion outside of the Title VII context.[147] These courts reason that Bostock's importance is not in the word "sex" as it appears in Title VII or other federal statutes but rather in its reasoning that an entity cannot discriminate against a person based on the person's transgender status or sexual orientation without first considering the person's sex. And therefore, these courts explain, Bostock's holding is not cabined to the Title VII context. The remainder of this Part provides a sampling of the non-Title VII contexts to which courts have already extended Bostock.[148]

Courts quickly applied Bostock in Title IX cases. Title IX generally prohibits educational programs and organizations that receive federal funding from discriminating against persons, inter alia, "on the basis of sex."[149] Generally, Title IX discrimination occurs when an

146. *Id.* at 1833.

147. *See* Robert Kim, *The Historic* Bostock *Opinion and LGBTQ Rights in Schools*, PHI DELTA KAPPAN (Sept. 21, 2020), https://kappanonline.org/historic-bostock-opinion-scotus-lgbtq-rights-schools-kim/. Some commentators aver *Bostock*'s literalist approach to textualism could inhibit positive results from affirmative action cases. *See generally* Jeannie Suk Gersen, *Could the Supreme Court's Landmark L.G.B.T.-Rights Decision Help Lead to the Dismantling of Affirmative Action?*, NEW YORKER (June 27, 2020), https://www.newyorker.com/news/our-columnists/could-the-supreme-courts-landmark-lgbt-rights-decision-help-lead-to-the-dismantling-of-affirmative-action; Michael Vargas, *The Radical Implications of the Supreme Court's* Bostock *Decision*, SAN JOSÉ SPOTLIGHT (July 9, 2020), https://sanjosespotlight.com/vargas-the-radical-implications-of-the-supreme-courts-bostock-decision/ ("[*Bostock*] is remarkable in that it effectively opens the door to protect LGBTQ+ people under more than 100 federal laws currently on the books that ban sex discrimination.").

148. Part IV further elucidates the importance of these cases.

149. 20 U.S.C. § 1681(a) (2018).

educational institution treats "similarly situated" persons differently.[150]

One of the first cases to apply Bostock in the Title IX context was Grimm v. Gloucester County School Board.[151] Gavin Grimm was assigned a sex of female at birth but identified as male later in adolescence.[152] While in high school and during transitioning, Grimm visited a psychologist, and the psychologist recommended that Grimm be treated as a male while at school.[153] As a result, Grimm's high school initially permitted Grimm to use male restrooms.[154] However, community members complained, and the school board then mandated that all students use bathrooms according to their sex as assigned at birth.[155] Shortly thereafter, the school's principal prohibited Grimm from using male bathrooms at school.[156]

Grimm sued, arguing that the school board violated Title IX by discriminating on the basis of sex via its bathroom policy and by its failure to amend its records to reflect that Grimm is a male.[157] After years of proceedings,[158] the Fourth Circuit agreed, and, applying

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150. Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 618 (4th Cir. 2020). Note the identicality between Title IX's "similarly situated" requirement and the same "similarly situated" language in equal protection cases. *Compare id.* at 606, *with id.* at 618.

151. *Id.* at 616–17.

152. *Id.* at 597.

153. *Id.* at 598.

154. *Id.*

155. *Id.* at 598–600.

156. *Id.* at 600.

157. *Id.* at 601–03.

158. *Grimm*'s procedural history is rather complicated. Grimm initially sued in 2016, and the district court granted the school board's motion to dismiss. *See generally* G.G. *ex rel.* Grimm v. Gloucester Cnty. Sch. Bd., 132 F. Supp. 3d 736 (E.D. Va. 2015), *rev'd*, 822 F.3d 709 (4th Cir. 2016), *vacated*, 137 S. Ct. 1239 (2017) (mem.). The Eastern District of Virginia reasoned that Grimm's Title IX claim failed as a matter of law because a Department of Education regulation unambiguously permits schools to provide separate bathroom facilities on the basis of sex without running afoul of Title IX. *Id.* at 744–45; *see also* 34 C.F.R. § 106.33 (2000) ("A [school] may provide separate toilet, locker room, and shower facilities on the basis of sex . . . ."). The Fourth Circuit reversed, reasoning that the regulation is indeed ambiguous and that the Department of Education's own interpretation of the regulation as reflected in a "Guidance Document"—which required transgender persons to be treated consistently with their gender identity—was entitled to *Auer* deference. G.G. *ex rel.* Grimm v. Gloucester Cnty. Sch. Bd., 822 F.3d 709, 718–23 (4th Cir. 2016), *rev'd*, 137 S. Ct. 1239 (2017) (mem.). *See generally* Auer v. Robbins, 519 U.S. 452 (1997) (explaining *Auer* deference, which protects administrative agencies' reasonable interpretations of their own rules and regulations from judicial review). The Department of Education withdrew the Guidance Document and issued a new one, so the Supreme Court vacated the Fourth Circuit's judgment. Gloucester Cnty. Sch. Bd. v. G.G. *ex rel.* Grimm, 137 S. Ct. 1239

