# 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

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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.
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. 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.

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

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.
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

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Title VII does not explicitly protect LGBTQ+ individuals from employment discrimination; it does, however, offer such protections based on sex (among other classifications). 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. 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. 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.”

The Court admitted that these cases might have been more difficult had the employers in question obfuscated the true reasons for terminating their employees. 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. 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.

B. “Dueling Textualisms”

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

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23. Id. at 1739, 1742.
24. Id. at 1741.
25. Id. at 1744.
26. Id.
27. Id. at 1742.
“dueling textualisms” 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. 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.” 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.”

The dissents of Justices Alito and Kavanaugh, however, took the majority to task for “sail[ing] under a textualist flag” but ignoring the ordinary public meaning of the text of Title VII when it was passed in favor of the literal meaning. This understanding is in accord with the traditional proponents of textualism as a theory of interpretation. 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.” 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.

II. JUSTICE ALITO’S APPENDIX C

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

29. Spindelman, supra note 28, at 557.
30. Id. at 563-66.
32. Bostock, 140 S. Ct. at 1739.
33. Id. at 1755-56 (Alito, J., dissenting).
34. Id. at 1824-25 (Kavanaugh, J., dissenting).
37. Bostock, 140 S. Ct. at 1745.
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

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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-8f56-63f38e990077_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. Further context is required to categorize them, however, as many of the parenthetical descriptions are vague or truncated.

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. Several of these areas focus on broader constitutional concerns such as religious employment, compelled speech relating to personal pronouns, and the implication of the Equal Protection Clause and its different class-based standards of review. However, constitutional applications are beyond the scope of this Note; what remains are Justice Alito’s statutory arguments largely concerning healthcare and education, specifically public accommodations for transgender individuals.

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. Justice Alito focuses much more of his concern on issues relating to access to bathrooms, locker rooms, and sports teams for transgender individuals. This is perhaps unsurprising; given these issues’ central presence in American “culture wars” in recent years, 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.
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.
54. Id. at 1778-80.
55. Id. at 1781-82 n.57.
56. Id. at 1778-80.
likely to animate many fears of conservatives like Justice Alito.\textsuperscript{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.\textsuperscript{59} Indeed, they have already begun to do just that,\textsuperscript{60} as Part IV of this Note will argue.

\textbf{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?\textsuperscript{61} To be sure, dissenters sometimes highlight what they view as negative unintentional consequences of the majority’s decision,\textsuperscript{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.\textsuperscript{63} Justice Alito may have also simply miscalculated

\begin{itemize}
\item 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).
\item 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.”).
\item Kalmbacher, \textit{supra} note 10.
\item 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 \textit{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.”).
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.  

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. 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.

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.

Given the climate of sexism in America at large and in the legal world, it seems plausible that a certain carelessness bred by over-confidence 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
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. All the statutes discussed in Appendix C unless otherwise specified.

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, while others do have conceivable consequences but are extremely limited in scope or potential impact. 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. Bostock’s textual analysis of sex-based discrimination would doubtless provide a

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

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, 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 Association\(^{82}\) 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. § 488(a).

\(^{78}\) Id. § 488(f) (“[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.


\(^{80}\) 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, \footnote{LGBTQ in the Military: A Brief History, Current Policies and Safety, MILITARY ONE SOURCE (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].} 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). \footnote{36 U.S.C. § 220522.} The USOPC ensures sex nondiscrimination in the composition of its governing board, \footnote{Id. § 220522(a)(9). There is, however, an exception to the nondiscrimination policy for board selections from sex-segregated sports programs. Id.} and it also includes provisions for equal opportunity for athletes and coaches. \footnote{Id. § 220522(8).} Given that American athletes at all levels of competition are still subject to intense scrutiny about their sexual orientation and gender identity, \footnote{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, BBCNEWS (June 21, 2021), https://www.bbc.com/news/world-asia-57549653 [https://perma.cc/74JZ-8TRP].} 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. \footnote{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-rca11622 [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-FCTP].} 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.
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.

