

JUSTICE ALITO'S LAUNDRY LIST:
HIGHLIGHTS FROM APPENDIX C OF *BOSTOCK*
AND A ROADMAP FOR LGBTQ+ LEGAL ADVOCATES

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INTRODUCTION

In June of 2020, the Supreme Court released its opinion in *Bostock v. Clayton County*, with a six-Justice majority holding that the sex-based protections of the Civil Rights Act of 1964 also protected individuals based on their sexual orientation or gender identity.¹ Authored by Justice Gorsuch, the majority opinion relied on a textualist approach, reasoning that discriminating against a person based on sexual orientation or gender identity must include discrimination based on that individual's sex, thus triggering the text of the Civil Rights Act.² LGBTQ+³ advocates hailed the decision as a landmark for LGBTQ+ rights in the United States, on par with *Lawrence v. Texas* and *Obergefell v. Hodges*, which struck down anti-sodomy laws and enshrined the right to marry, respectively.⁴

Three Justices dissented in *Bostock*;⁵ Justices Alito and Kavanaugh wrote opinions taking issue with the majority's approach to a textualist reading of the Civil Rights Act.⁶ Textualism and its applications, however, are largely ancillary to the focus of this Note. Instead, Justice Alito's strategy in drafting his dissent, not merely his argument within it, raises several interesting issues worthy of examination.

Justice Alito's dissent is particularly lengthy, owing in part to the extensive appendices included with it.⁷ To underscore his contention that the majority's opinion has a wider-ranging impact than it

1. 140 S. Ct. 1731, 1753 (2020).

2. *Id.* at 1754.

3. This Note uses the terms "LGBTQ+," "sexual orientation," and/or "gender identity" to refer to the group of people impacted by *Bostock*. However, the author also recognizes that the reasoning behind the *Bostock* decision may not include people who identify as bisexual, pansexual, or outside the socially prevailing gender binary. See, e.g., Meredith Rolfs Severtson, Note, *Let's Talk About Gender: Nonbinary Title VII Plaintiffs Post-Bostock*, 74 VAND. L. REV. 1507, 1524-26, 1528 (2021). However, because no easy shorthand exists to refer only to exclusively same-sex-attracted individuals and transgender individuals as a single group, this Note will use the above terms, with apologies for those within the community whose ability to enjoy *Bostock*'s legal benefits is currently uncertain.

4. *Landmark Cases*, LAMBDA LEGAL, <https://www.lambdalegal.org/in-court/cases/landmark> [<https://perma.cc/J4BR-VAD3>].

5. *Bostock*, 140 S. Ct. at 1736-37.

6. *Id.* at 1754-56 (Alito, J., dissenting); *id.* at 1824 (Kavanaugh, J., dissenting).

7. *Id.* at 1784-1882 (Alito, J., dissenting).

perhaps considered, Justice Alito included in his Appendix C a list of over 150 federal statutes that prohibit discrimination because of sex.⁸ Based on the textualist view of the Civil Rights Act taken by the majority, Justice Alito reasoned that these federal statutes would now be subject to a similar analysis, which in his assessment was a grave threat and evidence of judicial overreach.⁹

Upon its release, some LGBTQ+ activists and legal advocates considered this something of an “own goal.”¹⁰ Justice Alito, not someone particularly sympathetic to legal efforts to enshrine LGBTQ+ rights,¹¹ nonetheless provided a roadmap to challenge myriad federal laws that could expand protections for LGBTQ+ people under the *Bostock* analysis.¹²

After a brief background on *Bostock* in Part I, the bulk of this Note seeks to examine Justice Alito’s *Bostock* dissent and its potential future usefulness for LGBTQ+ advocates. Part II will analyze Justice Alito’s dissent and Appendix C, arguing that his concerns about *Bostock*’s consequences across other federal statutes fall into three primary categories of usefulness. The remaining Parts will survey these categories, including the “small potatoes” in Part III, the “blockbusters” in Part IV, and the “under-the-radar” areas in Part V. Part V takes particular notice of potential applications of *Bostock*’s pro-LGBTQ+ approach to federal statutes that may fall outside of policy areas that typically engender advocates’ attention. It is this author’s hope that such a categorization can help scholars and advocates accurately gauge the impact of *Bostock* and the veracity of Justice Alito’s complaints. More importantly, however, this categorization will allow advocates to prioritize policy areas that have been largely overlooked as important potential battlegrounds to further expand LGBTQ+ legal protections post-*Bostock*.

8. *Id.* at 1791-96.

9. *Id.* at 1778.

10. See Colin Kalmbacher, ‘Pirate Ship’ Alito Scores Own Goal, Points Civil Rights Lawyers to Buried Treasure, LAW & CRIME (June 15, 2020, 6:43 PM), <https://lawandcrime.com/awkward/pirate-ship-alito-scores-own-goal-points-civil-rights-lawyers-right-to-buried-treasure/> [https://perma.cc/E7K5-K2QF].

11. See, e.g., Nina Totenberg, *Justices Thomas, Alito Blast Supreme Court Decision on Same-Sex Marriage Rights*, NPR (Oct. 5, 2020, 4:13 PM), <https://www.npr.org/2020/10/05/920416357/justices-thomas-alito-blast-supreme-court-decision-on-gay-marriage-rights> [https://perma.cc/7D45-UJMK].

12. Kalmbacher, *supra* note 10.

I. BACKGROUND ON *BOSTOCK V. CLAYTON COUNTY*

Bostock represented a major victory for LGBTQ+ legal advocates,¹³ who were unsure of how the Court would respond to their novel argument that sexual orientation and gender identity expression amounted to textual sex discrimination, rather than the traditional gender stereotyping and nonconformity doctrine used in employment discrimination cases.¹⁴ The major arguments in the case grappled with how to interpret the text of Title VII of the Civil Rights Act of 1964 (Title VII), a noteworthy exercise for a Court at least one of whose members has declared that “we’re all textualists now.”¹⁵ Interestingly, the Court’s textualists had a difference of opinion in what exactly that meant.¹⁶

A. Justice Gorsuch’s Majority Opinion

In placing *Bostock* on its docket, the Supreme Court consolidated three different cases from the circuit courts where employees had been fired solely based on either their sexual orientation or gender expression.¹⁷ The Second¹⁸ and Sixth¹⁹ Circuits held that firings of a gay skydiving instructor and transgender funeral home employee, respectively, constituted violations of Title VII. The Eleventh Circuit created a split when it found that Title VII did not prohibit such firings, affirming the district court’s decision dismissing the suit of Gerald Bostock after his termination from a county child welfare advocate position.²⁰

13. *Landmark Cases*, *supra* note 4.

14. See Naomi Schoenbaum, *The New Law of Gender Nonconformity*, 105 MINN. L. REV. 831, 832-35 (2020).

15. Diarmuid F. O’Scannlain, “We Are All Textualists Now”: *The Legacy of Justice Antonin Scalia*, 91 ST. JOHN’S L. REV. 303, 304 (2017) (quoting Justice Elena Kagan).

16. Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265, 266-67 (2020).

17. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1737-38 (2020).

18. *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 107, 132 (2d Cir. 2018) (en banc).

19. *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 566, 600 (6th Cir. 2018).

20. *Bostock v. Clayton Cnty. Bd. of Comm’rs*, 723 F. App’x 964, 964-65 (11th Cir. 2018) (per curiam); see *Bostock v. Clayton Cnty.*, No. 16-CV-1460, 2017 WL 4456898, at *1 (N.D. Ga. July 20, 2017).

Title VII does not explicitly protect LGBTQ+ individuals from employment discrimination; it does, however, offer such protections based on sex (among other classifications).²¹ The *Bostock* majority seized on the logic that, had the plaintiffs' sex been different, their expressions of gender identity and attraction would not have resulted in their terminations.²² Put another way, had Gerald Bostock been a cisgender woman, an attraction to men would not have led to termination. Thus, their sex was a "but for" cause of their termination, triggering the protections of Title VII.²³ Writing for the Court, Justice Gorsuch recognized that "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."²⁴

The Court admitted that these cases might have been more difficult had the employers in question obfuscated the true reasons for terminating their employees.²⁵ Here, though, the employers were very clear that they intentionally fired their LGBTQ+ employees based on their identities and wanted the Court to allow them to do so without triggering Title VII.²⁶ It is certainly possible that, post-*Bostock*, employers will become more circumspect in their stated reasons for terminating LGBTQ+ employees, thus limiting the extent of this legal victory. Nonetheless, in "but for" causes like in *Bostock*, it is clear that LGBTQ+ Americans have employment protections through the lens of their sex, even when other factors come into play.²⁷

B. "Dueling Textualisms"

Much of the scholarly focus on the *Bostock* decision centers on the textualist dimensions of the ruling (and dissents).²⁸ While textualism is not the focus of this Note, a cursory understanding of the

21. 42 U.S.C. § 2000e-2(a) (also protecting against discrimination based on "race, color, religion [and] national origin").

22. *Bostock*, 140 S. Ct. at 1741-43.

23. *Id.* at 1739, 1742.

24. *Id.* at 1741.

25. *Id.* at 1744.

26. *Id.*

27. *Id.* at 1742.

28. See, e.g., Grove, *supra* note 16, at 266-67; Marc Spindelman, *Bostock's Paradox: Textualism, Legal Justice, and the Constitution*, 69 BUFF. L. REV. 553, 556-58 (2021).

“dueling textualisms”²⁹ of the majority and the dissents is necessary to grasp where Justice Alito’s strategy comes from.