Bostock, the court held the bathroom policy and the school board's refusal to amend Grimm's records violated Title IX.[159] The court noted that while Bostock interpreted Title VII, it nevertheless governs Title IX claims.[160] Citing Bostock, the Fourth Circuit reasoned that transgender discrimination per se constitutes sex discrimination because "the discriminator is necessarily referring to the individual's sex to determine incongruence between sex and gender . . . ."[161] Thus, the school board could not exclude Grimm from male bathrooms at school without necessarily considering sex.[162] The court applied the same reasoning in its analysis regarding whether the board's refusal to amend Grimm's records violated Title IX.[163]

Grimm also asserted the school board's conduct violated the Equal Protection Clause, and while the Fourth Circuit applied intermediate scrutiny and held the school board violated the Clause, the court did not rely on Bostock. Instead, the Fourth Circuit explained heightened scrutiny applied to the school board's actions on three bases: (1) the bathroom policy directly employed a biological sex-based classification by requiring persons to use bathrooms corresponding to their biological sex; (2) the classification was based on gender nonconformity and thus was sex stereotyping; and (3) under the Carolene Products framework, transgender persons constitute "at least a quasi-suspect class."[164]

The Eleventh Circuit decided a similar case in Adams ex rel. Kasper v. School Board of St. Johns County.[165] Like in Grimm, Adams, a transgender male high school student, sought to use the male bathrooms at school.[166] When the high school refused to permit Adams to use the male bathrooms after complaints, Adams sued.[167] Adams argued the school's policy violated Title IX and the Fourteenth

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(2017) (mem.). Back before the Eastern District of Virginia, Grimm amended the complaint and eventually received summary judgment on the Title IX and equal protection claims. *See generally* Grimm v. Gloucester Cnty. Sch. Bd., 400 F. Supp. 3d 444 (E.D. Va. 2019). The school board appealed, bringing the case before the Fourth Circuit yet again. *See Grimm*, 972 F.3d at 603.

159. *Grimm*, 972 F.3d at 615.

160. *Id.* at 616.

161. *Id.* (emphasis added) (citing Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1741–42 (2020)).

162. *Id.* at 616–17.

163. *Id.* at 619.

164. *Id.* at 607–16.

165. 968 F.3d 1286 (11th Cir. 2020), *vacated and superseded sub nom. by* Adams v. Sch. Bd. of St. Johns Cnty., 3 F.4th 1299 (11th Cir. 2021).

166. *Id.* at 1295.

167. *Id.* at 1293–95.

Amendment, and the Eleventh Circuit agreed.[168] The court employed Bostock to hold Title IX's prohibition of sex discrimination per se also prohibits transgender discrimination.[169] The Eleventh Circuit provided, "Bostock teaches that, even if Congress never contemplated that Title VII could forbid discrimination against transgender people, the 'starkly broad terms' of the statute require nothing less. This reasoning applies with the same force to Title IX's equally broad prohibition on sex discrimination."[170] Unlike the Fourth Circuit, though, the Eleventh Circuit quoted Bostock to support its equal protection holding as well.[171] The court explained that discrimination against a transgender person due to the person's transgender status is per se sex discrimination under the Equal Protection Clause.[172]

Judge William Pryor, Jr. dissented. Regarding the equal protection claim, Judge Pryor agreed the bathroom policy warranted intermediate scrutiny.[173] But unlike the majority, Judge Pryor argued the bathroom policy withstood intermediate scrutiny because it substantially furthered children's privacy interests in using the restroom away from and not exposing their bodies to members of the opposite sex.[174] Judge Pryor also would have held the bathroom policy did not violate Title IX. He averred Title IX's implementing regulations expressly allow schools to maintain separate restrooms.[175] He then turned to the meaning of the word "sex" in Title IX and asserted Bostock's reasoning applied only in Title VII and he highlighted that Bostock itself expressly refused to decide questions regarding sex-separated bathrooms for purposes of both Title VII and Title IX.[176] Finally, Judge Pryor agreed with the Bostock dissenters, arguing the ordinary meaning of "sex" refers only to reproductive function and not gender identity.[177]

In Walker v. Azar,[178] the Eastern District of New York held Bostock's reasoning applies to sex discrimination as is prohibited in implementation of the Affordable Care Act.[179] Pursuant to the Affordable Care Act's rulemaking statute, the Department of Health

168. *Id.* at 1295, 1304, 1310.
169. *See id.* at 1304–10 (quoting Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1753 (2020)).
170. *Id.* at 1305 (citation omitted) (quoting *Bostock*, 140 S. Ct. at 1753).
171. *Id.* (quoting *Bostock*, 140 S. Ct. at 1741).
172. *Id.*
173. *Id.* at 1311–12 (Pryor, Jr., C.J., dissenting).
174. *Id.* at 1312.
175. *Id.* at 1320.
176. *Id.*
177. *Id.* at 1320–21.
178. 480 F. Supp. 3d 417 (E.D.N.Y. 2020).
179. *Id.* at 429.

and Human Services under the Trump Administration promulgated regulations to define activity that constitutes sex discrimination.[180] The regulations explained that Title IX's prohibition of sex discrimination would guide sex discrimination in the implementation of the Act.[181] At the same time, the regulations' preamble made clear the Department did not consider Title IX (and thus the Act) to prohibit transgender discrimination.[182]

Two transgender plaintiffs challenged the regulations and sought a preliminary injunction to prevent their enforcement.[183] In considering the plaintiffs' likelihood of success on the merits, the Eleventh Circuit held the regulations were "not in accordance with law" and therefore were arbitrarily adopted under the Administrative Procedure Act.[184] The court explained the regulations' preamble reflected the Department's erroneous legal conclusion that transgender discrimination is not per se sex discrimination under Title IX (and thus under the Act).[185] The court reasoned that while Bostock interpreted Title VII, its opinion also informed the meaning of sex discrimination under Title IX (and thus the Act).[186] All considered, then, the court held the regulations were likely invalid because, in adopting them, the Department failed to fully consider and understand the breadth of Title IX's (and thus the Act's) prohibition of sex discrimination as understood in Bostock.[187]

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180. *Id.* at 422.