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90. 2 U.S.C. § 1311(a)(1).
91. 49 U.S.C. § 47123(a).
Applying *Bostock*’s analysis to enshrine LGBTQ+ discrimination protections in the realms of education and healthcare would have immediate and wide-ranging effects\textsuperscript{95} given the uneven state-level protections in these areas.\textsuperscript{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.\textsuperscript{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 bullying\textsuperscript{98} to less immediately obvious discrimination such as prohibitions on gender-conforming dress, use of gender-appropriate pronouns, or even discussing LGBTQ+


\textsuperscript{96.} See STATE POLICY SCORECARDS, GLSEN, https://maps.glsen.org/state-policy-scorecards/ [https://perma.cc/6HYY-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).


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


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.


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,
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


addressed in Part V. 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. Although Obergefell v. Hodges’s expansion of marriage rights across the country allowed many more LGBTQ+ families to access healthcare, there is still much progress to be made.

To begin, Title VII includes a provision barring “discrimination against any individual with respect to his compensation, terms, conditions, or privileges of employment.” 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. 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.
121. See Angela K. Perone, Health Implications of the Supreme Court’s Obergefell vs. Hodges Marriage Equality Decision, 2 LGBT HEALTH 196, 197 (2015).
suffered otherwise-avoidable medical harm. The district court easily applied *Bostock* to find sex discrimination, leaving the rest of its opinion to deal with issues of attaching liability. 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. 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*. 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 children as well as mental health and substance abuse—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.

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

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125. Id. at 674-75.
127. Id.
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.\textsuperscript{132} Because HIV infection still generally affects LGBTQ+ people at higher rates than the general population,\textsuperscript{133} and because PrEP continues to be extremely costly for those without health insurance coverage,\textsuperscript{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 \textit{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 \textit{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.


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), in this category, the sky is the limit. 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

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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, 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. 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. 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. More recently, the Ninth Circuit expanded the protections of J.E.B. to sexual orientation based on the same Equal Protection Clause analysis. 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

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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)).


141. SmithKline Beecham Corp. v. Abbott Lab’y’s, 740 F.3d 471, 484-86 (9th Cir. 2014).
sex.” States can create an opportunity to end state jury discrimination of LGBTQ+ individuals by resting on the (nonstatutory) reasoning the Court used in *J.E.B.*

As for federal juries, 28 U.S.C. § 1862 enshrines a nondiscrimination requirement for jury service. 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.

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. This problem is particularly acute for transgender women given the frequency with which they experience violence in American society. Several states have banned this tactic, and federal legislation has recently been introduced. One small potential backdoor to end this offensive and discriminatory practice of blaming LGBTQ+ victims for their own violent

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)).
assaults (or even deaths) may be found within federal death sentencing statutes.\footnote{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.\footnote{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.”\footnote{152} Applying \textit{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 \textit{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. \textit{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.

\textbf{B. Foreign Policy}

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

\footnotesize{\begin{itemize}
  \item \footnote{150} 18 U.S.C. § 3593(f).
  \item \footnote{151} \textit{Id}.
  \item \footnote{152} \textit{Id}. (emphasis added).
\end{itemize}}
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

155. Id. § 2314(a), (g).
156. See id.
principles. 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 LBGTQ+ rights are fundamental human rights. 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. This Executive Order purported to equalize immigration systems in its push for more LGBTQ+ legal protections. However, a closer inspection makes clear that this only includes one section of the Immigration and Nationality Act (INA), specifically the section dealing with refugee assistance and resettlement within the United States. 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

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. Id.
162. Id.
Although this is certainly a laudable goal, it is not the only section of the Act that includes a nondiscrimination provision.\textsuperscript{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.”\textsuperscript{166} Despite the Biden administration’s quiet omission of this statute in its decision to apply \textit{Bostock} to the INA,\textsuperscript{167} it includes similar language disallowing sex discrimination and therefore ought to be harmonized, either via executive action or litigation if necessary.\textsuperscript{168}

LGBTQ+ advocates should take special note of this provision, as immigration and naturalization can often be an arduous process for LGBTQ+ individuals.\textsuperscript{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.\textsuperscript{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 \textit{Bostock} is concerned. Immigration advocates should therefore press the administration to fully adopt its post-\textit{Bostock} position on all immigration matters or take their case

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{164} See Exec. Order No. 13,988.
\item \textsuperscript{165} See, e.g., 8 U.S.C. § 1152(a)(1)(A).
\item \textsuperscript{166} Id. (emphasis added).
\item \textsuperscript{167} See discussion supra Part V.B.2.
\item \textsuperscript{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.”).
\item \textsuperscript{169} See, e.g., \textit{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).
\end{itemize}
\end{footnotesize}
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 LBGTQ+ 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

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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).