Justice Gorsuch’s majority opinion looks to the literal text of Title VII to reach its conclusion that it applies to sexual orientation and gender identity.³⁰ Such a literal approach, termed “formalistic textualism” by Professor Tara Grove, “focus[es] on semantic context and downplay[s] policy concerns or the practical (even monumental) consequences of the case.”³¹ Even adopting for the sake of argument a restrictive definition of the term “sex” limited to “biological distinctions between male and female,” Title VII’s “but-for” cause mechanism is a wide-ranging, “sweeping standard.”³²

The dissents of Justices Alito and Kavanaugh, however, took the majority to task for “sail[ing] under a textualist flag”³³ but ignoring the ordinary public meaning of the text of Title VII when it was passed in favor of the literal meaning.³⁴ This understanding is in accord with the traditional proponents of textualism as a theory of interpretation.³⁵ Such “flexible textualism” begins with a close reading of the text in question and allows judges to “consider[] policy and social context as well as practical consequences.”³⁶ The majority acknowledged this attack, yet it insisted that the construction of the muscular “but-for” cause requirement in Title VII required a literalist reading.³⁷

II. JUSTICE ALITO’S APPENDIX C

Justice Alito, clearly unhappy with the majority’s reasoning and method of textual analysis, penned a “furious” dissent.³⁸ This

29. Spindelman, *supra* note 28, at 557.

30. *Id.* at 563-66.

31. Grove, *supra* note 16, at 267.

32. *Bostock*, 140 S. Ct. at 1739.

33. *Id.* at 1755-56 (Alito, J., dissenting).

34. *Id.* at 1824-25 (Kavanaugh, J., dissenting).

35. See ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 24 (Amy Gutmann ed., 1997) (“[T]he good textualist is not a literalist.”).

36. Grove, *supra* note 16, at 267.

37. *Bostock*, 140 S. Ct. at 1745.

38. Mark Joseph Stern, *The Supreme Court Just Tanked Trump’s Anti-Trans Agenda*, SLATE (June 15, 2020, 6:11 PM), <https://slate.com/news-and-politics/2020/06/scotus-trump-lgbtq-discrimination-agenda.html> [<https://perma.cc/9LBK-CF72>]. It is possible this anger stems from the majority’s foreclosing of any possibility of ambiguity in its textualist reading.

dissent attacked the majority's textualist bona fides,³⁹ but—intriguingly—also argued that the sweep of the Court's holding would extend much farther than the statute before it.⁴⁰ To illustrate this point, Justice Alito included a laundry list of “[o]ver 100 federal statutes [that] prohibit discrimination because of sex” among the appendices to his dissent.⁴¹ This Part seeks to understand Justice Alito's argument and his inclusion of Appendix C, consider its purpose, and propose a categorization framework for the statutes within.

A. “Far-Reaching Consequences” and Appendix C

Facially, the *Bostock* majority limited the reach of its decision to Title VII.⁴² However, given the easily translatable reading of “but-for” causation for sex discrimination in Title VII, many scholars and observers expect the same textual arguments to apply in litigation involving other statutes with “but-for” sex discrimination language.⁴³ Justice Alito, with great concern, foresaw similar results in his dissent, warning that the opinion was “virtually certain to have far-reaching consequences.”⁴⁴

The reason Justice Alito foresaw such consequences is because of his own research into over 150 federal statutes with similar sex discrimination provisions to Title VII, compiled in Appendix C of his dissent.⁴⁵ This compilation lists each statute, along with a brief

Id.

39. *Bostock*, 140 S. Ct. at 1754-56 (Alito, J., dissenting).

40. *Id.* at 1778.

41. *Id.*

42. *Id.* at 1753 (majority opinion). Another limiting factor is that the well-known public accommodation protections of Title II of the Civil Rights Act of 1964 do not include sex among their list of protected traits. 42 U.S.C. § 2000a(a).

43. See *infra* Parts IV-V.

44. *Bostock*, 140 S. Ct. at 1778 (Alito, J., dissenting). This Note and other commentators argue that Justice Alito was correct, much to the gratification of LGBTQ+ people and their allies. See, e.g., David Cole & Ria Tabacco Mar, Opinion, *The Court Just Teed Up LGBTQ Protections for So Much More than Employment*, WASH. POST (June 18, 2020, 2:05 PM), https://www.washingtonpost.com/opinions/the-court-just-teed-up-lgbtq-protections-for-so-much-more-than-employment/2020/06/18/725f7832-b0dc-11ea-8f56-63f38c990077_story.html [<https://perma.cc/G76V-T4Q5>] (“In short, LGBTQ people will be protected in nearly every aspect of public life.”).

45. *Bostock*, 140 S. Ct. at 1791-96 (Alito, J., dissenting).

parenthetical describing what subject matter the statute deals with.⁴⁶ Further context is required to categorize them, however, as many of the parenthetical descriptions are vague or truncated.⁴⁷

Justice Alito also included in the main text of his dissent a brief survey of areas of his specific concern as LGBTQ+ advocates move forward armed with the majority's textual analysis.⁴⁸ Several of these areas focus on broader constitutional concerns such as religious employment,⁴⁹ compelled speech relating to personal pronouns,⁵⁰ and the implication of the Equal Protection Clause and its different class-based standards of review.⁵¹ However, constitutional applications are beyond the scope of this Note;⁵² what remains are Justice Alito's statutory arguments largely concerning healthcare⁵³ and education, specifically public accommodations for transgender individuals.⁵⁴

Justice Alito's prediction that healthcare "may emerge as an intense battleground under the Court's holding" is immediately undercut by his admission that similar claims have already permeated the courts under the Affordable Care Act.⁵⁵ Justice Alito focuses much more of his concern on issues relating to access to bathrooms, locker rooms, and sports teams for transgender individuals.⁵⁶ This is perhaps unsurprising; given these issues' central presence in American "culture wars" in recent years,⁵⁷ they are

46. *Id.*

47. Looking to the subject matter classification for each of the U.S. Code Titles listed in Appendix C helps provide some of this missing context. *See* Titles of United States Code, U.S.C., at III; *see also infra* Part II.C.

48. *Bostock*, 140 S. Ct. at 1778-83 (Alito, J., dissenting).

49. *Id.* at 1780-81.

50. *Id.* at 1782-83.

51. *Id.* at 1783.

52. This is an intriguing avenue for LGBTQ+ legal advocates, but one that is potentially perilous given the current ideological composition of the Court. This Note leaves for other scholars to weigh the potential strengths and weaknesses of such Equal Protection Clause approaches to LGBTQ+ rights.

53. *Bostock*, 140 S. Ct. at 1781-82 (Alito, J., dissenting).

54. *Id.* at 1778-80.

55. *Id.* at 1781-82 n.57.

56. *Id.* at 1778-80.

57. Sydney Bauer, *The New Anti-Trans Culture War Hiding in Plain Sight*, NEW REPUBLIC (Feb. 11, 2020), <https://newrepublic.com/article/156539/new-anti-trans-culture-war-hiding-plain-sight> [<https://perma.cc/QU8N-PQYT>]; *see also Bans on Transgender Youth Participation in Sports*, MOVEMENT ADVANCEMENT PROJECT,

likely to animate many fears of conservatives like Justice Alito.⁵⁸ To credit his concerns (if not the reasons behind them), there is certainly a distinct possibility that LGBTQ+ advocates will use similar language found in other statutes such as Title IX of the Education Amendments of 1972 (Title IX) to fight discrimination for transgender students in schools.⁵⁹ Indeed, they have already begun to do just that,⁶⁰ as Part IV of this Note will argue.

B. Reactions and Rationales

At the time of its release, commentators viewed Justice Alito's dissent with some confusion: Why would someone who felt so strongly that the majority was making a mistake undertake such a comprehensive research assignment to pinpoint for his opponents exactly where to attack next?⁶¹ To be sure, dissenters sometimes highlight what they view as negative unintentional consequences of the majority's decision,⁶² but by any metric, Appendix C goes beyond "highlighting" and into the realm of exhaustive comprehensiveness.

Some commentators have chalked this up to anger; indeed, Justice Alito's use of harsh language throughout, characterized in the press as "incandescent" and "wounded," leaves open the possibility that his anger clouded his judgment in creating a roadmap for LGBTQ+ advocates.⁶³ Justice Alito may have also simply miscalculated

maps/sports_participation_bans [https://perma.cc/4AZ2-WBW2] (showing that 18 states ban transgender student athletes from participating in athletic teams consistent with their gender identity as of November 2022).

58. Tom Donnelly & Brianne Gorod, *None to the Right of Samuel Alito*, THE ATLANTIC (Jan. 30, 2016), <https://www.theatlantic.com/politics/archive/2016/01/none-to-the-right-of-samuel-alito/431946/> [https://perma.cc/C7T6-E3DC].

59. 20 U.S.C. § 1681(a) ("No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.").

60. See *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 616-17 (4th Cir. 2020).

61. Kalmbacher, *supra* note 10.

62. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 587-88 (2003) (Scalia, J., dissenting) (arguing that the majority's approach could also endanger the stare decisis protection that was afforded *Roe v. Wade*); *Shelby Cnty. v. Holder*, 570 U.S. 529, 590 (2013) (Ginsburg, J., dissenting) ("Throwing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet.").

63. Mark Joseph Stern, *Neil Gorsuch Just Handed Down a Historic Victory for LGBTQ Rights*, SLATE (June 15, 2020, 12:19 PM), <https://slate.com/news-and-politics/2020/06/>

that his dissent and Appendix C would be largely attended to only by ideological comrades, taken more as a call to arms than a plan of attack.⁶⁴

Another explanation might be that Justice Alito was overconfident in the judiciary's ability to push back against the majority's decision (and limit it solely to Title VII) in any later litigation. Indeed, the late Justice Ginsburg related a similar example of this kind of self-assurance from her time as a sex discrimination attorney.⁶⁵ After Ginsburg's victory as an advocate in *Moritz v. Commissioner* at the Tenth Circuit, the Solicitor General (unsuccessfully) attempted to convince the Supreme Court to grant certiorari.⁶⁶

Take the case nonetheless, the solicitor general urged, for the Court of Appeals decision "casts a cloud of unconstitutionality upon the many federal statutes listed in Appendix E."