181. *Id.* at 429.

182. *Id.* at 422–23. The Trump Administration rules succeeded Obama Administration rules that previously defined sex discrimination broadly to encompass transgender discrimination. *Id.* at 430. Specifically, the Trump Administration rules provided that "sex" under Title IX (and thus the Act) "refers to the biological binary of male and female." Nondiscrimination in Health and Health Education Programs or Activities, Delegation of Authority, 85 Fed. Reg. 37160, 37178 (June 19, 2020) (to be codified at 42 C.F.R. pt. 438, 440, 460; 45 C.F.R. pt. 86, 92, 147, 155, 156). The rules further specified that "discrimination on the basis of sex means discrimination on the basis of the fact that an individual is biologically male or female." *Id.* The rules reasoned that "[c]ontemporaneous dictionaries and common usage make clear that 'sex' in Title IX means biological sex." *Id.* at 37179.

183. *Walker*, 480 F. Supp. 3d at 424–25.

184. *Id.* at 428 (citing 5 U.S.C. § 706(2)(a) (2018)).

185. *Id.* at 429.

186. *Id.*

187. *See id.* at 430. Like *Grimm*, *Adams*, and *Walker*, other courts have found *Bostock* extends to Title IX cases.

> To be clear, the Court does not adopt Plaintiffs' contention that *Bostock* [rejects the Department's] position that Title IX [and

Title IX is not the only context in which courts have applied Bostock beyond the Title VII context; as Justice Alito predicted, courts have applied Bostock in Fair Housing Act (FHA) cases, as well.[188] The FHA renders unlawful discriminationagainst persons in the sale or rental of housing "because of . . . sex . . . ."[189] In Birdo v. Duluky,[190] the plaintiff alleged certain defendants discriminated against him in the terms of his housing because he was a heterosexual male.[191] The District of Minnesota assumed (without holding) that the FHA forbids sexual orientation discrimination.[192] In so assuming, the court cited Bostock and noted by analogy that Bostock applies in the FHA context because both Title VII and the FHA prohibit sex discrimination.[193] Other post-Bostock cases have held the FHA prohibits LGBTQ discrimination as well.[194]

Federal courts are not alone in recognizing Bostock's extra-Title VII reach. Recently, the Michigan Department of Insurance and Financial Services issued a bulletin explaining that its statutes and

> Obamacare] do not prohibit [transgender discrimination] . . . . It is sufficient . . . to determine that *Bostock, at the very least, has significant implications for the meaning of Title IX's prohibition of sex discrimination*, and that it was arbitrary and capricious for [the Department to implement its rule] without even acknowledging—let alone considering—the Supreme Court's reasoning or holding.

Whitman-Walker Clinic, Inc. v. U.S. Dep't of Health & Hum. Servs., 485 F. Supp. 3d 1, 42 (D.D.C 2020) (emphasis added). In *Whitman-Walker Clinic*, the D.C. Circuit avoided defining the appropriate level of scrutiny for LGBTQ classifications, and it refused to decide whether the regulation violated the Equal Protection Clause. *Id.* at 54. The D.C. district court dodged the equal protection issue by reasoning that it had already held the regulation was arbitrarily enacted and thus violated the Administrative Procedure Act, and therefore, it did not need to address the constitutional issue. *Id.* at 53–54. This exemplifies that some lower courts cower under the constitutional avoidance doctrine to avoid defining the level of scrutiny that applies to LGBTQ classifications.

188. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1780 (2020) (Alito, J., dissenting).

189. 42 U.S.C. § 3604(a) (2018); *see also id.* § 3604(b) (outlawing discrimination "in the terms, conditions, or privileges of sale or rental" of housing "because of . . . sex").

190. No. 20-CV-1108 (SRN/HB), 2020 WL 5549115 (D. Minn. Aug. 27, 2020).

191. *Id.* at *1.

192. *Id.* at *3.

193. *Id. Birdo* recognized that before *Bostock*, courts were split regarding whether the FHA prohibits sexual orientation discrimination. *Id.* (citing Walsh v. Friendship Vill. of S. Cty., 352 F. Supp. 3d 920, 926 (E.D. Mo. 2019)). Thus, *Birdo*'s assumption after *Bostock* that the FHA prohibits sexual orientation is arguably acquiescence that *Bostock*'s reasoning applies to the FHA. The court dismissed the plaintiff's claims, though, because the plaintiff did not plausibly plead them. *Id.* at *4.