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.\textsuperscript{175} Based on this success, LGBTQ+ advocates should look deeper to find more banking and lending statutes to bring in line with \textit{Bostock}.

Combining the federal government’s interpretations of the Fair Housing Act (FHA)\textsuperscript{176} and ECOA to provide protection from discrimination to LGBTQ+ homebuyers and homeowners may have a particularly wide-ranging impact.\textsuperscript{177} The Justice Department indicates that claims of mortgage discrimination may fall under both the FHA and ECOA.\textsuperscript{178} Given the new post-\textit{Bostock} interpretation, this includes LGBTQ+ discrimination.\textsuperscript{179} In addition, other statutes ensure nondiscrimination in federal mortgages, mortgage insurance, or other assistance.\textsuperscript{180} Advocates can similarly harmonize these with \textit{Bostock}, but litigation may not be necessary if the executive branch continues its push to include \textit{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.\textsuperscript{181} However, because the major impacts of \textit{Bostock}’s application in the lending sector are housing related,\textsuperscript{182} it provides an excellent segue into the final under-the-radar policy area for post-\textit{Bostock} advocacy.

\begin{itemize}
  \item \textsuperscript{176} See infra Part V.D. for a discussion of the Biden administration’s post-\textit{Bostock} interpretation of the FHA beyond its relation to discrimination in lending.
  \item \textsuperscript{177} See SAGE, supra note 175; Exec. Order No. 13,988.
  \item \textsuperscript{179} See SAGE, supra note 175; Exec. Order No. 13,988.
  \item \textsuperscript{180} 12 U.S.C. § 1735f-5(a).
  \item \textsuperscript{181} See, \textit{e.g.}, 20 U.S.C. § 1071 (Federal Family Education Loan Program nondiscrimination provision).
  \item \textsuperscript{182} See discussion \textit{infra} Part V.D.
\end{itemize}
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. Additionally, transgender individuals and LGBTQ+ senior citizens are particularly vulnerable to housing discrimination. More than half of states do not provide any such protections at all, 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 Orders explicitly applied Bostock’s reasoning to the FHA. Like Title VII, the FHA explicitly bars sex discrimination in a variety of housing contexts, including mortgages and rentals. President Biden’s Executive Order on this issue directed federal agencies to enforce the FHA to protect LGBTQ+ individuals from housing discrimination. The FHA, unsurprisingly, was also present in


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

190. 42 U.S.C. § 3604(a).

Appendix C and is the broadest and most consequential statute there that deals with housing policy.\textsuperscript{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 \textit{Bostock}'s reasoning applies to the FHA.\textsuperscript{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.”\textsuperscript{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-\textit{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.\textsuperscript{195} The Supreme Court has, in the past, “relied heavily on its Title VII jurisprudence in interpreting the FHA”\textsuperscript{196} even when it created problems for advocates to cross-apply similar principles.\textsuperscript{197} Professor Rigel Oliveri observes that the only major potential roadblock to a \textit{Bostock}-style analysis of the FHA is that Title VII textually allows claims based on mixed-motive discrimination while the FHA does not.\textsuperscript{198} However, because the \textit{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.\textsuperscript{199}

\begin{verbatim}
194. This claim was, perhaps not shockingly, dismissed. Id.
195. See Oliveri, \textit{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 \textit{Bostock}'s analysis that the term ‘because of sex’ in Title VII includes sexual orientation and gender identity to the FHA
\end{verbatim}
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, 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 LBGTQ+ 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

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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.

Peter Quinn*