What was Appendix E? It was a printout from the Department of Defense computer (an unexpected release in those ancient pre-PC days). The printout listed, title by title, provisions of the U.S. Code "containing differentiations based upon sex-related criteria." It was a road map for reform efforts.⁶⁷

Given the climate of sexism in America at large and in the legal world,⁶⁸ it seems plausible that a certain carelessness bred by overconfidence may have undergirded the production of the Solicitor General's Appendix E; perhaps so too with Justice Alito's Appendix C.

Setting aside the question of what its purpose is, the fact remains that Justice Alito attached Appendix C to his dissent, and it is

supreme-court-lgbtq-discrimination-employment.html [https://perma.cc/679R-DZKK].

64. See, e.g., Rena M. Lindevaldsen, *Bostock v. Clayton County: A Pirate Ship Sailing Under a Textualist Flag*, 33 REGENT U. L. REV. 39, 66 (2020).

65. RUTH BADER GINSBURG, MY OWN WORDS 156 (2016).

66. *Id.*

67. *Id.* at 156-57.

68. Lila Thulin, *The True Story of the Case Ruth Bader Ginsburg Argues in 'On the Basis of Sex'*, SMITHSONIAN MAG. (Dec. 24, 2018), https://www.smithsonianmag.com/history/true-story-case-center-basis-sex-180971110/ [https://perma.cc/44QV-323M].

available for public viewing and consideration. For LGBTQ+ legal advocates, the question then becomes what can be done with it.

C. Categorization of Appendix C

Categorizing Appendix C into useful buckets may improve its practicality for scholars and advocates. Such a categorization may provide a mechanism for legal advocates to prioritize which protections to expand for the LGBTQ+ community. To begin this categorization, an overview of Appendix C points to three major categories of statutes within.⁶⁹ Parts III, IV, and V examine each category in more depth and provide recommendations of targets for advocates and practitioners.

First, at least some of the statutes cited by Justice Alito appear to be, for lack of a better term, mischaracterized as to their potential impact. Some of these “small potatoes” statutes are simply inconsequential,⁷⁰ while others do have conceivable consequences but are extremely limited in scope or potential impact.⁷¹ These statutes are unlikely to provide fruitful avenues for impact litigation for LGBTQ+ legal advocates.

The second category consists of some of the most high-profile areas for impact litigation. Justice Alito is right to fear an advancement of LGBTQ+ rights in these “blockbuster” policy areas because they are seen by advocates as high-value targets.⁷² *Bostock*’s textual analysis of sex-based discrimination would doubtless provide a

69. All the statutes discussed *infra* are taken from the list in Appendix C unless otherwise specified.

70. *See, e.g.*, 15 U.S.C. §§ 719a, 719o (prohibiting exclusion based on sex, among other classes, in the creation of a transportation system for Alaskan natural gas).

71. *See, e.g.*, 48 U.S.C. § 1542(a) (establishing the right to vote for citizens of the U.S. Virgin Islands, provided that no discrimination based on sex is imposed by the territorial government). In a vacuum, this is certainly an important provision, but it is difficult to envision a U.S. territorial government prohibiting an LGBTQ+ person from voting based on their identity even without this statute’s protection.

72. *See, e.g., Healthcare*, NAT’L CTR. FOR LESBIAN RTS., <https://www.nclrights.org/our-work/discrimination/healthcare/> [<https://perma.cc/F7ZG-LJ26>]; *LGBTQ Youth*, ACLU, <https://www.aclu.org/issues/lgbtq-rights/lgbtq-youth> [<https://perma.cc/3ETH-V8W6>].

powerful tool to make significant progress in this category, which includes the policy areas of education⁷³ and healthcare.⁷⁴

The final category is the most intriguing, as it includes less obvious yet still quite significant policy areas. These “under the radar” statutes represent more novel or inconspicuous policy areas that do not always attract headlines, such as the legal system, foreign policy, credit and lending, and housing. This Note will argue that these policy areas that affect a range of everyday economic and legal rights deserve as much attention as the “blockbusters.” Therefore, they ought to be equal priorities for LGBTQ+ advocates seeking to harmonize federal law with *Bostock*’s textual reasoning in the long term.

III. “SMALL POTATOES”: LIMITED IMPACTS AND FEW OPPORTUNITIES

The first category of Appendix C statutes provides few opportunities for advocates to sink their teeth into. Several of the cited statutes are best considered as overstated rhetorical flourishes, not apt to see much, if any, direct interest or impact stemming from the *Bostock* decision. Additionally, some statutes are so limited in scope that their inclusion in Appendix C is puzzling at best. While these statutes do include antidiscrimination provisions,⁷⁵ it would be logically difficult to imagine their expansion to include gender and sexual minorities as having any meaningful legal or policy implications. This Part argues that advocates should largely ignore Justice Alito’s hyperbole on these subjects.

A. Statutes of Little Consequence or Potential Impact for Expanding LGBTQ+ Protections

Some of the statutes have such little potential impact on LGBTQ+ nondiscrimination that it is difficult to view their inclusion in Appendix C as the result of anything more than an overbroad Westlaw search. It seems unlikely to cause any great consternation

73. See, e.g., 20 U.S.C. § 1681 (Title IX of the Education Amendments of 1972) (“Title IX”).

74. See, e.g., 42 U.S.C. § 300x-57(a)(2) (antidiscrimination provision for block grants to states meant to address mental health and substance abuse).

75. See, e.g., 20 U.S.C. § 1715 (nondiscrimination in drawing school district lines).

among opponents of LGBTQ+ antidiscrimination policies—nor great excitement among advocates—if these were to be brought in line with *Bostock*'s textual reading of Title VII.

One example of this extremely tenuous potential impact concerns restrictions on secure handling and sale of ammonium nitrate.⁷⁶ This statute includes protections against civil liability for producers or sellers of the chemical who have a reasonable belief it will be used in an act of terrorism.⁷⁷ This statute has absolutely no bearing on antidiscrimination law except that these liability protections have a carve-out to deny immunity if that “reasonable belief” is based solely on a protected trait of the alleged misuser.⁷⁸ Sex, sexual orientation, and gender identity obviously have no impact on potential ammonium nitrate-based terrorism, leaving one to wonder whether this list of provisions was simply a cut-and-paste error in drafting.

Additionally, many of the statutes cited in Appendix C come from Title 36 of the U.S. Code, which deals with “Patriotic and National Observances, Ceremonies, and Organizations.”⁷⁹ Organizations such as the Vietnam Veterans of America,⁸⁰ the American Legion,⁸¹ and the Fleet Reserve Association⁸² are congressionally chartered, and many of these organizing statutes include nondiscrimination requirements for membership and/or staffing.⁸³

It would certainly be a boon for potential and current LGBTQ+ members (and employees) of these organizations to have *Bostock*-style protections read into their organizing statutes. However, because membership in these organizations is largely limited to

76. 6 U.S.C. § 488.

77. *Id.* § 488f(a).

78. *Id.* § 488f(b) (“[Traits include] race, sex, national origin, creed, religion, status as a veteran, or status as a member of the Armed Forces of the United States.”). This is likely a very important provision for particular traits; given the statute’s focus on terrorism, discrimination based on “national origin, creed [and] religion” may have been of special concern in the post-9/11 time period. *Id.*

79. 36 U.S.C. Statutes under Title 36 make over twenty appearances in Appendix C. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1794 (Alito, J., dissenting).

80. 36 U.S.C. § 230501.

81. *Id.* § 21701.

82. *Id.* § 70101.

83. *Id.* § 230504(b) (Vietnam Veterans of America, membership and staff); *id.* § 21704A (The American Legion, staff); *id.* § 70104(b) (Fleet Reserve Association, membership and staff).

specific military service-related criteria, the general LGBTQ+ public would have little to gain from a largely piecemeal effort to apply *Bostock* to each of these organizations. Given that the U.S. military has become (on balance) much more welcoming to LGBTQ+ servicemembers in the last decade,⁸⁴ trickle-down discrimination to related organizations is likely to ebb naturally over time as well.

One exception to this view may be the congressional establishment of the United States Olympic & Paralympic Committee (USOPC).⁸⁵ The USOPC ensures sex nondiscrimination in the composition of its governing board,⁸⁶ and it also includes provisions for equal opportunity for athletes and coaches.⁸⁷ Given that American athletes at all levels of competition are still subject to intense scrutiny about their sexual orientation and gender identity,⁸⁸ applying *Bostock*'s inclusive reading of sex discrimination may prove pivotal in the event that LGBTQ+ athletes within the organization can demonstrate discrimination based on their identity. This is especially true after the recent uptick in media and legislative attention on transgender athletes at the high school and collegiate levels.⁸⁹ The USOPC, an organization that funnels such athletes to one of the most prominent athletic competitions worldwide, would prove to be a very visible and significant litigation target in such a situation, making this statute potentially very valuable to LGBTQ+ legal advocates.

84. *LGBTQ in the Military: A Brief History, Current Policies and Safety*, MILITARY ONESOURCE (Mar. 19, 2021, 3:29 PM), <https://www.militaryonesource.mil/military-life-cycle/friends-extended-family/lgbtq-in-the-military/> [<https://perma.cc/Q3YA-6C6B>].

85. 36 U.S.C. § 220522.

86. *Id.* § 220522(a)(9). There is, however, an exception to the nondiscrimination policy for board selections from sex-segregated sports programs. *Id.*

87. *Id.* § 220522(8).

88. See, e.g., Alex Reimer, *Some Retired Gay Male Athletes Continue to Be Frustrated More Haven't Come Out After Them*, OUTSPORTS (Dec. 4, 2020, 8:45 AM), <https://www.outsports.com/2020/12/4/22152460/dave-kopay-nfl-gay-athletes-associated-press> [<https://perma.cc/R5A4-QXV7>]; Laurel Hubbard: *First Transgender Athlete to Compete at Olympics*, BBC NEWS (June 21, 2021), <https://www.bbc.com/news/world-asia-57549653> [<https://perma.cc/74JZ-8TRP>].