194. *See, e.g.*, Scutt v. Maui Fam. Life Ctr., No. 20-00375 JAO-KLM, 2020 WL 5579549, at *2 (D. Haw. Sept. 17, 2020) (implying that the FHA proscribes sexual orientation discrimination).

rules that prohibit sex discrimination necessarily also prohibit LGBTQ discrimination.[195] The bulletin noted that Bostock supports its conclusion.[196] The discrimination prohibitions encompassed within the Department's statutes and rules apply in broad-sweeping contexts.[197]

These instances alone provide ample evidence that courts will inevitably use Bostock to apply heightened scrutiny to LGBTQ classifications in equal protection cases. But even more persuasive is the fact that courts have already begun analyzing, citing, and applying Bostock in equal protection cases themselves.

As discussed earlier, the Eleventh Circuit in Adams applied Bostock in holding intermediate scrutiny applies to transgender classifications.[198] The Eleventh Circuit explained transgender discrimination is sex discrimination and thus intermediate scrutiny applies to transgender classifications because those classifications are based on a person's nonconformity with sex or gender stereotypes.[199]

Similarly, in Monegain v. Virginia Department of Motor Vehicles,[200] the Eastern District of Virginia quoted Bostock in holding LGBTQ classifications are subject to intermediate scrutiny.[201] Monegain was a transgender female who worked at the Virginia Department of Motor Vehicles.[202] Monegain's supervisor allegedly required Monegain to wear male clothing.[203] Monegain alleged this dress code violated, inter alia, the Equal Protection Clause because it discriminated based on transgender status.[204]

The Eastern District of Virginia concluded Monegain stated an equal protection claim.[205] In finding Monegain alleged sufficient facts to show differential treatment from similarly situated individuals, the court explicitly relied on Bostock.[206] The court repeated Bostock's reasoning that "it is impossible to discriminate against a person for

195. MICH. DEP'T OF FIN. & INS. SERVS., IN THE MATTER OF: USE OF THE TERM "SEX" IN STATUTES AND RULES, BULL. NO. 2020-34-INS (2020), 2020 WL 4754089.

196. *Id.*

197. *Id.* (citing MICH. COMP. LAWS § 493.12(4) (2018); MICH. COMP. LAWS § 500.2027 (1998); *id.* § 550.940(h); MICH. COMP. LAWS § 550.54 (1984)).

198. Adams *ex rel.* Kasper v. Sch. Bd. of St. Johns Cnty., 968 F.3d 1286, 1296 (11th Cir. 2020) (quoting Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1741 (2020)).

199. *Id.*

200. 491 F. Supp. 3d 117 (E.D. Va. 2020).

201. *Id.* at 142 (quoting *Bostock*, 140 S. Ct. at 1741).

202. *Id.* at 126.

203. *Id.* at 128.

204. *Id.* at 130.

205. *Id.* at 131.

206. *Id.* at 141–43 (quoting *Bostock*, 140 S. Ct. at 1741).

being homosexual or transgender without discriminating against that individual based on sex."[207] From there, the court explained the dress code policy discriminated on the basis of sex under the Equal Protection Clause and thus intermediate scrutiny applied because the dress code "necessarily rest[ed] on a sex classification."[208]

III. *BOSTOCK*'S INEVITABLE EXTENSION TO THE EQUAL PROTECTION CLAUSE

Under *Bostock*, LGBTQ discrimination is sex discrimination under Title VII because, for example, an employer cannot discriminate against a male employee on the basis of his sexual orientation without first considering his sex. Likewise, under the Equal Protection Clause, a discriminator cannot discriminate against a male "similarly situated" with a female based on the male's sexual orientation without first determining the male's sex. Consequently, this Article argues intermediate scrutiny should apply to LGBTQ classifications in equal protection cases because, as *Bostock* recognizes, LGBTQ discrimination is a type of sex discrimination, which itself warrants intermediate scrutiny. Part III.A explains this thesis in further detail. Part III.B addresses anticipated counterarguments.

A. A Call for Intermediate Scrutiny for LGBTQ Classifications after Bostock

"Sometimes small gestures can have unexpected consequences."[209]

Justice Gorsuch used these words to set the stage for the conclusion that Congress's "small gesture" of using the word "sex" in Title VII had the unintended consequence of proscribing sexual orientation and transgender discrimination. True, the *Bostock* majority decision is by no account a small gesture, but its reasoning will likely have positive, unexpected consequences for LGBTQ equal protection litigants.

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207. *Id.* at 142 (quoting *Bostock*, 140 S. Ct. at 1741).

208. *Id.* at 143–44 (quoting Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 610–11 (4th Cir. 2020)). Alternatively, the court found it would be appropriate to apply intermediate scrutiny even it had not followed *Bostock*'s logic because transgender classifications warrant quasi-suspect criteria under the *Carolene Products* framework. *Id.*

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

As discussed in Part I, the state of the Equal Protection Clause as applied to LGBTQ classifications is unsettled. While some argue the *Carolene Products* framework alone warrants heightened scrutiny for LGBTQ classifications, *Bostock* provides a more direct basis for persuading courts to apply heightened scrutiny to LGBTQ classifications. *Bostock* explains that LGBTQ discrimination is simply a type of sex discrimination. Because courts apply intermediate scrutiny to sex-based classifications, then, courts equally should apply intermediate scrutiny to sexual orientation and transgender classifications. Sex discrimination is sex discrimination is sex discrimination.