89. See, e.g., *Bans on Transgender Youth Participation in Sports*, *supra* note 57; Jo Yurcaba, *Amid Trans Athlete Debate, Penn's Lia Thomas Loses to Trans Yale Swimmer*, NBC NEWS (Jan. 11, 2022, 10:44 AM), <https://www.nbcnews.com/nbc-out/out-news/trans-athlete-debate-penns-lia-thomas-loses-trans-yale-swimmer-rcna11622> [<https://perma.cc/BQA4-UHGP>]; David W. Chen, *Transgender Athletes Face Bans from Girls' Sports in 10 U.S. States*, N.Y. TIMES (May 24, 2022), <https://www.nytimes.com/article/transgender-athlete-ban.html> [<https://perma.cc/SZ6M-PCTP>].

B. Statutes That Directly Incorporate Title VII or Other Nondiscrimination Provisions in Employment

This category also includes statutes that are largely limited in impact because they simply reincorporate the language of Title VII or naturally extend its protections to the federal workforce. One example is the codification of congressional employment practices, which not only uses the same language as Title VII but also explicitly cites it.⁹⁰ Other statutes dealing with government employment practices include topic areas such as airport development,⁹¹ maritime oil and natural gas development,⁹² the Foreign Service,⁹³ and White House offices.⁹⁴

Statutes that explicitly base their nondiscrimination protections on Title VII are classified under this category because under *Bostock*, their application is not in question. They are therefore of limited value to ambitious LGBTQ+ advocates as it is unlikely to take any great legal wrangling to harmonize them with *Bostock*. Further, the results of any litigation attempting to do so would have either few or highly specialized impacts. Appendix C presents much larger and more enticing targets for marquee litigation, however, and Part IV focuses on such “blockbuster” policy areas that many advocates have already begun targeting. In stark contrast to the convoluted and foregone applications of *Bostock* among Part III’s “small potatoes,” Part IV targets have already attracted intense scrutiny.

IV. THE “BLOCKBUSTERS”: OPPORTUNITIES FOR IMPACT LITIGATION

Much to the satisfaction of LGBTQ+ advocates, several statutory areas that Justice Alito highlighted do indeed present opportunities for impact litigation in the near future. Although these potential victories may not be to the scale of *Bostock*, they impact the daily lives of most, if not all, LGBTQ+ people in the United States.

90. 2 U.S.C. § 1311(a)(1).

91. 49 U.S.C. § 47123(a).

92. 43 U.S.C. § 1863 (outer continental shelf resource management).

93. 22 U.S.C. § 3905(b).

94. 3 U.S.C. § 411(a)(1).

Applying *Bostock*'s analysis to enshrine LGBTQ+ discrimination protections in the realms of education and healthcare would have immediate and wide-ranging effects⁹⁵ given the uneven state-level protections in these areas.⁹⁶

While these areas deserve particular attention from LGBTQ+ antidiscrimination advocates in the years to come, given their broad applicability to all Americans regardless of whether they identify as LGBTQ+, their importance is somewhat obvious. Indeed, these policy areas are already seeing interest from scholars and courts.⁹⁷ For this reason, this Note argues that innovative advocates may wish to also look to some of the “hidden gems” of Appendix C, discussed in Part V. However, this Part will outline the nascent progress of these important projects and suggest less obvious Appendix C-derived statutory avenues to advance them.

A. Education

Young people who identify (or, potentially, are perceived) as LGBTQ+ face numerous challenges at school, ranging from the widely acknowledged problem of bullying⁹⁸ to less immediately obvious discrimination such as prohibitions on gender-conforming dress, use of gender-appropriate pronouns, or even discussing LGBTQ+

95. See Sharita Gruberg, *Beyond Bostock: The Future of LGBTQ Civil Rights*, CTR. FOR AM. PROGRESS (Aug. 26, 2020), <https://www.americanprogress.org/article/beyond-bostock-future-lgbtq-civil-rights/> [<https://perma.cc/25F3-BEJ6>].

96. See STATE POLICY SCORECARDS, GLSEN, <https://maps.glsen.org/state-policy-scorecards/> [<https://perma.cc/6HYH-6KPU>] (as of August 2022, showing fewer than half of states have nondiscrimination provisions for LGBTQ+ students or antibullying laws that protect them); *Healthcare Laws and Policies*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/healthcare_laws_and_policies [<https://perma.cc/BU23-CK7Y>] (as of August 2022, showing fewer than half of states prohibit discrimination against transgender individuals in private insurance markets).

97. See, e.g., Rigel C. Oliveri, *Sexual Orientation and Gender Identity Discrimination Claims Under the Fair Housing Act After Bostock v. Clayton County*, 69 U. KAN. L. REV. 409, 409-10 (2021); Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 594-97 (4th Cir. 2020).

98. THE TREVOR PROJECT, THE TREVOR PROJECT RESEARCH BRIEF: BULLYING AND SUICIDE RISK AMONG LGBTQ YOUTH (2021), <https://www.thetrevorproject.org/wp-content/uploads/2021/10/The-Trevor-Project-Bullying-Research-Brief-October-2021.pdf> [<https://perma.cc/8Y33-H8Q5>] (52 percent of LGBTQ+ youth in middle and high schools surveyed in 2020 reported they were bullied in some form).

topics in school.⁹⁹ LGBTQ+ youth are among the most vulnerable groups in society,¹⁰⁰ and therefore applying *Bostock*-style protections in the field of education is and must be a priority for legal advocates.

The most prominent potential application of *Bostock* for educational advocates is Title IX, a well-known statute that prohibits any institution that receives federal funding from discriminating against, denying benefits to, or excluding a person based on their sex.¹⁰¹ Notably, Title IX has been associated with mitigating inequity in school athletics programs¹⁰² as well as sexual violence and harassment on college campuses.¹⁰³ Of late, however, transgender students in particular have sought to use Title IX's protections to live their lives at school in alignment with their gender.¹⁰⁴ This followed from Department of Education guidance in 2016 that interpreted Title IX to protect transgender students (though this guidance was later reversed under the Trump administration).¹⁰⁵

Clearly, transgender student rights advocates saw opportunity in Title IX both before and after *Bostock* was decided in 2020. Gavin Grimm, a transgender student in Gloucester County, Virginia, sued the county's school district in 2015 to end its discriminatory restroom policy for transgender students.¹⁰⁶ Grimm's case moved circuitously through the federal courts; finally, in 2020 the Fourth

99. JOSEPH G. KOSCIW, CAITLIN M. CLARK, NHAN L. TRUONG & ADRIAN D. ZONGRONE, GLSEN, THE 2019 NATIONAL SCHOOL CLIMATE SURVEY: THE EXPERIENCES OF LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND QUEER YOUTH IN OUR NATION'S SCHOOLS 40 (2020), https://www.glsen.org/sites/default/files/2021-04/NSCS19-FullReport-032421-Web_0.pdf [<https://perma.cc/6CJN-PXF9>] (59.1 percent of LGBTQ+ students surveyed in 2019 reported experiencing at least one discriminatory practice at school).

100. See THE TREVOR PROJECT, *supra* note 98, at 1 (finding that LGBTQ+ students are four times more likely than their straight peers to attempt suicide).

101. 20 U.S.C. § 1681(a). Included in this statute are several exceptions, which are beyond the scope of this Note.

102. See *Gender Equity and Title IX*, NAT'L COLLEGIATE ATHLETICS ASS'N, <https://www.ncaa.org/sports/2016/3/2/gender-equity-and-title-ix.aspx> [<https://perma.cc/WE4C-U5YE>].

103. See, e.g., *Title IX and Sexual Violence in Schools*, ACLU, <https://www.aclu.org/title-ix-and-sexual-violence-schools?redirect=cpredirect/39147> [<https://perma.cc/S55K-A5CW>].

104. See *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 593 (4th Cir. 2020); *Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty.*, 968 F.3d 1286, 1291-92 (11th Cir. 2020).

105. Lambda Legal, *FAQ: What Did Obama Do for Transgender Students and How Did Trump Take It Away?*, LAMBDA LEGAL: BLOG (Feb. 25, 2017), https://www.lambdalegal.org/blog/20170225_trans-students-faq [<https://perma.cc/QEZ5-SJ3C>].

106. Joshua Block, *Gavin Grimm Stood Up For Himself. Now We're Standing With Him.*, ACLU (July 27, 2015, 10:00 AM), <https://www.aclu.org/blog/lgbtq-rights/transgender-rights/gavin-grimm-stood-himself-now-were-standing-him> [<https://perma.cc/P9JN-TL58>].

Circuit explicitly applied the newly articulated *Bostock* analysis to Title IX, providing the last word in the case.¹⁰⁷

Such cases indicate the intense interest in applying *Bostock*'s reasoning to transgender student protections—indeed, the interest existed even before *Bostock* was decided.¹⁰⁸ These cases also have received large amounts of publicity,¹⁰⁹ making them attractive templates for litigants. And finally, the explicit nature with which federal appeals courts have employed *Bostock* to Title IX leaves little room for doubt as to whether its textual analysis of sex can or should apply.¹¹⁰ LGBTQ+ advocates clearly do not need encouragement to tackle this issue; indeed, a large portion of the groundwork is already laid down.

There are other less apparent education-based statutes that may be ripe for targeting by advocates, however. One such statute created the Head Start program, which provides early-childhood education for low-income families.¹¹¹ This legislation includes a non-discrimination statement, as flagged in Appendix C.¹¹² Ensuring young children have access to this critical early-childhood program regardless of their sex is certainly important, but it may not be immediately obvious how sexual orientation and/or gender identity is also worthy of consideration in this area.

Surveys indicate that significant percentages of LGBTQ+ individuals considered the fact that they might not be heterosexual (or that they were otherwise “different”) at an early age.¹¹³ Additionally,

107. *Grimm*, 972 F.3d at 616-19. A prominent Eleventh Circuit case similarly applied *Bostock* to a similar Title IX case brought by a transgender student challenging a school district's discriminatory restroom policy that same month. *See Adams*, 968 F.3d at 1310. At least one federal district court has questioned whether to apply *Bostock*'s Title VII analysis to Title IX, however. *See Neese v. Becerra*, No. 21-CV-163, 2022 WL 1265925, at *13-15 (N.D. Tex. Apr. 26, 2022) (denying dismissal because Title VII's “because of” language and Title IX's “on the basis of” language “are not necessarily synonymous”).