To illustrate, consider the current equal protection framework surrounding national origin discrimination. Classifications based on national origin are subject to strict scrutiny.[210] Envision persons from three nations: Russia, North Korea, and Australia. A statutory classification that disadvantages persons from North Korea is subject to strict scrutiny just as a statutory classification that disadvantages persons from Russia or Australia. The fact that these origins are themselves distinct from each other does not yield differential treatment for classifications based on each individually. Instead, each classification receives equal, strict scrutiny treatment because each classification is at its heart a form of national origin discrimination.

Likewise, after *Bostock* and pursuant to its plain language, sex discrimination (based on biological differences and gender stereotyping), sexual orientation discrimination, and transgender discrimination are all simply forms of sex discrimination. Accordingly, courts should apply the same level of scrutiny to LGBTQ classifications that they apply to sex classifications generally. If the characteristic that warrants intermediate scrutiny is "sex discrimination" rather than the particular form of sex discrimination (e.g., traditionally understood sex discrimination, discrimination based on gender nonconformity, sexual orientation discrimination, transgender discrimination, etc.), then there is no reason courts should treat each of these particular forms of sex discrimination differently. Again, sex discrimination is sex discrimination is sex discrimination. Therefore, the same equal protection principles that currently apply to sex discrimination should apply to LGBTQ discrimination.

To further understand why *Bostock*'s reasoning applies to equal protection cases, one should understand that Title VII and the Equal

210. Clark v. Jeter, 486 U.S. 456, 461 (1988).

Protection Clause are intimately associated. Plaintiffs often bring claims under both laws for the same discriminatory conduct.[211] In fact, claims under both Title VII and the Equal Protection Clause require that "similarly situated" persons receive different treatment. Furthermore, members of the Court have explained that, in some instances, the requirements of Title VII and the Equal Protection Clause are identical.[212] For example, the Sixth Circuit recognizes that the required showing for a Title VII violation under a disparate treatment theory perfectly mirrors the required showing for an Equal Protection Clause violation.[213] Moreover, the Second Circuit has recognized that sex stereotyping constitutes a discriminatory motive in an Equal Protection Clause case just as it reflects discriminatory intent in Title VII cases.[214] This close connection between Title VII and the Equal Protection Clause's intent requirements suggests courts must consider each body of law when interpreting the other. Consequently, *Bostock*'s holding—which relates to the intent requirement under Title VII—should inform the Equal Protection Clause's meaning, which also has an intent requirement that courts have held is coequal with Title VII's intent requirement.

It is important to note that this Article's argument that LGBTQ classifications are per se sex classifications and thus deserve intermediate scrutiny is more likely to be successful than the alternative argument, which is that LGBTQ classifications utilize suspect or quasi-suspect criteria under *Carolene Products*. This is so because the Court has refused to identify any new suspect or quasi-suspect classes for about fifty years.[215] Even if courts applied *Carolene*

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211. *See, e.g.*, DeFrancesco v. Ariz. Bd. of Regents, No. CV-20-00011-TUC-CKJ, 2020 WL 4673165, at *3 (D. Ariz. Aug. 12, 2020) (alleging the plaintiff's termination due to his sexual orientation violated both Title VII and the Equal Protection Clause).

212. *See* Johnson v. Transp. Agency, 480 U.S. 616, 649 (1987) (O'Connor, J., concurring).

213. Smith v. City of Salem, 378 F.3d 566, 576–77 (6th Cir. 2004).

214. Back v. Hastings on Hudson Union Free Sch. Dist., 365 F.3d 107, 119 n.9 (2d Cir. 2004).

215. *See* Raelynn J. Hillhouse, *Reframing the Argument: Sexual Orientation Discrimination as Sex Discrimination Under Equal Protection*, 20 GEO. J. GENDER & L. 49, 51–54 (2018) (explaining that the argument that sexual orientation discrimination is per se sex discrimination is more likely to be successful in convincing courts to apply heightened scrutiny to sexual orientation-based classifications than other approaches). In the meantime, the Court has refused to recognize any of the following as suspect classifications: classifications based on wealth, age, mental impairment, status as a close relative, and fetal status. *See, e.g.*, Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313 (1976) (age); City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 442–46 (1985) (mental impairment). *See generally* KUSHNER, *supra* note 33, § 9:5 (discussing all classifications the Supreme Court and lower courts have recognized as suspect, quasi-suspect, or non-suspect).

Products, courts very well may find LGBTQ classifications are not suspect (or even-quasi suspect),[216] especially considering courts inconsistently apply the *Carolene Products* factors due to their unclear meaning.[217] Conversely, though, framing the argument as this Article frames it permits courts to apply heightened scrutiny to LGBTQ classifications without needing to revitalize or even address the *Carolene Products* framework.

Finally, the law should be consistent where possible as such promotes confidence and trust in the judicial system.[218] Here, it would be inconsistent for courts to hold *Bostock*'s reasoning applies in the Title VII context but not in other contexts. If LGBTQ discrimination simply is sex discrimination under *Bostock*'s logic, there is no reason courts should hold that sex discrimination does not encompass LGBTQ discrimination in all contexts. Indeed, to do so would be to inconsistently apply the law, which would lead judicial skeptics to question the competence of the courts (and perhaps heightened scrutiny for sex-based classifications altogether).

B. Addressing Counterarguments

1. Bostock Does Not Apply to Equal Protection Cases Because Unlike Title VII, the Equal Protection Clause Does Not Contain the Word "Sex."

A critic may argue *Bostock* does not support any conclusion with respect to the Equal Protection Clause. This critic would likely assert *Bostock*'s holding is limited to Title VII cases because of *Bostock*'s heavy focus on Title VII's text.[219] It is true some judges have held

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216. *See generally* Stein, *supra* note 91 (analyzing arguments for and against the proposition that LGBTQ status is an immutable characteristic).

217. Hutchinson, *supra* note 16, at 1003, 1006, 1013.

218. *See* Paul M. Collins, Jr., *The Consistency of Judicial Choice*, 70 J. POL. 861, 861 (2008) ("[T]he desire for consistency . . . contribute[s] to a more just society as it reduces the appearance of inequality in the administration of justice . . . .").

219. It is true the Court has stated Title VII's requirements are not always coextensive with constitutional requirements. *See* Johnson v. Transp. Agency, 480 U.S. 616, 632 (1987) ("[W]e do not regard as identical the constraints of Title VII and the Federal Constitution *on voluntarily adopted affirmative action plans*." (emphasis added)). However, the Court in *Johnson* specifically referred to affirmative action cases. *See id.* And Justice O'Connor opined in her concurring opinion that Title VII's requirements were indeed coextensive with the Equal Protection Clause's requirements in that case. *See id.* at 649 (O'Connor, J., concurring).

Bostock's analysis is limited to Title VII.[220] Admittedly, this counterargument has some appeal: How can an analysis specific to a statute's text using the word "sex" support finding that intermediate scrutiny applies to LGBTQ classifications in equal protection cases when the Equal Protection Clause does not use the word "sex"?

While a few courts suggest *Bostock* is limited to Title VII, the fact that several courts and other government bodies have already held *Bostock*'s analysis is *not* limited to Title VII demonstrates that *Bostock*'s reasoning is not in fact limited to Title VII.[221] Indeed, applying *Bostock*, many courts have already held LGBTQ discrimination is sex discrimination under Title IX, the FHA, other statutes, and even the Equal Protection Clause.[222] It is illustrative that these courts have extended *Bostock* to equal protection cases despite that the word "sex" does not appear in the Equal Protection Clause.

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220. *See, e.g.*, Adams *ex rel.* Kasper v. Sch. Bd. of St. Johns Cnty., 968 F.3d 1286, 1320 (11th Cir. 2020) (Pryor, Jr., C.J., dissenting) ("[A]ny guidance *Bostock* might . . . provide about whether Title VII allows for sex-separated bathrooms does not extend to Title IX . . . ."); Scutt v. Maui Fam. Life Ctr., No. 20-00375 JAO-KJM, 2020 WL 5579549, at *3 n.4 (D. Haw. Sept. 17, 2020); Bollfrass v. City of Phoenix, No. CV-19-04014-PHX-MTL, 2020 WL 4284370, at *1 (D. Ariz. July 27, 2020). It is important to rebut the *Scutt* case. In *Scutt*, the law at issue was Title VI. *See Scutt*, 2020 WL 5579549, at *3. Unlike other statutes to which courts have extended *Bostock*, and unlike the Equal Protection Clause, Title VI does not prohibit sex discrimination at all (and thus by *Bostock*'s extension, LGBTQ discrimination). *Id. See generally* 42 U.S.C. § 2000d (2018) ("No person in the United States shall, on the ground of *race, color, or national origin*, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." (emphasis added)).

221. Commentators, too, have concluded *Bostock*'s logic extends to the Equal Protection Clause. *See* Chemerinsky, *supra* note 65; D. Jean Veta & Phillip S. May, *Viewpoint: Supreme Court Ruling Is One Step in Journey for LGBTQ Protections*, WASH. BUS. J. (June 19, 2020, 3:26 PM), https://www.bizjournals.com/washington/news/2020/06/19/viewpoint-supreme-court-lgbtq-antidiscrimination.html.

222. *See, e.g.*, Monegain v. Va. Dep't of Motor Vehicles, 491 F. Supp. 3d 117, 141–43 (E.D. Va. 2020); N.H. v. Anoka-Hennepin Sch. Dist. No. 11, 950 N.W.2d 553, 570 (Minn. Ct. App. 2020) ("[In *Bostock*], the Supreme Court . . . recently equated transgender discrimination with sex discrimination . . . and it previously held that classifications based on . . . sex . . . receive intermediate scrutiny . . . . *We hold that the intermediate-scrutiny standard applies to an equal-protection claim of sexual-orientation discrimination* . . . ." (emphasis added)); Hecox v. Little, 479 F. Supp. 3d 930, 973–75 (D. Idaho 2020). True, the Minnesota Court of Appeals decided *N.H.* under a Minnesota Constitution equal protection claim. *N.H.*, 950 N.W.2d at 563. *See generally* MINN. CONST. art. I, § 2. Nevertheless, the Supreme Court of Minnesota has made clear the analysis that applies in Minnesota Constitution equal protection cases matches the analysis that applies in United States Constitution equal protection cases. Minn. Majority v. Mansky, 708 F.3d 1051, 1054 n.1 (8th Cir. 2013) (citing Tatro v. Univ. of Minn., 816 N.W.2d 509, 516 (Minn. 2012)).