108. *See Block*, *supra* note 106.

109. *See, e.g., Zoe Tillman, Gavin Grimm Won a Huge Battle for Trans Student Rights. He Said It's a “Nightmare” that a Child Had to Fight It.*, BUZZFEED NEWS (June 28, 2021, 1:26 PM), <https://www.buzzfeednews.com/article/zoetillman/gavin-grimm-transgender-student-rights-supreme-court> [<https://perma.cc/TZU8-GDMM>].

110. *Grimm*, 972 F.3d at 619; *Adams*, 968 F.3d at 1310.

111. 42 U.S.C. § 9831.

112. *Id.* § 9849; *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1795 (2020) (Alito, J., dissenting).

113. PEW RSCH. CTR., A SURVEY OF LGBT AMERICANS: ATTITUDES, EXPERIENCES AND VALUES IN CHANGING TIMES 45 (2013), <https://www.pewresearch.org/social-trends/wp-content/>

one study indicated that teenagers who identified as gay, lesbian, or otherwise not heterosexual were more likely to exhibit gender nonconforming play as younger children—even as young as three-and-a-half years old.¹¹⁴ Finally, increasing numbers of parents do not explicitly prescribe traditional gender roles for their young children, preferring instead that their children come to such roles on their own.¹¹⁵ Drawing on this evidence, potential discrimination of young children by adults is clearly possible, based on (perceived or actual) LGBTQ+ traits, such as gender nonconforming expression or nontraditional pronoun use. Applying *Bostock*'s framework to Head Start programs would provide low-income families with a powerful tool to protect their children. Other families potentially stand to benefit as well, given the discussions surrounding federally funded universal pre-K education regardless of income.¹¹⁶

Finally, some of the remaining cited statutes deal with less pressing issues in relation to LGBTQ+ young people. Some statutes concern school desegregation, which is defined to encompass not only race but also other characteristics, including sex.¹¹⁷ Because it is unlikely that modern public schools would attempt to segregate based on sexual orientation or gender identity, much less sex, these sorts of statutes are unlikely to be of much use to LGBTQ+ advocates, barring some alarming setback in popular attitudes surrounding LGBTQ+ students. Another set of statutes deals with nondiscrimination in student loan-related topics.¹¹⁸ These statutes can be cross-categorized with the credit and lending statutes to be

uploads/sites/3/2013/06/SDT_LGBT-Americans_06-2013.pdf [https://perma.cc/2DFB-KPUL] (reporting that 27 percent of lesbian, gay, and bisexual adults surveyed in 2013 reported being younger than ten years old “when they first felt they might not be straight”).

114. Michael Price, *Toddler Play May Give Clues to Sexual Orientation*, SCI. (Mar. 10, 2017), <https://www.science.org/content/article/toddler-play-may-give-clues-sexual-orientation> [https://perma.cc/B96N-M3VW].

115. See Kyl Myers, *I Let My Child Create Their Own Gender Identity. The Experience Has Been a Gift for Us Both*, TIME (Sept. 3, 2020, 4:35 PM), <https://time.com/5885697/gender-creative-parenting/> [https://perma.cc/CMY3-59S9].

116. See, e.g., Shantel Meek & Conor P. Williams, Opinion, *One Way to Make Universal Preschool a Reality—Head Start for All*, HECHINGER REP. (Oct. 7, 2021), <https://hechingerreport.org/opinion-one-way-to-make-universal-preschool-a-reality-head-start-for-all/> [https://perma.cc/QBG9-ZC4Y].

117. See, e.g., 42 U.S.C. § 2000c(b).

118. See, e.g., 20 U.S.C. § 1071 (Federal Family Education Loan Program non-discrimination provision).

addressed in Part V.¹¹⁹ However, the major education-related statutes in this Section provide ample and important opportunities to help protect some of the most vulnerable individuals in American society—children and young adults who are (or are perceived to be) LGBTQ+.

Like students, LGBTQ+ people who seek healthcare are also among the most vulnerable in our society, and thus deserving of a similarly rigorous application of *Bostock* to relevant healthcare statutes. The next Section looks at this important policy area addressed by *Bostock* and the Appendix C statutes.

B. Healthcare

Healthcare is a major policy area for all Americans, but it is especially fraught for LGBTQ+ Americans who have historically been denied equal care for themselves and their loved ones.¹²⁰ Although *Obergefell v. Hodges*'s expansion of marriage rights across the country allowed many more LGBTQ+ families to access healthcare,¹²¹ there is still much progress to be made.

To begin, Title VII includes a provision barring “discriminat[ion] against any individual with respect to his compensation, terms, conditions, or privileges of employment.”¹²² Employment benefits fall under this language, and employer-sponsored health insurance is typically chief among such benefits, therefore providing an easy backdoor to apply *Bostock*'s expanded protections in the realm of healthcare.¹²³ Plaintiffs have already taken notice: one such case involved a union member suing her union for refusing to enroll her same-sex spouse in her health insurance plan until after her spouse

119. See *infra* Part V.C.

120. See, e.g., Shabab Ahmed Mirza & Caitlin Rooney, *Discrimination Prevents LGBTQ People from Accessing Health Care*, CTR. FOR AM. PROGRESS (Jan. 18, 2018), <https://americanprogress.org/article/discrimination-prevents-lgbtq-people-accessing-health-care/> [<https://perma.cc/C3AJ-4TRF>] (showing marked rates of difficulty accessing humane medical care for transgender individuals in particular).

121. See Angela K. Perone, *Health Implications of the Supreme Court's Obergefell vs. Hodges Marriage Equality Decision*, 2 LGBT HEALTH 196, 197 (2015).

122. 42 U.S.C. § 2000e-2(a)(1).

123. U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-CVG-2001-1, EEOC COMPLIANCE MANUAL, SECTION 3 EMPLOYEE BENEFITS (2000).

suffered otherwise-avoidable medical harm.¹²⁴ The district court easily applied *Bostock* to find sex discrimination, leaving the rest of its opinion to deal with issues of attaching liability.¹²⁵ So, if an LGBTQ+ person is denied benefits from an employer-sponsored health plan based on their identity, no additional statute is necessary and no further extension of *Bostock* beyond Title VII is required in order to challenge that discrimination.

An additional application of *Bostock* in the field of healthcare outside of the statutes of Appendix C stemmed from Trump administration-era Department of Health and Human Services rules that permitted discrimination against transgender individuals.¹²⁶ In *Walker v. Azar*, the district court granted an injunction prohibiting those rules from going into effect because its restrictive definition of sex discrimination did not comport with *Bostock*.¹²⁷ Again, here was a significant victory for LGBTQ+ people that did not implicate a single further statute beyond what was dealt with in *Bostock*.

However, moving into the statutes of Appendix C uncovers several potentially valuable tools to combat LGBTQ+ discrimination in healthcare. Block grants for mental healthcare—including for emotionally disturbed children¹²⁸ as well as mental health and substance abuse¹²⁹—include nondiscrimination requirements for any services provided pursuant to the grants. Such health issues are unfortunately of added importance to LGBTQ+ people in America compared to their heterosexual and cisgender neighbors.¹³⁰

Further, one block grant statute in Appendix C includes preventative health measures.¹³¹ One of the most important preventative

124. *Jimenez v. Laborer's Welfare Fund*, 493 F. Supp. 3d 671, 673-74 (N.D. Ill. 2020).

125. *Id.* at 674-75.

126. *Walker v. Azar*, 480 F. Supp. 3d 417, 420 (E.D.N.Y. 2020).

127. *Id.*

128. 42 U.S.C. § 290ff-1(e)(2)(C).

129. *Id.* § 300x-57(a)(2).

130. LGBTQ+ Americans are particularly more likely to experience mental health disorders (twice as likely) or a mixture of mental health and substance abuse problems (two-and-a-half times as likely). JEREMY KIDD, AM. PSYCHIATRIC ASS'N, MENTAL HEALTH DISPARITIES: LGBTQ (2017), <https://www.psychiatry.org/File%20Library/Psychiatrists/Cultural-Competency/Mental-Health-Disparities/Mental-Health-Facts-for-LGBTQ.pdf> [<https://perma.cc/CE4L-G9PJ>].

131. 42 U.S.C. § 300w-7(a). This statute explicitly cites Title IX, which *Bostock* is assumed to apply to, given the discussion *supra* Part IV.A.

health breakthroughs in recent years has been pill-based pre-exposure prophylaxis (PrEP), which reduces the risk of HIV infection from sexual intercourse by about 99 percent.¹³² Because HIV infection still generally affects LGBTQ+ people at higher rates than the general population,¹³³ and because PrEP continues to be extremely costly for those without health insurance coverage,¹³⁴ the ability to apply block grant funding to this important preventative measure would be a major public health victory.

Thus, mental health, sexual health, and LGBTQ+ advocates alike should seek to apply *Bostock* to these statutes if they believe that grant recipients are discriminating against potential patients based on sexual orientation or gender identity. Beyond these statutes, however, recent case law indicates that there are major victories to be had, even solely under Title VII and its related applications to executive branch action.

Health and education will always attract high-wattage attention and hypercapable advocates. But beyond these “blockbuster” policy areas, there exist less-headline-grabbing sectors where *Bostock*’s interpretive approach could have meaningful and positive impacts on wide swaths of the LGBTQ+ community. The next Part highlights several of these overlooked areas and argues that they deserve just as much real estate on the landscape of LGBTQ+ legal advocacy.

132. *Pre-Exposure Prophylaxis*, HIV.GOV, <https://www.hiv.gov/hiv-basics/hiv-prevention/using-hiv-medication-to-reduce-risk/pre-exposure-prophylaxis> [https://perma.cc/M5M4-MDGF].

133. CTRS. FOR DISEASE CONTROL & PREVENTION, HIV SURVEILLANCE REPORT 19 (2021), <https://www.cdc.gov/hiv/pdf/library/reports/surveillance/cdc-hiv-surveillance-report-2018-updated-vol-32.pdf> [https://perma.cc/PKT4-3487] (men who have sex with men accounted for 69 percent of new HIV infections in 2019).

134. Benjamin Ryan, *This Will Shut Us Down: HIV Prevention Clinics Brace for Gilead Reimbursement Cuts*, NBC NEWS (July 7, 2021, 7:26 AM), <https://www.nbcnews.com/nbc-out/out-health-and-wellness/-will-shut-us-hiv-prevention-clinics-brace-gilead-reimbursement-cuts-rcna1346> [https://perma.cc/F3C2-FBU2] (reporting that the monthly cost of a PrEP prescription in 2021 was \$1,842). However, recent federal government guidance to insurers has made PrEP free with no cost sharing for those with health insurance. Benjamin Ryan, *PrEP, the HIV Prevention Pill, Must Now Be Totally Free Under Almost All Insurance Plans*, NBC NEWS (July 21, 2021, 11:35 AM), <https://www.nbcnews.com/nbc-out/out-health-and-wellness/prep-hiv-prevention-pill-must-now-totally-free-almost-insurance-plans-rcna1470> [https://perma.cc/Q722-4TCF].

V. “UNDER THE RADAR”: POLICY AREAS DESERVING OF
MEANINGFUL ATTENTION POST-*BOSTOCK*

Certain policy areas present advocates less obvious—but equally impactful—opportunities to harmonize federal antidiscrimination law with *Bostock*. These include policy areas such as the legal system, credit and lending, foreign policy, and housing. Clearly, these are areas where LGBTQ+ advocates would prefer to have *Bostock*'s statutory analysis applied, as many LGBTQ+ people interact with these systems on a regular basis. This Part argues that although the previous “blockbuster” category of policy areas may dominate the conversation among advocates, these “under the radar” issues are equally worth their time and attention (assuming their time and attention is somewhat freely available). To ignore these statutes would be harmful to the larger project of expanding LGBTQ+ legal rights and protections. Hyperfocused litigation only on the “blockbusters” would deny LGBTQ+ people the more comprehensive legal benefits and greater equality that litigation on these statutes would bring.

Indeed, because the sweep of *Bostock* is likely to be as wide as LGBTQ+ legal advocates could wish (despite the majority opinion never straying from the strict confines of its Title VII analysis),¹³⁵ in this category, the sky is the limit.¹³⁶ Advocates should, therefore, adopt a creative approach and widen their scope to include these intriguing statutes identified in Appendix C. Thematically, this category is especially broad, with little connective tissue between subject areas. Therefore, this Note provides identification and an innovative reading of these statutes to ensure *Bostock*'s sex-discrimination-as-LGBTQ+-discrimination principles cover the waterfront in existing federal law. This Note acknowledges, however, that deeper subject-area analysis by experts in these fields

135. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1752-53 (2020).

136. Spindelman, *supra* note 28, at 569 (“*Bostock*'s reliance on extra-textual grounds to justify its interpretation of Title VII points to ... how far the opinion practically extends the lessons of *caselaw* that it does not directly cite or discuss in conventionally recognizable terms.” (emphasis added)).

should follow; it broadly seeks to provide a roadmap for the future of *Bostock*-informed legal advocacy.

A. *The Legal System*

Two Appendix C statutes of note may help advance LGBTQ+ legal rights and protections within the legal system itself. The state has historically weaponized the law against LGBTQ+ people,¹³⁷ and the kaleidoscope of LGBTQ+ people includes a significant overlap with other marginalized identity groups that have separately found it particularly challenging to find justice in the American legal system.¹³⁸ Thus, LGBTQ+ people have a particularly urgent need for legal system reform, and legal advocates should take a hard look at these Appendix C statutes to help advance that cause.

1. *Jury Service*

LGBTQ+ individuals currently lack explicit protections against discrimination in jury service in both federal and state courts.¹³⁹ For state courts, the Supreme Court has disallowed gender-based discrimination using peremptory strikes against jurors since *J.E.B. v. Alabama ex rel. T.B.* in 1994.¹⁴⁰ More recently, the Ninth Circuit expanded the protections of *J.E.B.* to sexual orientation based on the same Equal Protection Clause analysis.¹⁴¹ Even without equal protection arguments, applying *Bostock*'s logic that "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on

137. See, e.g., *Bowers v. Hardwick*, 478 U.S. 186, 192-93 (1986) ("Sodomy was a criminal offense at common law and was forbidden by the laws of the original thirteen States [U]ntil 1961, all 50 States outlawed sodomy." (footnotes omitted)).

138. *LGBT Data & Demographics*, THE WILLIAMS INST., (Jan. 2019), <https://williamsinstitute.law.ucla.edu/visualization/lgbt-stats/?topic=LGBT#about-the-data> [<https://perma.cc/7VX4-DWRV>] (indicating that as of 2019, 42 percent of LGBTQ+ individuals identify as nonwhite).

139. Dan Avery, *Jurors Can Be Rejected for Being Gay. The Equality Act Could Change That.*, NBC NEWS (Feb. 25, 2021, 10:19 AM), <https://www.nbcnews.com/feature/nbc-out/jurors-can-be-rejected-being-gay-equality-act-could-change-n1258761> [<https://perma.cc/7G2C-DETA>].

140. 511 U.S. 127, 146 (1994).

141. *SmithKline Beecham Corp. v. Abbott Lab'ys*, 740 F.3d 471, 484-86 (9th Cir. 2014).

sex”¹⁴² creates an opportunity to end state jury discrimination of LGBTQ+ individuals by resting on the (nonstatutory) reasoning the Court used in *J.E.B.*¹⁴³

As for federal juries, 28 U.S.C. § 1862 enshrines a nondiscrimination requirement for jury service.¹⁴⁴ Thus, *Bostock*’s statutory analysis can be applied directly to another federal statute to prevent LGBTQ+ jurors from being struck or otherwise barred from service based on their identity. Using this statute-based strategy together with a potential expansion of *J.E.B.*, *Bostock*’s logic may allow LGBTQ+ legal advocates to enshrine jury service protection without having to resort to further legislation.¹⁴⁵

2. “LGBTQ+ Panic” Defenses

One other major LGBTQ+ rights priority in the legal realm is the abolition of the “LGBTQ+ panic defense” (once known as the “gay panic defense”), a tactic that allows criminal defendants to blame their violent crimes on the “provocation” of the victim’s sexual orientation or gender identity.¹⁴⁶ This problem is particularly acute for transgender women given the frequency with which they experience violence in American society.¹⁴⁷ Several states have banned this tactic,¹⁴⁸ and federal legislation has recently been introduced.¹⁴⁹ One small potential backdoor to end this offensive and discriminatory practice of blaming LGBTQ+ victims for their own violent

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

143. 511 U.S. at 146.

144. 28 U.S.C. § 1862 (“No citizen shall be excluded from service as a grand or petit juror in the district courts of the United States ... on account of race, color, religion, sex, national origin, or economic status.” (emphasis added)).

145. See Avery, *supra* note 139; *Jury Non-Discrimination Act/Jury ACCESS Act*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/resources/juror-non-discrimination-act-jury-access-act> [<https://perma.cc/R2VT-BH65>] (discussing proposed legislation on this subject).

146. *LGBTQ+ “Panic” Defense*, THE LGBTQ+ BAR, <https://lgbtqbar.org/programs/advocacy/gay-trans-panic-defense/> [<https://perma.cc/C6NU-XCE2>].

147. See Cynthia Lee, *The Trans Panic Defense Revisited*, 57 AM. CRIM. L. REV. 1411, 1419-29 (2020).

148. *LGBTQ+ “Panic” Defense Legislation Map*, THE LGBTQ+ BAR, <https://lgbtqbar.org/programs/advocacy/gay-trans-panic-defense/gay-trans-panic-defense-legislation/> [<https://perma.cc/YV6W-VK5E>] (sixteen states and the District of Columbia have currently banned the LGBTQ+ panic defense tactic).

149. See *Gay and Trans Panic Defense Prohibition Act of 2021*, S. 1137, 117th Cong. (2021).

assaults (or even deaths) may be found within federal death sentencing statutes.¹⁵⁰

Within the federal criminal justice system, potential death sentences are heavily constrained; here, § 3593(f) seeks particularly to ensure that impermissible discrimination does not color the jury's imposition of such a sentence.¹⁵¹ It includes instructions to the jury that it not impose a death sentence unless it concludes that it would do so despite, among other things, the "sex of the defendant *or of any victim*."¹⁵² Applying *Bostock*'s reasoning, this statute would explicitly disallow juries from considering the sexual orientation or gender identity of a murder victim in deciding if the perpetrator should face a sentence of death. More comprehensive reform would certainly be desirable, and for LGBTQ+ advocates who also support the abolition of capital punishment, this may be an altogether academic argument. However, construing this statute under *Bostock* ultimately does provide a backstop against the "LGBTQ+ panic defense" in federal capital cases.

These legal system-related statutes touch on narrow yet important priorities for LGBTQ+ advocates. Again, while on-point federal legislation dispelling all doubt as to LGBTQ+ rights in the legal system would be preferable, that seems unlikely in the current political climate. *Bostock* has handed LGBTQ+ people two important tools to increase equity and justice in American courts, however, and they are worthy of consideration by litigators.

B. Foreign Policy

Although foreign policy is an area in which courts are typically more deferential to the executive branch,¹⁵³ the Supreme Court's pro-LGBTQ+ reading of Title VII in *Bostock* may force federal courts to expand this interpretation to statutes that deal with foreign affairs and immigration. Such an approach could potentially

150. 18 U.S.C. § 3593(f).

151. *Id.*

152. *Id.* (emphasis added).