A Congressional report released after *Bostock* regarding Congress's understanding of Title IX provides further support. It expresses that *Bostock*'s reasoning is not limited to the Title VII context.[223] The report explicitly recognizes that *Bostock*'s logic may extend to Title IX cases.[224] In fact, this report may lead Congress to amend Title IX and other federal statutes to abrogate *Bostock*'s potential applicability to them.[225] Thus, the report recognizes that *Bostock*'s logic is not confined to the word "sex" as it appears in a single statutory context.

Hearing this rebuttal, the critic will argue the fact that courts have extended *Bostock* to Title IX and the FHA is unsurprising given that those statutes, like Title VII, are statutes using the word "sex." But this counterargument equally misses the point. The importance of *Bostock* is not in the word "sex," which appears in these federal statutes. Rather, the importance is that *Bostock* represents the Court's first recognition that transgender and sexual orientation discrimination are simply forms of sex discrimination. Regardless whether the word "sex" appears in a statute or does not appear in the Equal Protection Clause, the Clause nevertheless prohibits sex discrimination and therefore prohibits LGBTQ discrimination to the same degree under *Bostock*'s logic that "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."[226]

Moreover, the argument that *Bostock*'s reasoning does not extend to the Equal Protection Clause because the Clause does not use the word "sex" yet extends to statutes using the word "sex" is self-defeating because every statute has a unique textual context. The Supreme Court has made clear on numerous occasions that identical words (even in the same statute) can have vastly different meanings depending on the given statutory context,[227] which itself depends on the statute's purpose.[228] And while Title VII, Title IX, and the FHA all prohibit sex discrimination, their individual purposes are unique.

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223. *See generally* JARED P. COLE, CONG. RES. SERV. LSB10531, TITLE IX'S APPLICATION TO TRANSGENDER ATHLETES: RECENT DEVELOPMENTS (2020).

224. *Id.* at 4.

225. *See id.* at 5.

226. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1741 (2020).

227. *See* Yates v. United States, 574 U.S. 528, 537–38 (2015) (collecting examples); *see also* Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 594–97 (2004) (explaining that the word "age" as it appears in two different provisions of the Age Discrimination in Employment Act has two separate meanings).

228. *Yates*, 574 U.S. at 538 (quoting Atl. Cleaners & Dyers, Inc. v. United States, 286 U.S. 427, 433 (1932)).

Accordingly, the reason *Bostock* applies to Title IX and the FHA is not because the statutes use the word "sex." Instead, *Bostock* extends to these statutes (and equally to the Equal Protection Clause) because of *Bostock*'s groundbreaking recognition that LGBTQ discrimination necessarily is sex discrimination. The *Bostock* majority may not have intended or expected courts to extend its holding to the Equal Protection Clause context, but, as the Court correctly stated, "sometimes small gestures can have unexpected consequences."[229]

The above arguments aside, one need not look further than *Bostock*'s dissents to understand why its reasoning applies in equal protection cases. Justice Alito himself noted *Bostock* would have implications not only for over one hundred statutes but also specifically for constitutional claims.[230] He asserted that "[b]y equating discrimination because of sexual orientation or gender identity with discrimination because of sex, the Court's decision will be cited as a ground for subjecting all three forms of discrimination to the same exacting standard of review [for purposes of equal protection]."[231] Justice Kavanaugh implicitly agreed.[232] Academics overwhelmingly agree.[233] And some courts have already verified Justice Alito's point.[234]

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

230. *Id.* at 1783 (Alito, J., dissenting).

231. *Id.*

232. *See id.* at 1832–33 (Kavanaugh, J., dissenting). Justice Kavanaugh did not specifically argue *Bostock*'s logic would apply in equal protection cases, but he asserted the Court had never before considered sexual orientation discrimination to be per se sex discrimination under the Equal Protection Clause or Title VII. *See id.*

233. *See* Brief of Amici Curiae Legal Scholars in Support of Equality in Support of Respondents at 5 n.11, 22, Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021) ("The Court's recent decision in *Bostock* . . . strongly suggests that sexual orientation merits intermediate scrutiny, as does sex discrimination."). The managing attorney for the Massachusetts Attorney General's Office, Amanda Hainsworth, wrote:

> *Bostock* . . . has potential implications for the standard of review that should be applied to federal equal protection claims involving discrimination against LGBTQ people . . . . [S]ex-based classifications have long been subject to intermediate scrutiny, and *Bostock*'s holding that discrimination against LGBTQ people is, at core, sex discrimination suggests that intermediate scrutiny should be applied to such claims moving forward.

Amanda Hainsworth, *Case Focus:* Bostock v. Clayton County, Georgia, *590 U.S. ___, 140 S. Ct. 1731 (2020)*, 64 BOS. BAR J. 22, 22, 24.

234. Some commentators have noted Justice Alito's dissent mimics Justice Scalia's dissent in *Windsor*, where Justice Scalia correctly predicted courts would use *Windsor*'s reasoning to set aside same-sex marriage laws. *See, e.g.*, Josh Blackman,

2. Why Not Strict Scrutiny?

This Article acknowledges scholarship calling for strict scrutiny application to LGBTQ classifications.[235] Whether LGBTQ classifications should receive strict scrutiny under the *Carolene Products* framework is in important issue but nevertheless one outside the scope of this Article. This Article merely argues intermediate scrutiny should apply to LGBTQ classifications under *Bostock's* reasoning: LGBTQ discrimination is sex discrimination, which itself receives intermediate scrutiny.