153. See, e.g., Kimberley L. Fletcher, *How the Courts Transformed Executive Authority in Foreign Affairs*, SCHOLARS STRATEGY NETWORK (Jan. 16, 2020), <https://scholars.org/contribution/how-courts-transformed-executive-authority-foreign-affairs> [<https://perma.cc/7423-QZ2B>].

advance the rights of LGBTQ+ people who are not currently American citizens or even located within the United States.

1. *Foreign Affairs*

Thorny issues of diplomacy aside, several statutes may compel the executive branch to deal more harshly with countries that continue to oppress LGBTQ+ people. One foreign affairs statute dealing with contracts with foreign countries or individuals instructs that there be “no participation or other assistance by any officer or employee of the Department of State (including the Agency for International Development)” if any U.S. person would be barred from or excluded from the contract based on, among other classes, sex.¹⁵⁴ A similar statute also exists with regard to furnishing “defense articles” or training to foreign countries.¹⁵⁵

Applying *Bostock*'s expansive definition of sex, these statutes would then appear to prohibit the State Department from contracting or arranging contracts with a foreign country or entity that refuses to contract with LGBTQ+ persons.¹⁵⁶ These statutes may be of use to LGBTQ+ advocates who have a more international focus. Many countries and foreign nationals that the United States deals with have restrictive attitudes and policies towards LGBTQ+ people.¹⁵⁷ Advocates who call for the United States government to reckon with the intolerant policies of its allies, partners, and aid recipients may force the State Department's hand by enforcing these statutes, making such countries or entities choose between these contracts and their anti-LGBTQ+ policies and beliefs.

In addition, the President is required by statute to advance human rights on the global stage “without distinction as to race, sex, language, or religion,” and condition security assistance on these

154. 22 U.S.C. § 2661a.

155. *Id.* § 2314(a), (g).

156. *See id.*

157. *See, e.g., Saudi Arabia*, HUM. DIGNITY TR., <https://www.humandignitytrust.org/country-profile/saudi-arabia/> [<https://perma.cc/HT32-WJMC>]; Yasemin Smallens, *LGBT Qataris Call Foul Ahead of 2022 World Cup*, HUM. RTS. WATCH (Nov. 24, 2021, 2:16 PM), <https://www.hrw.org/news/2021/11/24/lgbt-qataris-call-foul-ahead-2022-world-cup> [<https://perma.cc/9LX9-3KNL>].

principles.¹⁵⁸ Clearly some wiggle room exists, as this statute is an attempt to codify the United States' overall international philosophy; however, it may provide a backstop against any future presidents who seek to withdraw from the United States' current position that LGBTQ+ rights are fundamental human rights.¹⁵⁹ External foreign policy is not the only statutory realm in which additional protections for LGBTQ+ people may be applied, however: immigration statutes also create an area ripe for targeting by advocates.

2. Immigration

Ever a hot-button issue in contemporary America, immigration reform drew the attention of newly inaugurated President Biden immediately upon entering office. President Biden issued an Executive Order that explicitly made it his administration's policy to apply *Bostock's* reasoning equally to, among other things, the nation's immigration system.¹⁶⁰ This Executive Order purported to equalize immigration systems in its push for more LGBTQ+ legal protections.¹⁶¹ However, a closer inspection makes clear that this only includes one section of the Immigration and Nationality Act (INA),¹⁶² specifically the section dealing with refugee assistance and resettlement within the United States.¹⁶³ The effect of this change is to ensure that sexual orientation and gender identity will not be used to determine whether a refugee is granted assistance to settle

158. 22 U.S.C. § 2304(a).

159. Indeed, even the Biden administration asks that U.S. aid agencies merely "consider the impact of programs funded by the Federal Government on human rights, including the rights of LGBTQI+ persons, when making funding decisions." *Memorandum on Advancing the Human Rights of Lesbian, Gay, Bisexual, Transgender, Queer, and Intersex Persons Around the World*, WHITE HOUSE (Feb. 4, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/02/04/memorandum-advancing-the-human-rights-of-lesbian-gay-bisexual-transgender-queer-and-intersex-persons-around-the-world/> [<https://perma.cc/2473-GQPB>] (emphasis added). This "consideration" may be insufficient depending on how 22 U.S.C. § 2304 is read.

160. Exec. Order No. 13,988, 86 Fed. Reg. 7,023 (Jan. 25, 2021). This Order also made it the Biden administration's policy to apply the reasoning in *Bostock* to the Fair Housing Act (FHA), discussed *infra* Part V.D.

161. Exec. Order No. 13,988.

162. *Id.*

163. 8 U.S.C. § 1522(a).

in the country lawfully.¹⁶⁴ Although this is certainly a laudable goal, it is not the only section of the Act that includes a nondiscrimination provision.¹⁶⁵

The general selection system for immigrants also contains such a provision: along with exceptions that are not relevant to the scope of this Note, it provides that “no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person’s race, sex, nationality, place of birth, or place of residence.”¹⁶⁶ Despite the Biden administration’s quiet omission of this statute in its decision to apply *Bostock* to the INA,¹⁶⁷ it includes similar language disallowing sex discrimination and therefore ought to be harmonized, either via executive action or litigation if necessary.¹⁶⁸

LGBTQ+ advocates should take special note of this provision, as immigration and naturalization can often be an arduous process for LGBTQ+ individuals.¹⁶⁹ This is especially true of transgender individuals, who face abuse, discrimination, and—if undocumented—detention at sex-segregated facilities that do not match their gender identity.¹⁷⁰ Barring both the prioritization of heterosexuals and the prohibition of LGBTQ+ immigrants would be a key victory for advocates. It would immediately help a population that often emigrates to escape persecution in its home countries but might not otherwise qualify for refugee status.

The Biden administration’s current policy is thus incomplete as far as the application of *Bostock* is concerned. Immigration advocates should therefore press the administration to fully adopt its post-*Bostock* position on all immigration matters or take their case

164. See Exec. Order No. 13,988.

165. See, e.g., 8 U.S.C. § 1152(a)(1)(A).

166. *Id.* (emphasis added).

167. See discussion *supra* Part V.B.2.

168. Compare 8 U.S.C. § 1152(a)(1)(A) (“[N]o person shall ... be discriminated against in the issuance of an immigrant visa because of the person’s ... sex.”), with 8 U.S.C. § 1522(a)(5) (“Assistance and services funded under this section shall be provided to refugees without regard to ... sex.”).

169. See, e.g., *Covering LGBTQ Immigration Issues*, GLAAD, <https://www.glaad.org/vote/topics/immigration> [<https://perma.cc/Y4DT-QR4H>] (DACA recipients forced to leave the United States and their partners while applying for citizenship after marriage).

170. *The Precarious Position of Transgender Immigrants and Asylum Seekers*, HUM. RTS. CAMPAIGN (Jan. 4, 2019), <https://www.hrc.org/news/the-precarious-position-of-transgender-immigrants-and-asylum-seekers> [<https://perma.cc/ABL2-HYHW>].

to the federal courts. Given the inescapable logic of *Bostock*, there exists a great likelihood of helping untold numbers of LGBTQ+ immigrants gain access to the relative safety of the United States. Though these laws affect a group of LGBTQ+ people who are not (or not yet) American citizens, advocates should remain committed to helping LGBTQ+ people the world over find safety and security in the United States, especially those who face persecution in their current environments. One other policy area concerning security—specifically financial security—presents another overlooked yet appetizing target for advocates.

C. Credit and Lending

LGBTQ+ individuals and couples have a significantly higher risk of being denied access to credit or receiving a higher interest rate when obtaining credit than do non-LGBTQ+ individuals and couples, and have fewer protections available to them to guard against this risk.¹⁷¹ This is despite LGBTQ+ credit seekers being generally less risky for financial institutions to lend to, leading to the conclusion that discrimination or animus is likely afoot.¹⁷² This problem is largely neglected thanks to the more private and personal nature of finance generally and lending in particular. Several federal statutes may help address this problem and indeed may already be helping.¹⁷³

The Equal Credit Opportunity Act (ECOA) includes antidiscrimination provisions to ensure access to credit regardless of one's protected traits, including sex.¹⁷⁴ The Consumer Financial Protection Bureau has already incorporated *Bostock's* reasoning into its

171. See Tim Fitzsimons, *Same-Sex Borrowers 73 Percent More Likely to Be Denied Mortgage, Study Finds*, NBC NEWS (Apr. 18, 2019, 2:20 PM), <https://www.nbcnews.com/feature/nbc-out/same-sex-borrowers-73-percent-more-likely-be-denied-mortgage-n996016> [<https://perma.cc/KPL6-H9RQ>] (LGBTQ+ homebuyers 73 percent more likely to be denied mortgages, and receive 0.02-0.2 percent higher interest rates, than heterosexuals); Cyrus Mostaghim, Comment, *Constructing the Yellow Brick Road: Preventing Discrimination in Financial Services Against the LGBTQ+ Community*, 11 MICH. BUS. & ENTREPRENEURIAL L. REV. 63, 71-78 (2021) (describing the “gray area” of LGBTQ+ legal protection in this area and explaining the state of those protections as of 2021).

172. Mostaghim, *supra* note 171, at 71-78.

173. See, e.g., 15 U.S.C. § 1691(a).

174. *Id.*

own interpretation of the ECOA, observing that because LGBTQ+ seniors in particular face greater rates of poverty than the general public, access to credit is an acute need.¹⁷⁵ Based on this success, LGBTQ+ advocates should look deeper to find more banking and lending statutes to bring in line with *Bostock*.

Combining the federal government's interpretations of the Fair Housing Act (FHA)¹⁷⁶ and ECOA to provide protection from discrimination to LGBTQ+ homebuyers and homeowners may have a particularly wide-ranging impact.¹⁷⁷ The Justice Department indicates that claims of mortgage discrimination may fall under both the FHA and ECOA.¹⁷⁸ Given the new post-*Bostock* interpretation, this includes LGBTQ+ discrimination.¹⁷⁹ In addition, other statutes ensure nondiscrimination in federal mortgages, mortgage insurance, or other assistance.¹⁸⁰ Advocates can similarly harmonize these with *Bostock*, but litigation may not be necessary if the executive branch continues its push to include *Bostock's* interpretation of sex discrimination in its policies and enforcement actions. And finally, statutes that enforce nondiscrimination in student loan-related areas may similarly help equalize access for LGBTQ+ college and graduate students, which is an important policy goal.¹⁸¹ However, because the major impacts of *Bostock's* application in the lending sector are housing related,¹⁸² it provides an excellent segue into the final under-the-radar policy area for post-*Bostock* advocacy.

175. Press Release, SAGE, LGBT People Protected from Financial Discrimination Under Equal Credit Opportunity Act (Feb. 25, 2021), <https://www.sageusa.org/news-posts/cfpb-protects-lgbt-people-with-ecoa/> [<https://perma.cc/7Y59-HBJ3>].

176. See *infra* Part V.D for a discussion of the Biden administration's post-*Bostock* interpretation of the FHA beyond its relation to discrimination in lending.

177. See SAGE, *supra* note 175; Exec. Order No. 13,988.

178. *The Equal Credit Opportunity Act*, U.S. DEP'T OF JUST. (Sept. 24, 2021), <https://www.justice.gov/crt/equal-credit-opportunity-act-3> [<https://perma.cc/G6L8-QSXX>].

179. See SAGE, *supra* note 175; Exec. Order No. 13,988.

180. 12 U.S.C. § 1735f-5(a).

181. See, e.g., 20 U.S.C. § 1071 (Federal Family Education Loan Program nondiscrimination provision).

182. See discussion *infra* Part V.D.

D. Housing

Discrimination in housing is a widespread problem for LGBTQ+ Americans. In the states that expressly prohibit discrimination based on sexual orientation and/or gender identity (and therefore track this data as complaints arise), complaint rates averaged at three per 100,000 people.¹⁸³ Additionally, transgender individuals¹⁸⁴ and LGBTQ+ senior citizens¹⁸⁵ are particularly vulnerable to housing discrimination. More than half of states do not provide any such protections at all;¹⁸⁶ data is therefore not available from every jurisdiction and may in fact obscure even higher rates of potential housing discrimination.

The federal government has taken notice of the problem—upon entering office, one of President Biden’s “Day One” Executive Orders¹⁸⁷ explicitly applied *Bostock*’s reasoning to the FHA.¹⁸⁸ Like Title VII, the FHA explicitly bars sex discrimination in a variety of housing contexts, including mortgages¹⁸⁹ and rentals.¹⁹⁰ President Biden’s Executive Order on this issue directed federal agencies to enforce the FHA to protect LGBTQ+ individuals from housing discrimination.¹⁹¹ The FHA, unsurprisingly, was also present in

183. CHRISTY MALLORY & BRAD SEARS, THE WILLIAMS INST., EVIDENCE OF HOUSING DISCRIMINATION BASED ON SEXUAL ORIENTATION AND GENDER IDENTITY: AN ANALYSIS OF COMPLAINTS FILED WITH STATE ENFORCEMENT AGENCIES, 2008-2014, at 1 (Feb. 2016), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Housing-Discrimination-US-Feb-2016.pdf> [<https://perma.cc/3EV9-BEBW>]. For context, similar complaints based on sex and race totaled one and five per 100,000, respectively. *Id.*

184. *Housing & Homelessness*, NAT’L CTR. FOR TRANSGENDER EQUAL., <https://transequality.org/issues/housing-homelessness> [<https://perma.cc/73Z9-T4RZ>] (explaining that one in five transgender individuals in the United States have faced housing discrimination).

185. THE EQUAL RTS. CTR., OPENING DOORS: AN INVESTIGATION OF BARRIERS TO SENIOR HOUSING FOR SAME-SEX COUPLES (2014), https://equalrightscenter.org/wp-content/uploads/senior_housing_report.pdf [<https://perma.cc/K95D-NTAP>] (finding that 48 percent of testers with same-sex spouses encountered at least one incident of adverse treatment in seeking senior housing).

186. *Nondiscrimination Laws*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/non_discrimination_laws [<https://perma.cc/CJV7-SJQA>].

187. *Fact Sheet: President-Elect Biden’s Day One Executive Actions Deliver Relief for Families Across America Amid Converging Crises*, WHITE HOUSE (Jan. 20, 2021).

188. Exec. Order No. 13,988, 86 Fed. Reg. 7,023 (Jan. 25, 2021).

189. 12 U.S.C. § 4545(1); *see also supra* Part V.C.

190. 42 U.S.C. § 3604(a).

191. Exec. Order No. 13,988.

Appendix C and is the broadest and most consequential statute there that deals with housing policy.¹⁹²

Currently, there is not much in the way of successful litigation of FHA claims on sexual orientation and/or gender identity. So far, however, federal courts seem willing to at least acknowledge the possibility that *Bostock*'s reasoning applies to the FHA.¹⁹³ One example is a claim brought by a heterosexual man alleging discrimination from his LGBTQ+ landlord in which the court "assume[s] without deciding that [the FHA] also covers sexual-orientation discrimination against individuals who are not gay."¹⁹⁴ Despite this mind-twisting allegation of an altogether different sort of sexual orientation discrimination, it is clear that courts, at least at surface level, see sexual orientation discrimination as relevant to the FHA.

Recent scholarship also points toward the potential for success for a post-*Bostock* interpretation of the FHA. Title VII and the FHA are very similar statutes in many respects, as they were largely contemporaneous, contain similar language, and had similar remedial intent behind them.¹⁹⁵ The Supreme Court has, in the past, "relied heavily on its Title VII jurisprudence in interpreting the FHA"¹⁹⁶ even when it created problems for advocates to cross-apply similar principles.¹⁹⁷ Professor Rigel Oliveri observes that the only major potential roadblock to a *Bostock*-style analysis of the FHA is that Title VII textually allows claims based on mixed-motive discrimination while the FHA does not.¹⁹⁸ However, because the *Bostock* majority treated sexual orientation and gender identity as inextricable from sex, its reasoning does not rely on mixed motives for discrimination, thus allowing it to be easily harmonized with the Court's interpretations of the FHA.¹⁹⁹

192. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1792 (2020) (Alito, J., dissenting). There are other housing statutes of some note, including one guaranteeing nondiscrimination in access to affordable housing. See 42 U.S.C. § 12832.

193. See, e.g., *Birdo v. Dulucky*, No. 20-CV-1108, 2020 WL 5549115, at *3 (D. Minn. Aug. 27, 2020).

194. This claim was, perhaps not shockingly, dismissed. *Id.*

195. See Oliveri, *supra* note 97, at 431-32.

196. *Id.* at 432.

197. *Id.* at 433.

198. *Id.* at 439-40.

199. *Id.* at 442-43 ("[T]here should be no problem with applying *Bostock*'s analysis that the term 'because of sex' in Title VII includes sexual orientation and gender identity to the FHA

Given the new attention to enforcing LGBTQ+ antidiscrimination by the federal government, coupled with the seeming ease in applying *Bostock* in the litigation context on the topic, the potential major impact of a post-*Bostock* reading of the FHA is clear. Because of the acuteness of the problem for LGBTQ+ people,²⁰⁰ housing policy should be squarely on the radar of legal scholars and advocates seeking to strengthen LGBTQ+ legal protections.

Education and health policy, discussed in Part IV, are surely of great importance to LGBTQ+ people, as they are to all Americans. However, because of their omnipresence in the political discourse, they tend to become the focus of attention for most LGBTQ+ legal advocates and organizations. Issues that LGBTQ+ people face in regard to housing, gaining access to credit, immigrating to this country, and within the legal system itself impact their everyday lives. In all these areas, LGBTQ+ people face obstacles and discrimination that their straight or cisgender fellow citizens simply do not. These are not niche issues for the people that live with them.

CONCLUSION

Justice Alito was correct to worry about the expansion of the logic of *Bostock*'s landmark extension of sex antidiscrimination law beyond the four corners of Title VII. Because the majority opinion so clearly rejects the dissents' "flexible textualism" in favor of a more formalistic approach divorced from the intention and ordinary public meaning at the time of adoption, the expansion of sex discrimination in other similar statutes to include LGBTQ+ individuals is likely only a matter of time and resources for LGBTQ+ legal advocates. Justice Alito's foresight is likely cold comfort to him, however, given that he handed advocates a detailed blueprint of federal statutory schemes to attack in the form of his Appendix C.

This Note aimed to provide a system of classification for the lengthy and largely unexamined Appendix C, partially to understand its true meaning but more importantly to understand its true

because the FHA contains identical language. The two statutes may differ when it comes to mixed motives analysis, but this issue does not actually implicate mixed motives.").

200. See *supra* notes 179-82 and accompanying text.

value for LGBTQ+ advocates. With a few exceptions, that value is quite substantial.

It provides avenues to apply *Bostock* to statutes that explicitly cite Title VII, allowing litigants to make quick work of them. It highlights statutes impacting major, bread-and-butter issues for LGBTQ+ people such as healthcare and education, highlighting their already acknowledged importance as well as some potentially lesser-considered aspects. And it illuminates a class of statutes that might have otherwise been overlooked, many of which provide creative or innovating opportunities for long-term advocacy and litigation.

Even in an age of national political gridlock for many LGBTQ+ rights, the judiciary remains a fruitful avenue for reform. This author hopes that LGBTQ+ advocates can use, add to, and customize this map of post-*Bostock* litigation to allow for the greater liberation and protection of the community nationwide. Ironically, they have Justice Alito, its cartographer, to thank.

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* J.D. Candidate, 2023, William & Mary Law School. Enormous thanks to the staff and editors of the *William & Mary Law Review*, and in particular Ellen Matthews for encouraging me to take this dive into Appendix C. Thanks also to my family, friends, and loved ones for all their support throughout my time in law school. Finally, I'd like to thank all my former students and colleagues from my years at Randolph High School. I would never have thought I could succeed in law school without your encouragement, inspiration, and example. Thank you for restoring my ambition and helping to guide my advocacy in this new chapter of my life.