It is worth noting, though, a focus on the *Carolene Products*'s suspect classification framework could actually adversely affect LGBTQ advocates' cause in three important manners. First, the Court has refused to recognize any new suspect classifications under the *Carolene Products* framework in half a century, and leading commentators including Suzanne Goldberg believe the *Carolene Products* framework is a dead letter.[236] Accordingly, focusing on *Carolene Products* is wasted time and effort. Second, by distinguishing LGBTQ classifications from sex-based classifications––even in an effort to secure strict scrutiny for either—LGBTQ advocates risk undermining *Bostock*'s logic that LGBTQ discrimination is itself sex discrimination. Because LGBTQ activists already utilize *Bostock*'s reasoning to further LGBTQ rights,

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The Eleventh Circuit Grapples with Title IX, and the Equal Protection Clause, in the Wake of Bostock, VOLOKH CONSPIRACY (Aug. 8, 2020, 3:10 AM), https://reason.com/2020/08/08/the-eleventh-circuit-grapples-with-title-ix-and-the-equal-protection-clause-in-the-wake-of-bostock/; Thomas H. Prol, *'Virtually Certain': The* 'Bostock' *Promise of Full Equality for the LGBT Community*, N.J. L.J. (Aug. 7, 2020, 10:30 AM), https://www.law.com/njlawjournal/2020/08/07/virtually-certain-the-bostock-promise-of-full-equality-for-the-lgbt-community/. Also consider Justice Scalia's dissent in *Windsor*:

> It takes real cheek for today's majority to assure us, as it is going out the door, that a constitutional requirement to give formal recognition to same-sex marriage is not at issue here . . . . I promise you this: The only thing that will 'confine' the Court's holding is its sense of what it can get away with.

United States v. Windsor, 570 U.S. 744, 798 (2013) (Scalia, J., dissenting).

235. *See supra* Part I.C.

236. *See generally* Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481 (2004) (arguing for a single standard of review in equal protection cases).

undermining *Bostock* could be ruinous for their cause.[237] Finally, some commentators have identified that strict scrutiny does not truly protect and instead proactively harms members of suspect classes.[238] For example, Robinson has noted that when courts apply less than strict scrutiny to LGBTQ classifications, they tend to be even more skeptical of states' interests in the classifications than they are when considering racial classifications.[239] Robinson explains that persons of color and women often must demonstrate legislative malice whereas courts often presume animus under *Romer* when reviewing LGBTQ persons' claims.[240] Consequently, there is reason to believe intermediate scrutiny has benefits even over strict scrutiny application.[241]

CONCLUSION

The Court's landmark decision in *Bostock v. Clayton County* has shaken and will undoubtedly continue to shake the legal world for years to come. Champions of LGBTQ rights will continue to seek to extend *Bostock* to further their goals. One area of extension lies within the cloudiness surrounding treatment of LGBTQ classifications under the Equal Protection Clause. While *Romer* through *Obergefell* undoubtedly secured significant rights for the LGBTQ community, these cases only muddled the Court's equal protection framework as applied to LGBTQ classifications.

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237. This Article recognizes distinguishing LGBTQ classifications from sex-based classifications might cause the Court to consider LGBTQ persons to be members of a suspect class and thus apply strict scrutiny, which could be an even greater victory for LGBTQ rights activists. But this Article refuses to take a similar approach in light of the Court's recent indifference to the *Carolene Products* framework.

238. *See, e.g.*, Robinson, *supra* note 8, at 172; *see also* Alexander Bondarenko, *Between a Rock and a Hard Place: Why Rational Basis Scrutiny for LGBT Classifications Is Incompatible with Opposition to LGBT Affirmative Action*, 79 BROOK. L. REV. 1703, 1706–07 (2014). What is more, some scholars have argued sex-based classifications already receive a form of strict scrutiny encompassed within the "exceedingly persuasive justification" test expressed in *United States v. Virginia*. *See, e.g.*, Carline Marschilok et al., *Equal Protection*, 18 GEO. J. GENDER & L. 537, 563 (2017) (quoting Jason M. Skaggs, *Justifying Gender-Based Affirmative Action Under* United States v. Virginia*'s "Exceedingly Persuasive Justification" Standard*, 86 CALIF. L. REV. 1169, 1171, 1182–83 (1998)).

239. Robinson, *supra* note 8, at 173.

240. Robinson, *supra* note 8, at 173–74.

241. Scholars continue to debate this issue. Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1300–01 (2007); Robinson, *supra* note 8, at 173. *See generally* R. George Wright, *A Hard Look at Exacting Scrutiny*, 85 UMKC L. REV. 207 (2016). Again, these are merely observations and do not purport to conclusively allege that strict scrutiny is (or is not) appropriate for LGBTQ classifications.

Bostock provides an answer. It is difficult to disagree with Justice Alito's proposition that *Bostock*'s holding will have far-reaching legal ramifications. If, as a matter of logic, transgender and sexual orientation discrimination are simply forms of sex discrimination, there is little reason to treat LGBTQ classifications differently than sex classifications for any purpose, including under the Equal Protection Clause. The Court in *Bostock* may not have expected this extension, but as the Court recognized, small gestures can indeed have unexpected consequences.

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